



EMPLOYMENT TRIBUNALS

Claimant: Ms M Oyeleye
Respondent: Spencer & Arlington Limited
Heard at: East London Hearing Centre (by CVP)
On: 5 October 2023, 17 January 2024 and 15 July 2024
Before: Employment Judge Illing

Representation

Claimant: In person
Respondent: Lisa Hatch (Counsel)

The judgment of the Tribunal is that: -

1. The complaint of unfair dismissal is not well founded and is dismissed.
2. The complaint of wrongful dismissal is not well founded and is dismissed.
3. The complain of non-payment of holiday pay is not well founded and is dismissed.

Written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Procedural history and conduct of the case.

1. This is a claim for unfair dismissal, wrongful dismissal and holiday pay where there have been case management orders issued, but no case management discussion.
2. The claimant requested a Yoruba interpreter, which was provided for the first day of the hearing on 5 October 2023, which was by CVP.

3. The start of the hearing on 5 October 2023 was delayed due to the claimant having technical issues with her link. The hearing was able to start by 1100 with all parties in attendance.
4. At the outset of the hearing, the respondent called Ms Dionne Thompson, who was the investigating manager for the respondent. However, Ms Thompson was in Portugal. The respondent confirmed that they had not sort consent for Ms Thompson to give evidence from Portugal. The Tribunal made enquiries and confirmed that where there is no general guidance in relation to overseas witnesses, which is the case for Portugal, then permission must be sought in advance on a case-by-case basis. As permission had not been sought, Ms Thompson was not permitted to give evidence.
5. The CVP hearing was part heard on 5 October 2023 and was re-listed for 17 January 2024 to continue as an in-person hearing. Due to a Tribunal error a Yoruba interpreter was not booked for the 17 January 2024, but an interpreter was able to attend from 1200 onwards. Due to the delay, whilst evidence was concluded, the parties were not able to present their closing submissions. The parties were instructed to submit their final submissions in writing and the Tribunal would take these into consideration before making a decision.
6. The parties did submit closing submissions in January 2024, but these were not forwarded to the Judge nor to the file.
7. The case was listed for a hearing by CVP on 24 April 2024 for final consideration of the evidence, deliberation and to give judgment and remedy, if required. However, the interpreter was not available and the hearing was cancelled and re-listed.
8. The case was listed for a hearing by CVP on 15 July for final consideration of the evidence, deliberation and to give judgment and remedy, if required. A Yoruba interpreter was provided by the Tribunal to assist and the parties helpfully resubmitted their written closing submissions, which were taken into consideration.

The hearing

9. Bundle of 261 pages
10. We heard evidence from:
 - 10.1. Dione Thompson (Investigation) – not heard as located abroad
 - 10.2. Shontel Parsons (Disciplinary)
 - 10.3. Zaid Ali (Appeal)
 - 10.4. Maria Oyeleye
 - 10.5. Rosemary Akukwe (email from the claimant dated 21 June 2024) – this evidence was not heard as it was submitted after the evidence had been concluded.

Summary

11. The claimant is an employee of the respondent, which is a care company. Ms Oyeleye worked for the respondent from 2018 until her dismissal in February 2023 as a support worker.
12. The respondent company is a limited company with two directors. The company provides domiciliary care for individuals with learning difficulties in their own home. The care provided is the full range of care. The respondent is registered with the Care Quality Commission (CQC) and has policies in place to protect both employees and the vulnerable clients. This includes a Code of Conduct and Safeguarding Policies.
13. The claimant does not dispute that she has been dismissed by reason of her conduct. Her position is that the sanction is too harsh, that the respondent failed to carry out a thorough investigation and that the respondent failed to listen to the claimant.
14. The respondent states that the claimant was dismissed for conduct and pleads “trust and confidence”, i.e. some other substantial reason as an alternative.
15. The respondent denies that the claimant was unfairly dismissed and states that the claimant was dismissed following a full, fair and reasonable disciplinary process in accordance with the Acas process.
16. The dismissal is admitted by the parties.
17. The complaints presented are as follows:
 - 17.1. Unfair dismissal under section 98 Employment Rights Act 1996
 - 17.2. Wrongful Dismissal
 - 17.3. Non-payment of holiday pay.

Findings of fact for unfair dismissal

Policies and Procedures

18. The respondent operates a number of relevant policies and procedures including the following:
 - 18.1. Disciplinary and dismissal process policy
 - 18.2. Code of conduct. This was signed by the claimant at the start of her employment. This code expressly states:

Duty of Candor

- *By Law you have a duty of candour towards organisation and towards your service users (Staff sometimes can oversee injury's by assessing themselves and only put plaster when stiches are required), it must be reported with an **urgency**.*
- *Clearly communicate and state the condition of the injury*

- *Observe the healing*
- *Take pictures*
- *Managers trust you and responsibility rests on you, you represent the service user.*
- *You are there to protect the clients, their safety and make sure needs are met or otherwise you will place service user and yourself at risk.*
- *If neglect of the service user becomes substantiated, our competence is questioned.*
- *It's about protecting the service users, they can't protect themselves*
- *Your job is simple, to **Report duty of candour straight away** (emphasis is as within the Code of Conduct)*
- *If you are aware of the issue and do not report you can be addressed [sic] accountable*
- *It may lead to losing the job and being taken off from working in the care industry.*

18.3. The claimant has completed a test on the Code of Conduct and the following question was asked and answered:

5. Reporting the injury is essential because:

A. *Client might be in pain*

B. *For the manager to be aware in case it grows into something big*

18.4. The claimant has ticked both A and B, which is the correct answer.

19. There are also Policy Notices at pages 100 – 108 of the bundle, which provide, express references to poor and criminal practice as follows:

10. *Not reporting incidents, abuse or accidents.*

20. Additionally, the Policy Notice headed Safeguarding Adults CMT12 – Policy & Legislation at page 104 which provides:

No Secrets

21. The claimant completed this training on 15 June 2022.

22. There is a further Policy notice heading **Zero Tolerance Policy, Report it**. This requires the individual to contact their supervisor immediately and provides a dedicated email address and states:

No excuses, don't wait, or think its been reported, report it, anything unusual, seen or told about, all bruises, injuries, accidents, incidents, seizures, absconding, safeguardings, abuse, complaints, medication errors, all health concerns, any Health and Safety concerns, carers absence, any professional conduct, poor practice, anything! Report it immediately! DON'T WAIT, DON'T

THINK, REPORT IT. Contact your supervisor immediately and report@sandacare.co.uk

23. The respondent provides internal and external training. The claimant accepted that she had received training for her role.

Training history

24. The respondent provided the claimant with training for her role. The training matrix for 2021 / 2022 and the policy evidence includes the following training courses as completed by the claimant:
- 24.1. Whistleblowing The Facts on 8 April 2021, which includes the emphasis on If in doubt – speak out! At page 94
 - 24.2. Safeguarding and whistleblowing – A case study on 8 December 2021, page 95
 - 24.3. Raising concerns and whistleblowing on 15 December 2021
 - 24.4. Reporting & Recording Behaviours & Incidents on 26 January 2022
 - 24.5. Understanding of an incident, accident and reporting on 26 January 2022
 - 24.6. Report it (CMT14) dated 26 September 2022
 - 24.7. Report it Types of Abuse (CMT15) on 5 May 2022

Contract

25. The claimant signed her contract at the outset of her employment on 23 February 2018. This includes references to disciplinary and grievance policies.
26. At section 1.9 of the contract of employment it states as follows:
- You must obey this contract, our lawful instructions and orders and follow the rules and procedures that you will find in the Staff Handbook and in policies/ procedures / manuals and memos that we may issue from time to time.*
27. I find that this is a reasonable contractual term for a reasonable employer in the circumstances of the respondent.

Background

28. The Claimant stated that she commenced employment in or around October 2017 where she attended training. She also explained that she had taken part in the employer's induction training in January 2018 and that she was paid for this. The contract of employment identifies that the claimant's employment started on 23 January 2018 and it was signed on 23 Feb 2018. I find that the claimant's employment started on 23 January 2018.
29. The claimant was employed as a support worker. Their role being to provide 1-to-1 support in clients own home, including personal care and support to a vulnerable non-verbal client. The claimant agreed that the job description in the bundle was her job description, but she described her role as a carer and not as a support worker as identified in the description.

30. The respondent is a limited company that provides domiciliary care providing support for individuals with learning difficulties in their own homes. The respondent operates various policies to protect staff and vulnerable clients including a Code of Conduct and Safeguarding policies and it provides training to all employees.
31. The claimant underwent training including training in relation to the reporting of incidents and the requirement that the report should be immediate. The respondent states that the claimant had specific training on 26 Jan 22, 15 Jun 22 and 26 Sep 22 in relation to this. The claimant also had further training on 13 June 22 in relation to good and poor practice. The claimant accepts that she received all of the training that she required.
32. The Respondent states that it has “report it” flash cards, which the claimant would have had, to remind employees of the importance of reporting incidents to management immediately. The respondent also states that the employees were aware that the Respondent operated a “zero-tolerance” policy in relation to this.
33. The claimant was the primary carer for a vulnerable adult who has both learning difficulties and is non-verbal. This person will be referred to as SH. The claimant was responsible for providing daily care, including personal care to SH. The claimant was a shift worker with other colleagues. Care was provided on a 1-2-1 basis.
34. The claimant accepted that SH could not communicate, not even with the claimant. It was put to the claimant that she was not only the eyes and ears of the respondent for the safety and wellbeing of SH, but that she was also the voice for SH, who was unable to communicate anything, including if she was in pain. The claimant agreed that this was correct.
35. The claimant was required to complete a daily log of her care with SH, which was part of her job description. The same job description required the claimant to “report concerns”.
36. The claimant admitted in evidence that she would complete the daily records and that she would, from time to time, ask questions or report concerns. The claimant accepted that she understood the difference between keeping records and reporting a concern.

Findings of Fact for the Unfair Dismissal

37. The respondent operates a Code of Conduct and a Safeguarding policy as detailed above. I find that it is reasonable for a respondent in these circumstances to do so and that the Code and Policies are themselves reasonable.
38. The respondent also issues policy notices and I find that it is reasonable for them to do so.
39. The policy for reporting is a zero-tolerance policy. In the circumstances of the respondent, I find that it is reasonable for a reasonable employer to operate such a strict policy.

40. The training documents are all signed and dated by the claimant. I find that the claimant has completed the training as provided by the respondent, which is detailed above. I also find that it was reasonable for the claimant to complete this training.

16 and 17 November 2022

41. The claimant was on duty on the 16 and 17 November 2022 caring for SH during the day.
42. The daily log for the 17 November 2022 was completed by the claimant [109]. At 0800 there is an entry that staff had noticed that at the back of SH's leg was "*burn by the house heating*". It went further to note that SH liked to rest her leg on the house heating. The log records that "*the staff cleaned the wound with Dettol and that it was fine*".
43. On 17 Nov 22 at 0800 the claimant completed a client ABC chart and provided first aid to SH. This first aid was the application of Vaseline and a dressing.
44. During the morning of 17 November 2022, the claimant's team leader, Debbie Rainger, attended SH's house. It is the respondent's position that this was at 0920 in the morning, it is the claimant's position that it was 1130 – 1200. It is accepted by both parties that the claimant did not tell Ms Rainger of the injury to SH at this time. It is the claimant's position that she was busy assisting Ms Rainger and that she forgot.
45. I find that Ms Rainger did attend SH's home on the morning of the 17 November 2022 at 0920 after the injury had been found and that the claimant did not report the injury to Ms Rainger.
46. The claimant completed her shift at 1500 and this is recorded in the log. The responsibility for the care of SH was handed over to "Rosemary". It is the claimant's position that she fully informed Rosemary of the injury to SH. This is not recorded in the log. I find that the claimant did report the injury to Rosemary in writing by the log record.

18 November 2022

47. The claimant states in her witness statement that she contacted Debbie Rainger, team leader, on 18 November to inform her of the injury. The claimant does not mention this to the investigation, the disciplinary or the appeal meetings.
48. Ms Parsons, Disciplinary manager, states in her evidence that the respondent was made aware of the injury by a report from the claimant's colleague, Rosemary and that it was Ms Rainger who called the claimant on 18 November to discuss the injury.
49. I find that, on balance, the injury was reported to the respondent by Rosemary and that Ms Rainger called the claimant on 18 November to discuss it.
50. On 18 November at 1150 the daily care logs records that SH's GP was contacted to discuss the injury. The GP said that SH should be taken to hospital for urgent care and that the surgery should be sent an email with the photograph of the injury.

51. At 1421 SH was taken to hospital. The injury was considered significant by the hospital and SH required two follow-up appointments. I find that this was a significant injury.
52. As part of the safeguarding process, the respondent reported the incident to the appropriate local authority as a safeguarding issue. Further controls such as supervision were put in place, but the respondent did not believe that the claimant was a risk to SH. The respondent was satisfied that the claimant had not caused the injury and was not a risk to SH.

Investigation

53. The respondent appointed Ms Dionne Thompson, HR Manager, to investigate what had happened. The respondent wrote to the claimant on 7 December 2022 to invite her to a fact-finding disciplinary meeting. The specific allegations were that:
 - 53.1. *You failed to report burn of SH to management on the 17 November and handing it over to your colleagues to take SH to urgent care*
 - 53.2. *Did not adhere to initial management instruction to provide proof of items of clothes bought for SH, breach of petty cash policy*
 - 53.3. *Not providing receipts from the cash withdrawn whilst in Southport (it is approximately £124.00)*
 - 53.4. *You raised your voice and spoke inappropriately to manager (Debbie Ranger) in a telephone conversation on the 16th of November 22, breach of the code of conduct policy*
 - 53.5. *Failure to monitor the heating in the property, which is a risk to SU(SH) safeguarding*
54. Following a cancellation by Ms Thompson due to annual leave, a fact-finding meeting took place on 16 December 2022.
55. During the investigation the claimant was asked to explain to Ms Thompson what had happened. The claimant accepted this in evidence and that she was given the opportunity to reply to the allegations. She also accepted that she knew that she should report the injury to her supervisor immediately.
56. Following the investigation meeting Ms Thompson prepared a report, which recommended that a disciplinary hearing was required on the above points. Points 2 and 3 above (receipts and clothing) were not progressed. This report was sent to the disciplinary manager, Ms Shontel Parsons (Care Manager) with all of the investigation documents and evidence.
57. I find that Ms Parsons had regard to all of the investigation material prior to the disciplinary meeting.

Disciplinary

58. By email on 25 Jan 23 the respondent invited the claimant to a disciplinary hearing. The invitation informed the claimant of:
 - 58.1. The allegations in that:

- 58.1.1. *You failed to supervise Ms SH on the 15, 16 and 17 November 2022 when Ms SH sustained a significant burn to the back of her left leg whilst you were on shift – this falls within the category of neglect and duty of care.*
- 58.1.2. *You failed to follow the company policy to record and report the injury sustained to Ms SH on 15 November, you reported the injury on 18 November 2022, that constitutes as a breach of professional conduct and duty of care,*
- 58.1.3. *You failed to seek medical attention on the 15, 16 and 17 November 2022, leaving Ms SH at risk of infection, that constitutes to neglect & breach of duty of care towards your client*
- 58.1.4. *You failed to follow reasonable instructions by the QA Officer DR – that constitutes insubordination.*
- 58.1.5. *You were shouting at the QA Officer*
- 58.1.6. *You failed to monitor the heating in SH property by keeping heating oh [sic] high setting putting SH at risk of sustaining injury and financial strain – That constitutes financial abuse*
- 58.2. It also informed her of her Right to be accompanied and that if proven the allegations would amount to gross misconduct and a fundamental breach of trust and confidence for the following reasons:
 - 58.2.1. *Failure of duty of care by not acting immediately to get SH medical care for a significant injury*
 - 58.2.2. *As soon as the injury was reported on the 18th November 2022, Ms SH was taken to hospital for urgent care, Ms SH underwent medical treatment for a period of two outpatient visits.*
 - 58.2.3. *Safeguarding of client / neglect*
 - 58.2.4. *Not complying with or following manager's instructions / advice on reporting incidents*
 - 58.2.5. *Breach of code of conduct – inappropriate verbal communication with manager*
- 58.3. She was provided copy documents of evidence numbered 1 – 15 within the invitation letter.
- 58.4. She was invited to provide a written statement and warned that the outcome could be summary dismissal.
- 59. The disciplinary meeting was held on 2 Feb 23 chaired by Shontel Parsons, Care Manager.
- 60. Ms Parsons states that during the disciplinary meeting the claimant did the following:
 - 60.1. The claimant confirmed she had the letter and documents and understood the allegations.

- 60.2. That the claimant had full opportunity to state her case.
- 60.3. That the claimant accepted that it was her fault that she had not recorded or reported the burn and faulty radiator.
- 60.4. That the claimant accepted that she had failed in supervision as she couldn't say when the burn had occurred and that she had noticed the burn on the 16 November as this was the day on which SH had a proper wash. The claimant stated that she did not see the injury on the night before, but noticed it on the morning of the 17 November.
- 60.5. The claimant confirmed that the injury was a blister with water inside.
- 60.6. The claimant confirmed that she knew that Debbie Rainger was coming to the house that day but that she forgot to tell her about the injury.
- 60.7. That the claimant apologised for her conduct.
- 60.8. The claimant confirmed that she was an experienced carer and confirmed that her training was up to date.
- 60.9. She handed over the injury to a colleague at the end of the shift.
- 60.10. She recorded the incident in the daily logs
- 60.11. She had reported the incident as she was required to do.
- 60.12. That she had forgotten to report the injury to Debbie but did so as soon as she remembered.
- 60.13. That she was very sorry for her actions but did not give a reason why she had not reported the injury.
- 60.14. That she had not shouted at her manager on 16 November, despite this being witnessed by a colleague.
61. The meeting was adjourned for Ms Parsons to consider the outcome.
62. Ms Parsons reviewed the claimant's training record and this was up to date. The latest code of conduct being updated and signed by the claimant in July 2022.
63. By letter of 9 Feb 23, the claimant was summarily dismissed on grounds of gross misconduct on the grounds that:
 - 63.1. *She had lacked supervision over her client.*
 - 63.2. *Failed to report and record an incident that led to hospital treatment for her client.*
 - 63.3. *Failed to report a faulty radiator, which the claimant accepted she was aware of.*
 - 63.4. *That the claimant had failed to comply with her managers instructions and shouted at her.*
64. The disciplinary outcome letter stated what mitigation it had taken into consideration including employment position, length of service, experience and

individual circumstances but that it had not been able to identify any mitigation or an appropriate alternative to dismissal.

65. I find that I prefer the evidence of Ms Parsons ahead of the claimant and it is consistent with the disciplinary documents.

Appeal

66. The claimant was given the right to appeal.
67. The claimant submitted an appeal by email dated 13 Feb 23.
68. The appeal meeting took place on 17 Feb 23 chaired by Zaid Ali (Director). The claimant was accompanied by her Uncle, Apozu Abeobete.
69. The claimant appealed on the grounds that:
- 69.1. She had worked for the respondent for 6-years without a problem.
 - 69.2. That the injury was documented on an ABC chart and the daily log.
 - 69.3. That the Dr had been informed on 18 November.
 - 69.4. That the burn was minor and the claimant had given first aid as directed by the GP.
 - 69.5. That the client would always rest her feet on the radiator when she was in the room.
 - 69.6. That no-one knew that the radiator was faulty.
 - 69.7. That she didn't shout at Ms Rainger.
 - 69.8. That the iPad for the receipts were not working.
 - 69.9. That she had been unfairly treated and due process had not been followed.
70. During the appeal meeting Mr Ali states that he reviewed the contents of the claimant's letter of appeal in full with her and that he checked his understanding of what she was saying. The claimant asserts that she did not tell Mr Ali that she had spoken to a doctor about the injury, but that "Dr" in the email was reference to Debbie Rainger.
71. In evidence the claimant explained that the reference to a GPs advice for the first aid was historical advice.
72. It was Mr Ali's evidence that the reference to Dr and GP are clear. There is a separate reference to Debbie further in the email, which shows the difference in the meanings.
73. The doctor was informed of the injury on the 18 November 2022, but not by the claimant. This was following the report by Rosemary to Debbie Rainger of the injury, which required SH to attend A&E at the hospital.
74. I find that the email of appeal is misleading by the claimant in that it suggests that she did inform the doctor on the 18 November, when this was by another member

of staff. The email also suggests that a GPs assistance was sought by the claimant to administer first aid, when this was not the case.

75. Mr Ali reviewed the process that had been followed in the investigation and disciplinary proceedings. He had received all of the investigation and disciplinary documents prior to the appeal and had taken them into consideration. Mr Ali discussed the process with the claimant and was satisfied that a full and fair process had been followed. The claimant states that he did not.
76. I find that I prefer the evidence of Mr Ali, which is consistent with the appeal meeting notes.
77. Mr Ali adjourned the appeal meeting to consider his decision.
78. By letter of 21 Feb 23 the respondent informed the claimant that the original decision to dismiss was upheld. The reasons being:
 - 78.1. The claimant had failed to follow the respondent's policy to protect a vulnerable adult in her own home.
 - 78.2. That claimant had accepted that she had had recent training regarding reporting incidents
 - 78.3. The claimant had attempted to minimise the extent of the injury
 - 78.4. The claimant had told Mr Ali that she had sought advice from a GP, which was untrue
 - 78.5. The claimant had failed to report an injury to her supervisor resulting in A&E treatment for her client
 - 78.6. The claimant asserted that the respondent had not followed due process, but accepted that she had received all statements, evidence minutes and letters.
79. I find that Mr Ali disregarded the allegations in relation to the claimant shouting at Ms Rainger and the issues with the receipts in his decision making.
80. In mitigation, Mr Ali expressly considered that the claimant had accepted that she had failed to report the injury to her manager, despite the manager being on-site, that she had been apologetic and full of remorse and he took into account her length of service.
81. The outcome of the respondent's report to the council regarding the safeguarding issue was that the panel that considered the report did not feel that a referral should be made to a DBS barring service. The claimant was advised of this decision within the appeal outcome letter.

Findings of fact for wrongful dismissal

82. It is the claimant's position in evidence that she did not receive the documents and that she did not understand the allegations against her.
83. I find that the claimant did receive the email with the documents attached in evidence of the allegations. I also find that she understood the allegations she faced.

84. It is accepted that the claimant was a primary carer for SH and that she was the first to notice the injury.
85. I find that the claimant understood her caring responsibilities towards SH and that SH was unable to communicate for herself.
86. It is the claimant's position that she had reported the incident as far as she was required to do and that it was fully recorded. I find that the claimant did not fully record or report the injury. I find that the claimant was obliged to record and report the injury further and that she had received training regarding this.
87. The claimant's contract provided that the claimant was required to obey company policies, which includes the Code of Conduct and Safeguarding Policy and Policy Notices.
88. This was a significant physical injury on a vulnerable adult who was non-verbal. I have found that the respondent had a reasonable zero-tolerance policy to require all of its employees to report any concerns to their manager and the claimant did not do so.

Findings of fact for holiday pay

89. The claimant does not detail her claim for holiday pay within the claim form nor did she provide any detail in her witness statement.
90. The schedule of loss indicates a claim for 4-days of accrued but untaken holiday.
91. The claimant's payslip for February 2023 shows that the claimant did receive 2-days holiday pay.
92. The respondent's leave year runs from 1 April – 31 March and the claimant was entitled to 5.6-weeks of holiday.
93. The claimant had taken 24-days of holiday and the February payslip shows that 4-days of holiday were remaining for the year.

The law

Unfair Dismissal

94. An employee has the right not to be unfairly dismissed, s. 94(1) of the Employment Rights Act 1996 (ERA). The relevant test is at s.s.98(1), (2) and (4) are relevant to this case. This states:

98. General.

(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— ...

(b) relates to the conduct of the employee ...

(4) Where the employer has fulfilled the requirements of subsection (1), 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.”

95. The question of fairness in a conduct dismissal is **British Home Stores Ltd v Burchell** [1980] ICR 303 (EAT) which held that a dismissal on the grounds of conduct will be fair where, at the time of dismissal, a) that the employer must have a genuine belief in the misconduct; b) reasonable grounds for that belief; and c) the employer carried out as much investigation as was reasonable in the circumstances. I remind myself that I can only take account of those facts or beliefs that were known to those who took the actual decision to dismiss at the time of dismissal.

96. The test as to whether the dismissal fell within the band of a reasonable response are summarised within the judgment of Brown-Wilkinson J in **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17, which states:

(1) the starting point should always be the words of [S.98(4)] themselves;

(2) in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the... tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the... tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.”

97. In considering the “band of reasonable responses” I also direct myself to consider the question as to whether the respondent has acted reasonably or unreasonably in deciding to dismiss in accordance with equity and the substantial merits of the case, s.98(4) ERA. **Newbound v Thames Water Utilities Limited** [2015] I.R.I.R. 734.

Wrongful dismissal

98. Wrongful dismissal is a claim of breach of contract by the employee against the employer for the unpaid notice pay.

99. The question of what level of misconduct is required for an employee's behaviour to amount to a repudiatory breach is a question of fact for the court or tribunal. The question is whether the conduct "so undermine[s] the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment" (**Neary v Dean of Westminster** [1999] IRLR 288, approved by the Court of Appeal in

Briscoe v Lubrizol Ltd [2002] IRLR 607 and by the Privy Council in ***Jervis v Skinner*** [2011] UKPC 2).

100. In **Sandwell & West Birmingham Hospitals NHS Trust v Westwood** **UKEAT/0032/09**, the EAT summarised the case law and held that gross misconduct involves either deliberate wrongdoing or gross negligence. IN cases of deliberate wrongdoing, it has been held that it must amount to a wilful repudiation of the express or implied terms of the contract (**Wilson v Racher** [1974]ICR 428 (CA))

Holiday Pay

101. This is a breach of contract claim. Was the respondent in breach of contract by failing to pay the claimant for the holidays accrued, but not taken, by the date the claimant's employment ended?

Submissions

102. Both parties provided written submissions.

Conclusions

103. In forming my conclusions, where there has been inconsistency in evidence between the parties, I have preferred evidence that is supported by documents created at the time.
104. The claimant has requested an interpreter from the Tribunal for this hearing. I have considered whether the claimant understood what was required from her in relation to whether she understood her training and the requirement to report injuries immediately. I find, from the written logs, the written training records, the records of the meetings and the claimant's evidence that she did understand her obligation to report injuries immediately.

Unfair dismissal

Was the claimant dismissed?

105. The claimant was dismissed, which is accepted by both parties.

If the claimant was dismissed, what was the reason or principal reason for dismissal?

106. I find that the reason for the dismissal was conduct, which is again accepted by both parties.
107. The primary reason for the dismissal was the failure by the claimant to report a significant injury to the respondent immediately.

Was it a potentially fair reason?

108. Yes, conduct is a potentially fair reason for dismissal.

Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

109. The Tribunal will usually decide, in particular, whether:
- 109.1. there were reasonable grounds for that belief;
 - 109.2. at the time the belief was formed the respondent had carried out a reasonable investigation;
 - 109.3. the respondent otherwise acted in a procedurally fair manner;
 - 109.4. dismissal was within the range of reasonable responses.

110. Taking each in turn:

Reasonable grounds for the belief

111. The claimant has admitted that she did not tell the respondent about the injury immediately. This admission was made prior to the decision to dismiss.

Belief formed after reasonable investigation

112. The respondent investigated the injury and took into account the daybook and the claimants admission. It also considered the claimant's training record.
113. I have found that the claimant did receive training from the Respondent and that this training was reasonable.
114. The belief that the claimant acted as alleged was formed by the respondent's managers (both Ms Parsons and Mr Ali) following the claimant's admission and review of logs and training records. I have found that they did believe that the claimant had acted as alleged and I find that this was a genuine and reasonable belief for them to hold.

Range of reasonable responses

115. The circumstances of this case are as follows:
- 115.1. SH was a vulnerable client.
 - 115.2. SH was unable to communicate for herself.
 - 115.3. The respondent operated reasonable Codes of Conduct and Safeguarding policies with a zero-tolerance stance for not reporting.
 - 115.4. That the claimant had completed her training and was aware of the zero-tolerance policy.
 - 115.5. That SH suffered a significant injury and the claimant did not follow the code of conduct or report the injury as she was required to do.
 - 115.6. The claimant could not explain why she had failed to report the injury to her manager, only that she had forgotten.
 - 115.7. That the claimant had 4-years of service as an experienced carer.
 - 115.8. That the claimant was apologetic and full of remorse.

116. My starting point to consider this question is s.98(4) and I remind myself that this question is in relation to the reasonableness of the respondent's conduct and not what I consider to be fair. Additionally, I may not substitute the employer's decision with my decision as to what was the right course of action to adopt. I am to consider whether, in all of the circumstances, a reasonable employer would consider that the actions of the claimant were sufficient to warrant a dismissal.
117. In considering this I take into account all of the circumstances of the case as detailed above. I have found that the respondent formed a genuine belief that the claimant acted in the manner alleged and that this was a reasonable belief to hold. I have found that there was a reasonable investigation to form this belief.
118. In considering the "band of reasonable responses" I also direct myself to consider the question as to whether the respondent has acted reasonably or unreasonably in deciding to dismiss in accordance with equity and the substantial merits of the case.
119. The Respondent is a care provider and SH was a vulnerable adult, reliant on the care provided to her. SH suffered a significant injury and it was not reported immediately, which led to a delay in care for that injury.
120. The claimant was employed in a position of trust to provide personal care to a vulnerable adult.
121. I have found that the policies and procedures operated by the respondent to be reasonable for a reasonable employer in these circumstances. I have also found that it is reasonable for this to be a zero-tolerance policy. Additionally, I have found that the claimant knew of this requirement and understood the actions required of her, but that she did not take this action when she was required to do so.
122. Where the claimant understood what was required of her, particularly in these circumstances, it is fair and just for a reasonable employer to impose a sanction.
123. SH did suffer an injury and required hospital treatment, that was delayed due to a failure to immediately report the injury. The respondent requires immediate reports of all safeguarding issues, to protect both the vulnerable clients and the employees.
124. I accept that this was the claimant's first disciplinary issue. However, the claimant had received specific training in relation to the respondents zero-tolerance for the failure to report any incident that impacted the safeguarding of its vulnerable clients.
125. Equity refers to fairness and justice and the question is whether the sanction by the respondent was fair and just in all of the circumstances. The conduct of the claimant is that she failed to report a significant injury to her manager in accordance with the Respondent's Code of Conduct and Safeguarding policies.
126. In considering the substantial merits of this case, this case is in relation to the obligation for all of the employees of the respondent to immediately report any safeguarding issue. The respondent provided training to its employees and the zero-tolerance policy was reasonable for a respondent in these circumstances. The claimant did not report the injury as required.

127. In the alternative, the respondent says the reason was a substantial reason capable of justifying dismissal, namely a fundamental breach of trust and confidence. I have found that the claimant did not inform her manager immediately, which is a breach of trust. This trust is a fundamental part of the safeguarding of the vulnerable adults in the respondent's care.

Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

128. This includes a consideration of whether the respondent acted in a procedurally fair manner.

129. I have found that the claimant did fail to follow the code of conduct and safeguarding policies.

130. I have found that the respondent held a genuine belief that the claimant did act as alleged and that this was a reasonable belief to hold.

131. The requirement by the respondent to report incidents is central to the safeguarding of its vulnerable clients. The zero-tolerance of non-reporting is reasonable and I find that the respondent did act reasonably in treating this non-reporting as a sufficient reason to dismiss the claimant.

132. The respondent investigated the allegations before making a decision at the disciplinary meeting to dismiss. The claimant was afforded her rights to be accompanied and understood the allegations she faced. She was also given the opportunity to answer these allegations. I find that the procedure followed was reasonable.

133. In conclusion, I find that the decision to dismiss would fall within the range of reasonable responses by a reasonable employer in all of these circumstances. I conclude that the dismissal was substantively and procedurally fair.

134. If asked to consider whether the claimant has contributed to her dismissal, I conclude that she was solely responsible for her actions and any compensation would be reduced by 100%.

135. If asked to consider any procedural defects, I concluded that if there were any procedural defects rendering the dismissal unfair, I find that, on balance of probability, it is 100% likely that the claimant would have been dismissed in any event.

Wrongful dismissal / Notice pay

What was the claimant's notice period?

136. The claimant commenced employment on 23 February 2018 and her termination date was 9 February 2023, giving her 4-years of continuous service.

Was the claimant paid for that notice period?

137. The claimant was not paid for her notice period upon dismissal.

If not, was the claimant guilty of gross misconduct? / did the claimant do something so serious that the respondent was entitled to dismiss without notice?

138. I have found that the claimant has acted in the manner alleged. I have also found that the respondent operates a reasonable Code of Conduct and Safeguarding policy.
139. The claimant's contract of employment requires the respondent's employees to obey its policies and procedures.
140. The claimant was aware of the requirement to report all concerns regarding safeguarding to her manager and of the zero-tolerance policy operated by the respondent for failing to report incidents.
141. I have found that the claimant did not report the injury to her manager immediately. The only reason for this failure has been that the claimant forgot. I am satisfied that the claimant knew that she should report the injury but did not do so and I find that this was a fundamental breach of contract. I find that the claimant was guilty of gross misconduct and that she did do something so serious that the respondent was entitled to dismiss without notice.

142. **Holiday Pay (Working Time Regulations 1998)**

What was the claimant's leave year?

142.1. The claimant's leave year is from 1 April to 31 March.

How much of the leave year had passed when the claimant's employment ended?

142.2. The claimant was dismissed on 9 February 2023 without notice. As at her termination date, 45-weeks of the leave year had passed.

How much leave had accrued for the year by that date?

142.3. The claimant was entitled to 5.6-weeks per year, or 28-days. The holiday would accrue at the weekly rate of $5.6 / 52 = 0.11$ weeks per week, therefore $0.11 \times 45 = 4.8$ -weeks had accrued within the 45-weeks worked.

142.4. Calculating this into days, 4.8-weeks is 24-days.

How much paid leave had the claimant taken in the year?

142.5. The claimant had taken 24-days of leave and there were no days to carry over. Therefore, the claimant had received the holiday pay to which she was entitled.

Judgment

122. The complaint of unfair dismissal is not well founded and is dismissed.
123. The complaint of wrongful dismissal is not well founded and is dismissed.

124. The complain of non-payment of holiday pay is not well founded and is dismissed.

**Employment Judge Illing
Dated: 22 July 2024**