



EMPLOYMENT TRIBUNALS

Claimant: Mrs D Whelton

Respondent: Shirley Old People's Welfare Committee Limited

Heard at: Midlands West Employment Tribunal via video hearing

On: 26 and 27 February 2024

Before: Employment Judge Fitzgerald

Representation

Claimant: In person

Respondent: Mr Pickett, Counsel

JUDGMENT

The Judgment of the Tribunal is that:

1. The name of the Respondent is amended to Shirley Old People's Welfare Committee Limited.
2. The Claimant was unfairly dismissed.
3. The Claimant's compensatory award is reduced by 100% on the grounds that the Claimant would have been dismissed in any event and therefore the procedural defects made no difference to the overall outcome.
4. The Claimant's basic award is reduced by 100% on the grounds of her contributory fault.

REASONS

Claims and Issues

1. At the outset of the hearing we established the issues. This is a claim of unfair dismissal. The Respondent admits that the Claimant was dismissed.
2. The fair reason relied on is misconduct or in the alternative capability.
3. In circumstances where the Claimant was dismissed for gross misconduct I will consider:
 - a. whether the Respondent genuinely believed the Claimant had committed misconduct.
 - b. did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the Claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:
 - i. there were reasonable grounds for that belief;
 - ii. at the time the belief was formed the Respondent had carried out a reasonable investigation;
 - iii. the Respondent otherwise acted in a procedurally fair manner;
 - iv. dismissal was within the range of reasonable responses.
 - c. If the Claimant's dismissal is unfair should there be any reduction to compensation on the grounds of:
 - i. Contributory fault and/ or
 - ii. Polkey deduction, i.e. that any procedural defects made no difference to the outcome.

Procedure, documents and evidence heard

4. At the outset of the hearing we spent quite considerable time (over 2.5 hours) resolving issues relating to the documents and ensuring that all parties had seen and had an opportunity to read the relevant documents. The Claimant had not seen the bundle of documents, albeit she had previously seen most of the documents. The Respondent's Counsel had not seen the Claimant's witness statement, albeit it was saying largely the same as previous statements that had been seen. There were also a number of extra documents which the Claimant had annexed to her witness statement. The majority of these were in the bundle and the 2 extra documents – doc 1 and doc 3 – Amy's statement and the careplan were admitted into evidence. It was unclear whether directions had been given by the Tribunal as regards exchange of documents and so we focussed on remedying the situation. I had some concern as to whether we could go ahead in the current listing or whether a postponement may be necessary. Both parties were provided with additional time to read the new documents and both confirmed that they were able to proceed and

wished to do so. Later in the course of the hearing I was provided the minutes of the disciplinary hearing and the Respondent's disciplinary policy which were also admitted into evidence.

5. The Claimant only had access to the bundle on a phone and so it was agreed that the Respondent would courier a hard copy of the bundle to her with the aim that this would arrive in time for her to give her evidence on the second day of the hearing – this did not arrive and so the Respondent printed the bundle at the care home and hand delivered it to the Claimant – which was appreciated.
6. I had before me a bundle of documents running to 110 pages. I reviewed the additional documents admitted into evidence as detailed above. I also viewed CCTV footage provided by the Respondent of the incident on 24 June 2023 which led to the Claimant's dismissal. I watched the first 20mins of this recording which I was directed to as the relevant period.
7. The Respondent presented oral evidence and a witness statement from Ms Joanne Clarke.
8. The Claimant presented oral evidence and witness statement from herself, Ms Cilla Pouney and Ms Ayesha Nawaz.

Facts

9. The Claimant started employment with the Respondent on 6 May 2015 and worked as a Team Leader. The Respondent is a provider of health and care services to elderly people in an around the Solihull area and is registered with the CQC. The Claimant worked at the Respondent's care home called Elizabeth House.
10. Around midday on 24 June 2023 two carers were caring for an elderly resident, EG, in the lounge area of Elizabeth House. The resident appeared to be sleeping and was woken by Cynthia Atkins and Cilla Pouney to be taken for lunch. This involved supporting the resident to stand up using the support of a walking frame and then with the aim to move into a wheelchair. In the process of supporting the resident to stand she fell to the ground. There has been a lot of evidence about whether EG fell or whether she 'put herself to the floor'. On viewing the CCTV it appears that EG legs gave way causing her to fall. It is impossible for me to say whether there was any element of intent on EG's part to fall to the floor/ put herself to the floor, however given that she recently had had a hip operation it seems likely that she would have had limited strength in her legs which meant that she did not have the strength to stand at that time, even with the walking frame, and therefore collapsed. In my view whether EG fell or out herself to the floor has little relevance as I am satisfied that this did not form part of the reason for dismissal.
11. Once EG was on the floor Cilla Pouney went to find the Claimant as the most senior person on site that day and obtain her support to assist EG. The Claimant was in the reception area at the time dealing with a situation for a very unwell resident. It was a busy shift. The Claimant went to collect the mangar, an inflating chair which is used to lift someone who

has fallen. The Claimant went to the lounge and together with colleagues proceeded to inflate the mangar to lift EG. The stabilising legs were not used and EG was not on the mangar properly. It then had to be deflated and a slide sheet used to move EG and then the mangar re-inflated. Then the hoist was used to lift her into the wheelchair. I have watched the CCTV and make the following finding of fact:

- a. The Claimant stepped over EG's head when entering the room;
 - b. During the incident EG's skirt rides up repeatedly and although the Claimant makes some effort to cover her, her legs are exposed and splayed at times and this is visible to other residents in the lounge who are close by, including at least one male resident.
 - c. The Claimant did not move other residents out of the room during the incident.
 - d. There was a child in the room, a son of another care worker, and he was not moved out.
 - e. During the process of recovering EG the Claimant appears to do some checking of EG, but nothing significant to ensure she wasn't injured especially in light of her recent hip surgery. The Claimant says this was because she did not think EG had fallen rather that she 'put herself to the floor'.
 - f. During the process of supporting EG she does not appear to be well supported, her head and neck are falling to the side and she is clearly distressed. She appears to be handled roughly at times by the Claimant and arms and legs pushed firmly. When EG tries to hit the Claimant her arms are held down.
12. Following the incident another carer Amy completed an incident/ concerns form on 24 June saying that she did not think that EG had been treated correctly or with the right manual handling techniques and she was concerned for the resident.
13. This was picked up by the manager Natasha Grinnell on Monday 26 June 2023. She carried out an initial investigation and obtained a statement from Jess, who was working in the kitchen but came into the lounge to see what had happened. Jess had also spoken to Natasha on the Saturday and so Natasha was aware of the incident. Natasha then viewed the CCTV and had serious concerns. She took advice from HR and proceeded to call the Claimant to an investigatory meeting on 28 June 2023.
14. The notes from the investigatory meeting are in the bundle at page 45. The Claimant confirmed that her training was up to date and that she was aware of correct manual handling techniques. The Claimant said that EG was being un-cooperative and there was a discussion about the care plan with Natasha saying that a hoist should be used to lift EG at all times. The Claimant said that she believed she was reassuring EG and trying to protect her dignity and said that she had checked EG for injuries by touching her on the shoulders and leg, but as she thought she had put herself on the floor then there wouldn't be any injuries. The Claimant was shown the CCTV recording and Natasha said to the Claimant that she did not believe that EG had been treated in a proper, respectful way. The

Claimant said that she did not think it was too bad – this is how EG is kicking off all the time.

15. The Claimant was suspended around this time. There is some uncertainty as to the date of the suspension. The Claimant believes she was suspended on Monday 26 June although the letter states that following the investigatory meeting the Claimant was suspended i.e. 2 days later. I do not think the date is of significant relevance, but accept the Claimant's date of 26 June as the suspension date. The Claimant was told in the suspension letter:

During the course of your suspension, you are instructed not to contact or attempt to contact or influence anyone connected with the investigation in any way or to discuss this matter with any other employee or client of the Company. However, should you wish to contact any employee who you feel could assist you in preparing an explanation for the allegations made against you under investigation, then please contact me in order that arrangements can be made for them to be available for interview. It is also essential that you do not attend your place of work.

16. This instruction was re-iterated to the Claimant by letter dated 3 April 2023 (but should be 3 July 2023).

17. The Claimant was invited to a disciplinary hearing on 5 July. The allegations were:

At this meeting, you will be given every opportunity to put your point of view forward with regard to the following allegations.

- On 24th June 2023, when handling resident E.G, it is alleged that she was handled inappropriately by you and required equipment was not used.
- Resident E.G, was not handled in line with her care plan.
- The incident with resident E.G was not recorded accurately as per our procedures.
- The above would be a breach of safeguarding.

The matters above are very serious and may amount to gross misconduct which could result in your dismissal from the Company.

18. The disciplinary hearing took place on 5 July 2023 and the Claimant was accompanied by a work colleague. Ms Clarke chaired the disciplinary hearing and was the decision maker. Matters discussed at the disciplinary hearing are referenced in the outcome letter dated 10 July, page 49. Ms Clarke states: *"At the hearing we discussed the company policies and procedures which you confirmed you were aware of and further confirmed that you had received all the relevant training to carry out your duties. We discussed safeguarding and you confirmed that you were aware of the safeguarding procedure and had recently carried out safeguarding training and manual handling training. You also explained that you were aware of what a care plan was and understood your duties as team leader."*

19. The Claimant agreed with this in evidence.

20. Ms Clarke suggested to the Claimant that the resident had not been treated in line with manual handling training, nor respecting her dignity. As she has done in evidence today the Claimant denies that. In evidence before the Tribunal the Claimant accepts that she should not have stepped over the resident's head, but otherwise says that she thinks she acted correctly.

21. Following the disciplinary hearing Ms Clarke took the decision to dismiss the Claimant. There are multiple reasons for her decision: the incident on 24 June, but also due to a new matter which came to Ms Clarke's attention following the disciplinary hearing, namely that she had been told that the Claimant had met up with a colleague who was also being investigated during her suspension, namely Cilla Pouney. Ms Clarke knew this

because a colleague had witnessed them together and Ms Pouney subsequently admitted to this in her disciplinary hearing. Ms Clarke did not extend the allegations against the Claimant to include this matter, nor put it to her or offered her the chance to comment on it. I find that it nevertheless formed part of the decision to dismiss and Ms Clarke stated this in evidence. Also in the decision letter she said: *“Having evidence of this and the individual confirming that you were in contact, I have therefore also considered this when making my decision. As you hold a senior role within the business, I therefore expect you to follow the correct rules and lead by example. I was disappointed to hear that you have breached your suspension terms given the reason for your suspension was in connection with serious situations.”*

22. The Claimant accepts that she breached her suspension terms, albeit that she was not asked about this at the time. She was given a lift to her disciplinary meeting by Cilla Pouney.
23. Ms Clarke has given evidence that even if the suspension breach issue had not arisen she believes that she would have taken the decision to dismiss the Claimant in any event due to the issues on 24 June. I accept this evidence.
24. The Claimant was given the right of appeal and the appeal was undertaken by Guardian Human Resources, an independent HR organisation. The appeal hearing took place on 26 July 2023 and was conducted by Harjit Sidhu. Ms Sidhu conducted further investigation into the Claimant's 8 appeal points and reached a decision that the appeal was unsuccessful.
25. The Respondent took disciplinary action against 3 other staff members who were involved in the incident. Cilla Pouney was also dismissed following a disciplinary process. Cynthia Atkins was also suspended and was issued with a final written warning following a disciplinary hearing. She avoided dismissal due to showing remorse and also agreeing to undertake an extensive training programme. Ms Clarke said that she also had not been seen breaching her suspension notice which Cilla Pouney and the Claimant had.
26. Finally Amy Atkins was investigated and given a verbal warning due to her involvement in the incident.

The Law

27. I must consider whether the decision to dismiss an employee was within the range of conduct that a reasonable employer could have adopted ("the band of reasonable responses test"), having regard to section 98(4) of the Employment Rights Act 1996 and the principles of fairness established by case law.

28. Section 98(4) sets out that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):
- 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.
29. It is for the Respondent to show that the reason for dismissal was potentially fair. The potentially fair reasons for dismissal include conduct which is the reason relied on in this case.
30. I am mindful of the test set out in *BHS v Burchell 1978* in relation to misconduct dismissals, namely that a dismissal for misconduct will only be fair if, at the time of dismissal:
- The employer believed the employee to be guilty of misconduct.
 - The employer had reasonable grounds for believing that the employee was guilty of that misconduct.
 - At the time it held that belief, it had carried out as much investigation as was reasonable.
31. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: *Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23*.
32. As part of my decision making I must consider whether there were any procedural flaws which caused unfairness. Guidance on that part the exercise was given by the Court of Appeal in the case of *OCS v Taylor [2006] ICR 1602*, which clarified that the proper approach is for the tribunal consider the fairness of the whole of the disciplinary process. The court stated that our purpose is to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at a particular stage.
33. The Court went on to say that the tribunal should not consider the procedural process in isolation but should consider the procedural issues together with the reason for dismissal as it has found it to be and decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss.
34. It is important that the employee knows the full allegations against him or her. The Court of Appeal has stated that disciplinary charges should be precisely framed, and that evidence should be limited to those particulars — *Strouthos v London Underground Ltd 2004 IRLR 636, CA*. Not only is it fundamental that employees should know the case against them, but they should also know what evidence the employer is relying on.

35. When considering the fairness of the dismissal I have also directed myself to the 2015 ACAS Code on Disciplinary and Grievance Procedures.
36. I have also reminded myself that I must assess the Respondent's actions in line with the above tests and must not substitute my own view.
37. If the Respondent's decision to dismiss the Claimant was unfair on procedural grounds then I must consider whether the Claimant might or would have been dismissed in any event had a fair procedure been followed - *Polkey v AE Dayton Services 1987*. I must consider whether, if applicable, there should be any deduction to the Claimant's compensatory award, known as the Polkey deduction.
38. I must then consider the application of the ACAS Code and whether any uplift, or reduction, is appropriate – of up to 25%.
39. Finally, I must consider whether it is appropriate to make any percentage reduction for any contributory conduct on the part of the employee (s123(6) ERA 1996). This applies to both any compensatory award and basic award. Where there is a significant overlap between the factors taken into account in making a Polkey deduction and when making a deduction for contributory conduct, I must consider expressly, whether in the light of that overlap, it is just and equitable to make a finding of contributory conduct, and, if so, what its amount should be. This is to avoid the risk of penalizing the claimant twice for the same conduct (see *Lenlyn UK Ltd v Kular UKEAT/0108/16/DM*).

Conclusions

40. In this case the burden of proof is on the Respondent to show that the dismissal was fair.
41. No evidence was brought before the Tribunal in respect of capability as a fair reason for dismissal and therefore I have made these conclusions in respect of conduct only.
42. The first question is whether the employer genuinely believed the employee to be guilty of misconduct and whether it has reasonable grounds for that belief. To answer this question I am focussed on Ms Clarke's decision process. In respect of the incident on 24 June Ms Clarke reached the view that the Claimant was guilty of misconduct in the way that she handled EG. She based this view on the witness evidence, but primarily on the CCTV. Ms Clarke was clear in evidence that she believed the Claimant to have acted unacceptably on 24 June and the dismissal letter sets out the misconduct in connection with this incident, namely para 1 on page 50:
 - a. Despite having had the training failed to follow it;
 - b. Failed to check the resident to ensure she was not injured;
 - c. Did not respect EG's dignity;
 - d. Did not remove residents out of the lounge;
 - e. Did not lead the team to make the correct decisions.

43. I find that in relation to this reason for dismissal Ms Clarke did hold a reasonable belief and had reasonable grounds for holding that belief based on her viewing of the CCTV, the other witness statements and hearing from the Claimant at the disciplinary hearing.
44. In relation to the second element of the dismissal- the breach of suspension terms – Ms Clarke received a report from a colleague that Cilla Pouney and the Claimant had been seen together in a car. Ms Clarke questioned Ms Pouney about this at her disciplinary hearing and despite initially denying it she broke down in tears and admitted it. On this element of the test I consider that Ms Clarke genuinely believed the Claimant to have committed misconduct in terms of breaching her suspension terms.
45. I then move on to the investigation carried out.
46. Natasha Grinnell was the investigating manager and she collected witness evidence from Amy Atkins and followed up and obtained a statement from Jess Tea. Although I was not specifically referred to it there is also evidence in the bundle relating to rotas and training which it appears that Ms Grinnell collected. Ms Grinnell then carried out an investigatory meeting with the Claimant and showed her the CCTV. Ms Clarke also reviewed the CCTV and refers to it throughout the disciplinary meeting and provides the Claimant with the chance to comment. Ms Clarke did not make her decision immediately and carried out further investigation before reaching a conclusion. Somewhat surprisingly I was not provided with a copy of the disciplinary hearing minutes until after Ms Clarke had given evidence and therefore she could not be questioned as to what this extra investigation was. I also note the extra investigation undertaken at the appeal stage which led to a full appeal response.
47. Overall I consider the level of investigation in relation to the incident on 24 June 2023 to be reasonable.
48. In relation to the breach of suspension there was some investigation carried out, a report from a colleague and then asking Ms Pouney about this at her disciplinary hearing. However I consider that an important part of any investigation is to ask the individual accused what their position is and this was not undertaken. Therefore I conclude that the investigation in relation to the suspension incident was not within the band of reasonable responses.
49. Next I have considered procedure. In relation to the incident on 24 June 2023 I conclude that the process was fair as per the Respondent's disciplinary policy and the ACAS Code. The matter was investigated, the Claimant attended investigation and disciplinary meetings and was accompanied at the latter. The allegations were clearly set out for the Claimant in the letter of 3 July 2023 (typo in date corrected) and she was clear the charges that she had to answer. Following the outcome the Claimant was offered an appeal and an appeal hearing duly took place.

50. However I do not consider there to have been a fair procedure in relation to the breach of suspension allegations. This is because the Claimant had no idea that this matter was being considered. I accept that Ms Clarke was not aware of the matter until after the disciplinary hearing, however upon becoming aware of it, and on the basis that she deemed it to be relevant to her decision to dismiss there was a requirement in my view to put the allegation to the Claimant and allow her to comment on it. It has been put to me that there was no need to do so as the Claimant was going to be dismissed anyway in relation to her misconduct in relation to 24 June, however according to the case of Polkey the House of Lords deemed that in all but the most exceptional cases that is relevant to compensation but not the fairness of the dismissal. I have considered whether this case falls into one of those exceptional cases where it would be utterly useless or futile, but I do not consider it to be so. I accept Ms Clarke's evidence that she believes she would have dismissed the Claimant in any event, but she devotes a paragraph of the dismissal letter to this issue and it clearly informed her decision to dismiss – she states – '*I have therefore also considered this when making my decision*'. In line with the ACAS Code and caselaw such as *Strouthos* the employee should be made aware of the case against them and have the opportunity to respond before a decision is made. In this case the allegation around the breach of suspension should have been put to the Claimant and she should have been able to comment on it. This would not have necessarily needed a new disciplinary hearing and could have been done quite quickly via a follow up telephone call or e-mail correspondence. It need not have taken long.

51. So overall looking at the band of reasonable responses:

- a. The Claimant has argued that there was no harm to the resident and she did nothing wrong. I have viewed the CCTV and have already set out my findings of fact. In my view there is clear evidence that the resident was not treated with dignity and respect by the Claimant and not handled correctly in line with manual handling training on that day. The resident was manipulated roughly and not thoroughly checked for any injury. She was held down at times and her head and neck are not supported. The resident is in distress. I accept the Claimant's contention that the shift was busy and there was an unsupervised child who distracted her – however these are not satisfactory reasons to act in the way she did.
- b. I consider that it was valid for Ms Clarke to take into account that the Claimant showed no remorse and did not accept that she had done anything wrong – indeed she has maintained that position during the Tribunal hearing.
- c. I accept that another carer supported EG to stand later on in the day but I consider this is not relevant to the dismissal which was due to the Claimant's conduct during the period that EG was on the floor. As regards the care plan I have not heard clear evidence on whether it was changed, although it seems that it may have been to confirm that the hoist should be used in all cases for EG. It is possible that this was changed entirely legitimately in response to the incident on 24 June. In any event the failure to follow a care

plan, whilst it was an allegation, it did not form part of the reason to dismiss.

- d. The Claimant has pointed out that she was not suspended until Monday and therefore was allowed to continue working for several days after the incident. I am satisfied that once Natasha Grinnell had viewed the CCTV she took swift action to contact HR and subsequently start an investigation and suspend the Claimant and others. I am also satisfied that the reason that safeguarding took no further action was that they were assured that the resident was safe, that carers had been suspended and the home was investigating.
- e. The Claimant has made allegations that this was all due to a witch-hunt and that she was disadvantaged due to the others having personal friendships. I acknowledge that there is evidence of personal friendships but there is no evidence to suggest that this influenced Ms Clarke's decision to dismiss, nor the appeal officer's decision to turn down the appeal. Amy and Jess' witness statements were relevant but the overwhelming evidence in this case was the CCTV and Ms Clarke made her own mind up on that having viewed it and having heard from the Claimant. Even if Amy did make the complaint to seek to get the Claimant into trouble this was no longer relevant once the CCTV was viewed.
- f. I have considered consistency in relation this and am satisfied that the Respondent acted appropriately in respect of the Claimant's colleagues. One colleague was dismissed and another had a final written warning (Cynthia). I am satisfied with Ms Clarke's explanation that there were reasons in the case of the latter as that individual showed remorse and understanding of what she had done wrong. I am also satisfied that there was no inconsistency in relation to Amy and she also received a verbal warning.

52. I am satisfied that Ms Clarke's decision that the Claimant's actions on 24 June amounted to gross misconduct is within the band of reasonable responses that a reasonable employer could make in these circumstances. However, as stated above, that was not the sole reason for dismissal. In respect of the suspension incident my judgment is that allowing this to form part of the decision to dismiss without putting it to the Claimant was a breach of the ACAS Code and a breach of the requirements of fairness as demonstrated by the caselaw. It would not have been difficult to put this to the Claimant and obtain her comments and I believe that any reasonable employer in these circumstances would have taken that extra step. I therefore consider that this takes this employer's decision to dismiss for the two reasons stated in the outcome letter outside the band of reasonable responses and therefore the dismissal was unfair.

53. Therefore, in conclusion, because of the procedure followed in this case I find the dismissal to be outside the band of reasonable responses and the Claimant's dismissal was unfair.

54. I have then gone on to consider 3 matters – in the order to which they apply:

Polkey reduction, ACAS uplift and contributory fault.

55. It is the procedural failings around the suspension matter which have rendered the dismissal unfair.
56. I accept Ms Clarke's evidence that if there had been no breach of the suspension then she would have made the decision to dismiss in any event. Alternatively the Claimant has admitted in evidence to the Tribunal that she did breach her suspension by accepting a lift from Cilla Pouney and therefore had this been put to her by Ms Clarke then she would have admitted it and this would have legitimately formed part of Ms Clarke's decision. I consider that for the purposes of assessing compensation Ms Clarke could quite reasonably have conducted the necessary procedural step in the 5 days between the disciplinary hearing and dismissal. It is clear that the Claimant would have been dismissed in any event either way and because I have concluded that, save for the procedural defects in connection with the suspension incident, the dismissal would have been fair I make the decision to apply a 100% deduction to the Claimant's compensatory award.
57. Due to the 100% deduction any ACAS uplift does not apply.
58. In relation to the basic award I cannot make a Polkey deduction but must assess the appropriate award taking into account any contributory fault. A reduction on the ground of the employee's conduct must be made where *'the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent'* — S.122(2) ERA.
59. The behaviour of the Claimant which gives rise to possible contributory fault is:
- a. Her actions on 24 June;
 - b. Her action in breaching her suspension rules.
60. I am required to consider if that conduct is culpable or blameworthy. I find that it is on both counts. In this case I have had the benefit of viewing the incident myself through CCTV (which is relatively unusual) and I have found that the Claimant acted contrary to her training and did not treat the resident with dignity nor respect on that day.
61. In respect of the suspension the Claimant has admitted to the Tribunal that she breached the terms of her suspension.
62. I then need to consider whether it is just and equitable to reduce the basic award. I find that it is. I have had clear evidence before me of the misconduct in relation to the resident on 24 June and in my view this is gross misconduct. The situation was exacerbated by the second strand, i.e. the Claimant then going against clear instructions not to contact colleagues – and here the relevant colleague was a fellow colleague facing a disciplinary and in circumstances where collusion was a real risk.

63. I have therefore taken the view that the Claimant entirely contributed to her dismissal and her basic award should also be reduced by 100%.

So in conclusion I am making a finding of unfair dismissal but the Claimant receives no compensation due to reduction of 100% to compensatory award on the basis that she would have been dismissed in any event if the procedural failings had been rectified and a 100% reduction to the basic award on the grounds of contributory conduct.

Employment Judge Fitzgerald

Date 8 April 2024