Case No: 1305965/2018

EMPLOYMENT TRIBUNALS

Claimant:	**Mrs M Raphael**		
Respondents:	**1) Trentside Manor Care Limited** **2) Mr T Dhadda** **3) Mr P Dhadda**		
Heard at:	**Birmingham by CVP**	**On:**	**21-29 March 2023**
Before:	**Employment Judge Liz Ord** **Member Mrs R Pelter** **Member Mr J Sharma**		

Representation:

Claimant: **Mr T Sheppard (Counsel)**
Respondent: **Mrs M Peckham (Solicitor)**

JUDGMENT having been given orally on 29 March 2023, and the written record having been sent to the parties, subsequent to a request for written reasons in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

1. This was a liability hearing only. A separate reserved judgment has been written for remedy.

The Complaints and Issues

Unfair Dismissal

2. What was the principal reason for the Claimant's dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent asserts it was a reason relating to the Claimant's conduct.

3. If the Respondents can show conduct was the reason for the dismissal

    - Did the employer carry out as much investigation as was reasonable in the circumstances?
    - Did the employer genuinely believe that the employee was guilty?
    - Did the employer have in its mind reasonable grounds, based on the investigation, for holding that belief?

4. Was dismissal within the range of reasonable responses which a reasonable employer might have adopted?

5. Was dismissal a fair response to the misconduct in question?.

    Taking into consideration:

    - whether a fair procedure was followed in the investigation, disciplinary and appeal stages prior to the decision being taken with the claimant having an appropriate opportunity to put forward any representations,
    - the size and administrative resources of the employer's undertaking; and
    - equity and the substantial merits of the case.

Wrongful Dismissal

6. Was the Claimant in repudiatory breach of her contract of employment?

7. If so, did the Respondent terminate the contract of employment in acceptance of this repudiatory breach?

8. If not, what notice pay was owing to the claimant and what notice pay, if any, was paid?

Discrimination Arising from Disability – s.15 Equality Act 2010

9. Did the following thing(s) arise in consequence of the claimant's disability?

    - The claimant experienced increased stress, pressure, tiredness, and difficulty concentrating?
    - The Claimant needed to make a request for flexible working

10. Did the respondent treat the claimant unfavourably as follows:

    - suspending the claimant on 2 July 2018
    - dismissing the claimant on 21 August 2018
    - not upholding the claimant's appeal against dismissal on 7 September 2018.

11. Did the respondent treat the claimant unfavourably in any of those ways because the claimant experienced increased stress, pressure, tiredness and difficulty concentrating?

12. The respondent has not pleaded a defence of justification under section 15 (1)(b) Equality Act 2010 and does not intend to do so.

13. Has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

Direct discrimination – s.13 Equality Act 2010

14. The claimant's complaints of direct disability discrimination and direct age discrimination were pleaded in the alternative to the s.15 disability discrimination. As the claimant was successful with the s.15 claim, the tribunal did not go on to consider the s.13 claims and they were dismissed.

Evidence

15. The tribunal had before it the following documentary evidence:

    - A documents bundle running to 962 electronic pages;
    - A supplementary bundle of 34 electronic pages;
    - Chronology;
    - Schedule of documents sent to claimant for Investigation, Disciplinary and Appeal;
    - Trentside risk assessments of 28.6.2018 & 29.6.2018;
    - Trentside Daily Handover Report 25.6.2018 to 30.6.2018;
    - A witness statement bundle running to 56 pages;
    - Claimant's written submissions;
    - Respondent's written submissions.

16. It heard evidence on oath from:
    - Mrs Marie Raphael (claimant);
    - Mr Pargan Dhadda (director of Trentside Manor Care Home);
    - Mr Talwinder Dhadda (director of Trentside Manor Care Home);
    - Mr Harninder Kandola (director of Wilbraham House Care Home).

The Law

Unfair dismissal

17. **Section 98 of the Employment Rights Act 1996** provides, so far as is relevant:

    (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
    (a) the reason (or, if more than one, the principal reason) for the dismissal and
    (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

    (2) A reason falls within this subsection if it-
    a) …..

b) Relates to the conduct of the employee

98(4) whether the dismissal is fair or unfair

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

18. The **ACAS Code of Practice** 1 on Disciplinary and Grievance Procedures 2015 applies to the procedure to be followed.

19. Applying the case of ***British Home Stores v Burchell*** [1980] ICR 3030 the employer has to show:

- that it genuinely believed the claimant was guilty of misconduct;
- that it based that belief on reasonable grounds;
- at the time that belief was formed, it had carried out a reasonable investigation;

20. In ***J Sainsbury plc v. Hitt*** [2003] ICR 111, the Court of Appeal said that, in applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. The range of reasonable responses test applies not only to the decision to dismiss but also to the **procedure** by which that decision is reached.

21. The burden of proof is upon the employer to establish a genuine belief in the misconduct relied upon, which led it to believe the dismissal fell within the potentially fair reason of "conduct" under the Act.

22. The burden of proof relating to the issue of the reasonableness of the belief, the reasonableness of the investigation and the reasonableness of the procedure is a neutral one.

23. It was held in ***Abernethy v Mott, Hay & Anderson*** [1974] ICR 323 that: "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee."

24. When determining reasonableness, the tribunal should not focus on whether it would have dismissed in the circumstances and substitute its view for that of the employer – ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17, EAT.

25. The test to be applied in determining reasonableness is whether the employer's decision to dismiss fell within the range of reasonable responses available to it – **(1)** ***Post Office v Foley*** **(2)** ***HSBC Bank plc v Madden*** [2000] ICR 1283, CA.

26. In determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee; ***A v B*** [2003] IRLR 405.

27. In ***Brito-Babapulle v Ealing Hospital NHS Trust*** [2013] IRLR 854 it was held that where dismissal is for gross misconduct, the tribunal has to be satisfied that the employer acted reasonably both in characterising the conduct as gross misconduct, and then in deciding that dismissal was the appropriate punishment.

28. ***Taylor v OCS Group Ltd*** [2006] ICR 1602, CA, provides that a tribunal should look at the procedural fairness and thoroughness of the appeal stage and the open-mindedness of the decision-maker when deciding whether any prior procedural deficiencies are cured.

Wrongful Dismissal

29. A dismissal by the employer in breach of contract, gives rise to an action for wrongful dismissal at common law. The tribunal must be satisfied, on a balance of probabilities, that there was a repudiation of the contract by the employee.

Disability discrimination

Legislation

30. **Discrimination arising from disability - Section 15 Equality Act 2010 (EqA)**

    (1) A person (A) discriminates against a disabled person (B) if –
    - A treats B unfavourably because of something arising in consequence of B’s disability, and
    - A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

    (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

31. **Section 136 EqA - Burden of Proof**

    (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

    3) But (2) does not apply if A shows that A did not contravene the provision.

Caselaw

32. In ***Pnaiser v NHS England and Coventry City Council*** [2016] IRLR 170, EAT, Mrs Justice Simler set down the approach to be taken to causation in section 15:

- A tribunal must first identify whether the claimant was treated unfavourably and by whom. No question of comparison arises.
- It must identify what caused the unfavourable treatment. The focus is on the reason in the mind of the alleged discriminator. The motive of the alleged discriminator is irrelevant.
- The tribunal must determine whether the reason or cause was "something arising in consequence of the claimant's disability. This is an objective test and does not depend on the thought process of the alleged discriminator.
- The "something" that caused the unfavourable treatment need not be the main or sole reason, but must have at least a significant (more than trivial) influence on the unfavourable treatment, and so amount to an effective reason or cause of it.
- The causal link between the something that causes unfavourable treatment and the disability may include more than one link. The more links in the chain between the "something" and the disability, the harder it is likely to be to establish the requisite connection as a matter of fact.

33. In ***Secretary of State for Justice & Anor v Dunn*** EAT 0234/16, the EAT identified the following four elements that are needed to succeed in a Section 15 claim:

    - There must be unfavourable treatment;
    - There must be something that arises in consequence of the claimant's disability;
    - The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and
    - The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

34. An employer will not be liable where it did not know and could not reasonably have been expected to know that the employee had a disability: ***IPC Media Ltd v Millar*** [2013] IRLR 707.

35. There is no requirement that the alleged discriminator should have known that the relevant "something" arose from the claimant's disability: ***City of York Council v Grosset*** [2018] EWCA Civ 1105.

    Burden of Proof Caselaw

36. ***Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases*** 2005 ICR 931, CA - the outcome at the first stage will usually depend upon what inferences it is proper to draw from the primary facts found by the tribunal. The CA cautioned against too readily inferring unlawful discrimination merely from unreasonable conduct. However, it held that it was not an error of law for a tribunal to draw an inference of discrimination from unexplained unreasonable conduct at the first stage of the two stage burden of proof test.

37. ***Laing v Manchester City Council [2006] ICR 1519, EAT*** provides that, in deciding whether or not a prima facie case has been made out, the tribunal should ignore the substance of any explanation proffered by the employer for the treatment, turning to it only once the burden has shifted. This does not mean that at the first stage the tribunal should consider only evidence adduced by the claimant and ignore the respondent's evidence. The tribunal should have regard to all the facts at the first stage to determine what inferences can properly be drawn.

38. If it is very clear from the evidence that the case succeeds or fails, it is not necessary to use the two staged burden of proof. In ***Hewage v Grampian Health Board*** [2012] IRLR 870, SC, the Supreme Court said of the burden of proof provisions:

    "They will require careful attention where there is room for doubt as the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

Other law

39. The tribunal has taken into account all aspects of the law, additional to the above, as set out in the parties' written submissions.

Findings of Fact

40. Trentside Manor is a care home, operated at the material time by Pargan Dhadda (Pargan). Both he and his nephew, Talwinder Dhadda, known as Bobby, were directors. There was a sister care home, Wilbraham House, at which both Dhaddas were also directors, along with their cousin, Harninder Kandola. The Dhaddas had little or no experience of dealing with the care side of matters and left this to the claimant.

41. The claimant joined Trentside Manor in 2011 as the Registered Manager of the care home. Prior to that she worked for Staffordshire County Council for 11 years starting as Care Assistant and moving through to Caretaker Manager. She worked mainly with dementia patients and was trained in skin-care.

42. The claimant's job description in her contract of employment (b62) states that the manager must accept responsibility for all the housekeeping and safety awareness within the home.

43. She worked for Trenside Manor for 7 complete years and had an unblemished work record before her dismissal. At this stage she was the longest serving and most experienced carer at the home. She put in place the Personal Care Plan Systems, drawing from her experience at Staffordshire County Council. During her time as manager the home's ratings with the Care Quality Commission (CQC) significantly improved.

44. In June 2015 the claimant suffered a stroke, and in around 2016 she started to suffer from Chronic Obstructive Pulmonary Disease (COPD). She also

suffered from a Chronic Heart Condition and depression. It is not disputed that she was disabled at the relevant time because of these four conditions.

45. The respondents admit knowledge of the stroke from when it occurred and knowledge of the COPD from May 2018. This knowledge is clear from the entries in the Citation notes.

46. The claimant's disability impact statement (b563), which is not disputed, refers to impacts of the stoke being tiredness, low energy levels, low moods, tearfulness and forgetfulness, amongst other things. It also refers to the impacts from the COPD, including tightness across the chest.

47. In 2017 the claimant had hospital investigations for a tremor in her arm, and in 2018 the onset of Parkinson's disease was queried. Pargan Dhadda was aware of this.

48. Following the stroke, the claimant was off work for 3 months, returning on a phased basis in September 2015. From 2015, she did not receive any pay increases, whilst other staff did. This is not disputed.

49. The claimant's evidence, which we accept, is that she previously had a good relationship with Pargan, but that it deteriorated slightly after her stroke and was less friendly.

50. There are a series of Citation advice notes starting from the time of the stoke, which discuss the claimant's health, performance and the respondent's options. The impression they convey is that Pargan sought advice on how to deal with her health issues, but at times seemed reluctant to follow that advice. The tone of the notes convey a sense of an employer who was not receptive to the claimant's health needs.

51. In July 2015, just after finding out about the stroke, Pargan discussed termination of the claimant's employment with Citation (b479). The Citation advice note on 2/7/2015 reads:

"My own concerns are, when and if she would be able to return back to work and whether she would be able to cope under the pressure of it all."

"*Amanda can stand in for her. Advised - Marie is entitled to take up to 28 weeks SSP before they make any decision to terminate for ill health grounds."*

52. In October 2017 the claimant informed the respondents that she was being tested for Parkinson's disease. The Citation note of 24/10/2017 (b476) reads:

"Employer advised last week….she has been diagnosed with Parkinson's disease." Citation advised an occupational assessment." However, there is no evidence that this assessment was done.

53. On 1/11/2017 the Citation notes say:

"Employer asked what they would do if she didn't achieve actions after a week." There was advice about trying to assist her and continued by saying could consider performance management if failures."

54. Another entry on 1/2/2018 (b474 – 475) talks about Pargan's concerns about the claimant not being very productive and her attitude. It records Citation querying:

    "Anything else that they have evidence of that they could use for disciplinary? Not sure"

55. There was an acrimonious meeting with Pargan and the claimant about management of the home on 28/3/2018, at which Amanda Jones (deputy manager) was present. This resulted in the claimant sending Pargan a letter on 29/3/2018 (b101-102) where the claimant indicated that if Pargan wished to employ a new manager, she would be willing to discuss a termination package. In the event, nothing came of that. The letter is recorded on the Citation notes (b473).

56. On 4/5/2018 the claimant made a request for flexible working (b152), saying she was "feeling quite stressed at the moment."

57. The same day (4/5/2018) Pargan asked for advice from Citation about this. The note (b473) records:

    "*Employer wants to sack her! Advised that putting in a request for Flex working isn't a dismissible offence." "Would advise a flex working meeting."*

58. A flexible working request meeting followed on 9/5/2018 (b156-158). In the context of putting GDPR in place, talking of staffing levels and everything else that was going on, the claimant told Pargan she was quite stressed, tired and struggling. She said she wanted to drop a day so she didn't end up going off sick. The meeting was inconclusive.

59. The claimant wrote to Pargan the following day 10/5/2018 (b160-161) stating his manner had been officious, bullying and controlling and that she felt a victim instead of a loyal employee wanting to discuss her welfare. She said the request concerned her health and for the record she set out her medical conditions of stroke, COPD, Chronic Heart Condition, and right hand and arm shaking (possible Parkinson's). She suggested reducing her working week to 4 days as a reasonable adjustment.

60. The record of Citation advice to Pargan of 10/5/2018 (b471) states:

    "advises employer that he has an obligation to make reasonable adjustments." "Advise further meeting to discuss her request for reasonable adjustments."

61. The record of Citation advice to Pargan on 15/5/2018 (b470-471) states:

    "Never told him she has COPD."

62. Amongst other things it then records:

"*Could he sack her? Advise what reason would he have to dismiss? She is not showing she is not incapable of doing her job – just that she is struggling due to health….*"

63. They advised that her health be explored and whether they could get consent to write to her GP. This was not done.

64. A further meeting followed on 16/5/2018 (b165-167). The claimant told Pargan she was tired, her head wasn't clear, she was stressed. She didn't have the energy she used to when she started and when she didn't have the illnesses.

65. Pargan commented that he wasn't aware she had COPD. He suggested a Plan of action be made. The claimant put a Plan together and proposed her flexible working start on 11/6/2018.

66. She started her 4 day week on w/c 18/6/18, taking off Friday 22/6/2018.

The incident

67. The following week on 28/6/2018, after finishing serving lunches, the claimant saw a new pressure relieving profile mattress in the corridor, which had been delivered.

68. There is a dispute over what happened next. The claimant says that Amanda Jones was in the office and the claimant asked her who it was for. Amanda told her it had been ordered by the district nurses for resident A, who had started to develop a pressure area.

69. Pargan says that Amanda Jones and Daisy Bourne (senior on duty) were out of the office that day and she/they didn't know about the mattress.

70. However, the only person who was there at the time who has given evidence to the tribunal is the claimant. We accept her evidence.

71. The mattress was longer than resident's A's divan bed and overhung by a few inches. The claimant says 3 inches and, upon considering the photographic evidence, we accept it was in that order of magnitude.

72. The claimant went into A's room and noted that the divan bed was situated in the corner against 2 walls with a chair at the bottom of it and a bookcase.

73. The claimant accepts she did not do a written risk assessment but did do a mental risk assessment. She assessed that the risk of resident A developing pressure sores without the mattress was far greater than him falling off the bed with the mattress. She was satisfied that putting the profile mattress on the divan bed posed little risk and was an acceptable short term solution. We accept this evidence.

74. She asked Maurice, the handyman, to put the new mattress on the bed and to skip the old one, which he did. She left the bed to be made up by one of the care staff.

75. She did not check whether there were any other empty profiling beds in the home. In fact there were two. However, at her appeal hearing she gave

evidence that (b434) "I was unaware that there were 2 empty profiling beds in the building but in any event it is not standard or good practice to swap beds between service users as their equipment is personal to them." We accept this evidence.

76. The claimant wanted to order a profiling bed immediately to fit the mattress. They were often delivered the next day. She needed authority from Pargan for this.

77. She explained that there was a WhatsApp group in place for work communication and it was usual practice to use it for anything that needed to be ordered and authorised by a director. Amanda, Pargan and the claimant were in the group.

78. She said she sent WhatsApp messages to the group about the bed, and Amanda would have been party to what was said. Pargan says there was no such group and the messages went only to him.

79. The respondents have not disclosed the WhatsApp messages themselves. Instead they have produced an email dated 4/7/2018 (b220), which is a timeline of what was said.
80. In the absence of the actual messages, we accept the claimant's evidence that there was a WhatsApp group and Amanda would have been aware of the messages.

81. The thrust of the messages is that the claimant was asking Pargan for profiling beds and said that pressure mattresses were too long for the resident's bed and put him at risk of falls. Pargan's response was to leave it to the following week to discuss.

82. The claimant finished her shift at 15.30 and the WhatsApp messages continued until 20.43.

83. Amanda's shift finished at 4.00pm, after the claimant's. The claimant said she assumed Amanda would inform the appropriate staff of the bed after her departure. Whilst the claimant did not complete the handover record, the system was that the senior on duty did this.

84. That evening Pargan sent Amanda back to the home to do a risk assessment. He did not ask the claimant to go back and do it. He never told the claimant that he had sent Amanda back to do it. The claimant was unaware a written risk assessment had been done. It was not disclosed to her.

85. The Hand Over Report of 28/6/2018 is signed by a Day Senior. It shows that a Risk Assessment was done by Amanda Jones on that date. That handover note was not shown to the claimant.

86. The risk assessment of 28/6/2018, done that evening, shows a medium hazard rating for slips/falls. It notes:

"resident A has a shelving unit against the wall at the end of his bed, that will prevent mattress from sliding from the bed temporarily. Staff not to

move this unit." "Profiling bed to be put into A's room in the morning to prevent further risk."

87. The Personal Care Plan (PCP) for resident A for 28.6.2018 (b256-257) records that there is now a pressure relieving mattress and cushion (Daisy Bourne). A separate entry that day at 21.50 records the pressure relieving mattress being too long for the bed and a risk assessment having been completed and now in place for tonight (Amanda Jones). An entry of 29.6.2018 records " – A now has profiling bed in place."

88. Another risk assessment was done on 29/6/2018 "– identified hazard – Pressure areas due to lack of mobility. Sores due to incontinence" "Hazard risk rating – High".

89. On the morning of 2/7/2018, Debbie Sherratt (the senior on duty) informed the claimant that the claimant needed to go to Pargan's office, which she did. Pargan raised concerns with her about no written risk assessment having been done and resident A's skin care paperwork not being updated. The claimant told him what had happened and that she had done a mental risk assessment.

90. Pargan then took advice from Citation, after which he suspended the claimant. There is no record of this suspension meeting.

91. He wrote an email to Sarah Ireland at the CQC on 2/7/2018 telling her of the claimant's suspension and saying he had "a few concerns over her performance" (b236).

92. He initiated an investigation. He chose who to interview to support his case against the claimant, and arranged the dates for the necessary meetings, in an attempt to comply with basic disciplinary procedure.

Investigation meeting

93. By letter of 2/7/2018 the claimant was asked to attend an investigation meeting on 3/7/2018 to answer the following allegations (b230), which were drafted by Pargan:

    - On Thursday 28/6/2018 – left a service user on an unsafe bed/mattress with high risk of falls
    - PCP – skin care had not been updated/reviews
    - No risk assessment in place
    - Failing to inform all the staff on duty or handover
    - 3 other PCPs has not been updated for Skin Care or Risk Assessed

94. There were serious flaws with the paperwork which was before this meeting. The following was missing:

    - The handover record of 28/6/2018
    - The written risk assessments of 28 & 29/6/2018
    - Initial statements from Janet Paterson, Daisy Bourne and Amanda Jones.

95. The following were included:

- Pargan's own witness statement (b351)
- A grievance against the claimant by Cassey Brindley on an entirely different matter.

96. In the amended notes of investigation meeting (b390) there is reference to Pargan showing the claimant copies of errors, and missing information in numerous files. He had produced copies of 3 patients' PCPs highlighted in yellow to indicate where he believed the missing/erroneous information was. He also sent her a written list of all the omissions he had identified (b249-255).

97. However, the claimant said she was given no opportunity to comment on each of these alleged errors or omissions. Pargan said he did go through each of them with her but he made no notes of it. There is no record of the claimant being asked for her comments on each of these alleged failures.

98. We find that the respondents did not go through the alleged errors/omissions one by one and did not obtain the claimant's comments on each of them.

99. At the tribunal's Full Merits Hearing, the claimant went through each of the alleged omissions, which were highlighted in yellow (b279-343), with the judge. She provided a reasonable explanation for the majority of them, whilst accepting that there were a few entries that were incomplete. Those that were incomplete were minor.

100. The respondents did not have her response before them during the disciplinary process and consequently failed to consider important information.

The substance of investigation meeting

101. At the investigation meeting the claimant read out a statement (b239) answering all the allegations.

- Allegation 1 and 3 - Regarding the mattress and risk assessment, she explained about the mental risk assessment and balancing the risk of falls against development of pressure sores. She admitted she had not done a written risk assessment.

- Allegation 2 and 5 – PCPs – updating for skin care – she explained there had never been a requirement to implement skin management within the care plan. District Nurses notes were used. The CQC had never questioned skin care or raised any concerns with the recording method.

- Allegation 4 – failing to inform staff or handover. She said the deputy manager was aware of the mattress and was on site after the claimant left. Neither of them made staff aware during handover or documented this.

- Whilst the claimant did not complete the handover notes, this was not her job, and she made the respondents aware that the system was for the senior on duty to do this.

102. She was remorseful and apologised.

103. Nonetheless, she gave evidence that she believed Pargan was not really listening to her.

104. Pargan knew that the claimant had brought in the PCP system from her role at Staffordshire County Council and she was responsible for its operation. He knew there had never been any criticism of it from the CQC. In the amended minutes (b390) it records the claimant telling Pargan that anyone could update the care plans and she reviewed them monthly.

Disciplinary

105. Following the investigatory, the claimant was asked to attend a disciplinary meeting with Bobby Singh Dhadda on 6/7/2018 (b398) to answer the same allegations. The date was then moved to 12/7/2018. She asked that her husband be allowed to accompany her, but was refused.

106. The claimant took legal advice from Knights solicitors and on 9/7/2018 they sent the respondents a Letter (b384) setting out the claimant's case in detail. On the back of this the claimant's husband was allowed to attend the disciplinary.

107. The claimant was sent numerous emails that day from Pargan producing piecemeal the documents for the disciplinary hearing.

108. The claimant went off sick on 12/7/2018 to 9/8/2018 due to the stress of the disciplinary process and obtained a FIT note recording adjustment reaction (b404).

109. The disciplinary meeting eventually took place on 14/8/2018. Again, there were procedural issues.

110. The highlighted PCPs were again not gone through with the claimant at the meeting, and the invite to the disciplinary hearing made no reference to any formal guidance, standards or legislation (b362). The Amanda Jones' written risk assessment and the handover record was not produced.

111. Bobby Dhadda suggested the claimant was not qualified to assess pressure sores and should have taken the district nurses' advice. However, the respondents did not consult any district nurses to get advice themselves to inform the disciplinary process.

112. The minutes of the disciplinary meeting (b424-430) show that the claimant gave a similar account to what she had given in the investigatory. There was no consideration of her length of service or unblemished work record.

113. In these minutes (b430) and in the claimant's appeal letter (b435) there are comments on other members of staff who received lesser sanctions for far more serious conduct, such as medication errors and duplication of medication. This was not challenged by the respondents and we accept it as cogent evidence.

114. The outcome letter (b432) dated 16/8/2018 but received by the claimant on 21/8/2018, summarily dismissed her for gross misconduct. It gives no indication of why the claimant's explanations were not accepted and does not analyse why she was guilty of gross misconduct. There is no consideration of lesser sanctions.

Appeal

115. The claimant appealed on 23/8/2018 (b434) on the basis that Bobby Dhadda had not explained why her replies were deemed to be unsatisfactory, and she set out in brief her responses to the allegations. She submitted that the allegations were over exaggerated and did not amount to gross misconduct individually or collectively. She said dismissal was a disproportionate sanction and no consideration had been given to her unblemished record or length of service.

116. The appeal hearing took place on 7/9/2018. It was conducted by Harinder Kandola, who was related to the Dhaddas, rather than by any independent senior staff from Wilbraham House.

117. It was done by way of review. The appeal minutes (b441) show that Kandola makes the comments:

> "I'm coming to the questions I've been asked to ask" (b449)
>
> "we felt it was the only course of action" (b453)

118. The claimant queried his independence.

119. Before and after the appeal Mr Kandola spoke the Dhaddas. There is no note of what was said and the claimant was not informed.

120. The appeal was not upheld.

Other considerations

121. The respondents declined to give voluntary disclosure of Citation advice notes to the claimant, and when this was ordered by the employment tribunal, they appealed the decision to the Employment Appeal Tribunal, indicating a fierce determination to avoid disclosure.

122. The respondents failed to disclose key relevant documents until ordered by this tribunal at Full Merits Hearing to do so, namely the handover notes, particularly for 28/6/2018 and the risk assessments for 28/6 and 29/6.

123. We have considered the credibility of the witnesses.

124. The claimant came across as a straightforward, credible witness, answering questions to the best of her ability and making concessions where appropriate.

125. Mr Pargan Dhadda tried to avoid answering specific questions and often gave responses which bore no relevance to the question. He appeared keen to impart the information which he wanted to impart. We found him to be self serving and unreliable. We found him not to be a credible witness.

126. Mr Bobby Dhadda also tried to avoid specific questions, talked over the questioner and came across as belligerent, difficult and unreliable. We found him not to be a credible witness.

127. The statements of Amanda Jones are unsigned. Amanda Jones was not called to give evidence. We give her statements no weight.

Discussion and Conclusions

128. From 2015, being the time of her stroke, there is clear evidence, particularly in the Citation notes, that the 3rd respondent, Pargan Dhadda, wanted to get rid of the claimant. He asked for advice on sacking her, and paid little regard to Citation's advice on health assessments and initially on reasonable adjustments.

129. From then onwards he failed to give her a pay increase, even though other staff members received an increase. His attitude towards her deteriorated and there was an acrimonious meeting in March 2018 at which the claimant felt pushed to offer her resignation on terms.

130. When the claimant put the request in for flexible working in May 2018, this was a tipping point and caused Pargan to ask Citation whether he could sack her.

131. On getting more advice on reasonable adjustments, he reluctantly put a 4 day week in place from 18/6/2018, with the claimant having Fridays off work. She took only one Friday off (22/6/2018) before the incident with the mattress occurred on Thursday (28/6/2018).

132. When writing to the CQC about her suspension, Pargan simply referred to he "having a few performance issues" rather than misconduct.

133. If the mattress incident was really thought to be gross misconduct by the respondents, we would have expected the claimant to be contacted immediately or at least the next day (Friday). There was no contact over the weekend. Nothing was said until the Monday.

134. That delay is at odds with the speed at which the disciplinary process subsequently took place: with the suspension meeting on the Monday (2/7/218), the investigation meeting on the Tuesday (3/7/2018), and an

intention to hold the disciplinary on the Friday 6/7/2018). This demonstrates a keenness to dismiss as quickly as possible.

135. Such a timeline would have given scant opportunity for the claimant to respond, and would not have afforded her the opportunity to pull together her thoughts. It was not indicative of an employer wanting to properly investigate the issues.

136. The allegation that no risk assessment had been done was an exaggeration and was disingenuous. Pargan was fully aware that a written risk assessment had been carried out by Amanda Jones, as he had sent her back into the home on the Thursday evening to complete one.

137. It is concerning to the tribunal that the respondent failed to disclose this risk assessment until the Full Merits Hearing, and then only when directly asked for it by the Judge. This was despite these documents being highly relevant to the case.

138. Whilst the claimant had not done a written risk assessment, she made it clear to the respondent that she had done a mental risk assessment by balancing the risks of bed sores developing against those of falling, and concluded that falling was a small risk compared to the high risk of bed sore development.

139. The bed was in the corner of the room, hemmed in by two walls and a chair and bookcase. It should have been obvious to the respondents that there was little risk of slippage or falls.

140. In the claimant's mind the mattress on the divan was a short term measure and she wanted to order a profile bed immediately, which she believed would have arrived the next day.

141. Although the respondents said that she ought to have taken one of the spare profiling beds that were already in the home, she did not know they were there. In any event, she told them it was not good practice to swap beds between service users.

142. There was no real attempt to investigate or seriously consider the claimant's response. Pargan did not tell the claimant that Amanda had gone back to do the risk assessment. That was underhand. Had the written risk assessments of 28/6 and 29/6 been reviewed, the respondents would have seen that these documents corroborated the claimant's evidence.

143. Whilst at the disciplinary, Bobby Dhadda suggested the claimant was not qualified to assess pressure sores and should have taken the district nurses' advice, the respondents failed to take such advice themselves as part of the investigation.

144. In any event, they should have known that the claimant was fully able to assess the risk of bed sores, as this was part of her job. She had considerable experience and was the most experienced employee in the home. She was best placed to this. The Dhaddas, in contrast, had little if any care experience. They were not best placed to say there was a high risk of falls.

145. It appeared that Pargan was just going through the necessary process. He was on a fishing expedition to find other evidence against the claimant and used the PCPs to bolster his case. The completion of the plans had never been criticised by the CQC and he knew this.

146. Pargan never explored in detail or gave the claimant the opportunity to respond to the highlighted parts of the PCPs. The first time the claimant had an opportunity to do this was at the tribunal's Full Merits Hearing at which she demonstrated that there was good reason for most of the alleged omissions. Where there were omissions, these were minor. The respondents were unreasonable in not exploring this.

147. Regarding the allegation that the claimant never told anybody about the mattress, Amanda Jones was fully aware of it and Amanda's shift ended after the claimant's. It was reasonable for the claimant to assume that Amanda would inform the appropriate staff members about the mattress.

148. The claimant also sent the WhatsApp messages to Pargan and Amanda about the mattress and the need for a profile bed.

149. Whilst she did not complete the handover record, the system, was that the senior on duty did this. The respondents were made aware of this.

150. The senior completed the handover as shown by the 28/6/2018 record. The claimant knew best how the system operated. This document was also not considered in the disciplinary process, despite its relevance and was only disclosed to the tribunal at the Full Merits Hearing, and only when asked for by the judge.

151. The disciplinary outcome letter was not properly reasoned and did not consider the claimant's long service and unblemished record, or alternatives to dismissal. Other staff had been guilty of far more serious misconduct and had received lesser sanctions.

152. Pargan had a controlling influence throughout. He was intrinsically involved up to the disciplinary; he suspended, investigated, drafted the allegations, provided evidence himself, co-ordinated the dates, and chose who to interview.

153. Before and after the appeal hearing, Kandola spoke to the Dhaddas. The disciplinary process was kept within the family, despite them having another care home (Wibraham House) with other senior staff who might have been more independent.

154. Therefore, pulling all these matters together, we conclude that the respondents wanted to dismiss the claimant because of the impacts of her health. They had looked for an opportunity to do so since as long ago as 2015, and they thought they had found it when she made a modest slip regarding the mattress. They jumped on this as an excuse to get rid of her.

155. From this, we conclude on the issues as follows:

156. **Unfair Dismissal**

1. *What was the principal reason for the Claimant's dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent asserts it was a reason relating to the Claimant's conduct.*

   Answer: Her general health, tiredness, difficulty concentrating, low energy levels, and need to work less hours.

2. *If the Respondents can show conduct was the reason for the dismissal*

   a. *Did the employer carry out as much investigation as was reasonable in the circumstances?*

      Answer: no

   b. *Did the employer genuinely believe that the employee was guilty?*

      Answer: no

   c. *Did the employer have in its mind reasonable grounds, based on the investigation, for holding that belief?*

      Answer: no

   d. *Was the procedure fair?*

      Answer: no

3. *Was dismissal within the range of reasonable responses which a reasonable employer might have adopted?*

   Answer: no

157. **Wrongful Dismissal**

1. *Was the Claimant in repudiatory breach of her contract of employment?*

Answer: no

2. *If so, did the Respondent terminate the contract of employment in acceptance of this repudiatory breach?*

N/A

3. *If not, what notice pay was owing to the claimant and what notice pay, if any, was paid?*

Not dealt with at liability hearing.

158. **Discrimination Arising from Disability – s.15 EqA**

Applying *Pnaiser,* we considered whether there was unfavourable treatment and by whom; if there was, the reason for it and whether that reason was "something" arising in consequence of the claimant's disability.

We note that any unfavourable treatment must be because of that "something" and that "something" must be in consequence of the disability.

1. Did the following thing(s) arise in consequence of the claimant's disability?

    a. The claimant experienced increased stress, pressure, tiredness, and difficulty concentrating?

       Answer: We find that these things were a consequence of the claimant's disability and particularly her stroke.

    b. The Claimant needed to make a request for flexible working

       Answer: This was because of the stress, tiredness, and difficulty concentrating in consequence of her stroke.

2. Did the respondents treat the claimant unfavourably as follows:

    c. suspending the claimant on 2 July 2018

    d. dismissing the claimant on 21 August 2018

    e. not upholding the claimant's appeal against dismissal on 7 September 2018.

    Answer: These matters are all unfavorable treatment and this was admitted by the respondents.

3. Did the respondents treat the claimant unfavourably in any of those ways because the claimant experienced increased stress, pressure, tiredness and difficulty concentrating, and because she needed to make a request for flexible working?

   Answer: Yes.

4. Have the respondents shown that they did not know, and could not reasonably have been expected to know, that the claimant had the disabilities?

   Answer: The respondents admitted that they knew about the stoke shortly after it occurred and they knew about the COPD from May 2018.

Overall conclusion

159. The claimant was unfairly dismissed and wrongfully dismissed.

160. She was discriminated against because of her difficulty concentrating, and the stress, pressure, and tiredness she experienced, and because of her request for flexible working. These were all consequences of her disabilities and particularly of her stroke.

161. With respect to the section 13 disability and age discrimination claims, these are dismissed, as the reason for the unfavorable treatment was the "something" that arose in consequence of the claimant's disability (tiredness, stress, pressure, difficulty concentrating and flexible working).

____

Employment Judge Liz Ord

7 August 2023

Notes

Public access to employment tribunal decisions
Judgements and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.