Case Number: 3400438/2014

EMPLOYMENT TRIBUNALS

Claimant: Mrs G M Cahill

Respondent: Beekay International Ltd (In voluntary Liquidation)

HEARD AT: HUNTINGDON ET **ON**: 22nd, 23rd & 24th May 2017

BEFORE: **Employment Judge Moore**

MEMBERS: Mr T Chinnery
Mr D Sutton

For the Claimant: Mr R Shaw (Son)

For the Respondent: Mr G Ridgeway (Consultant)

RESERVED JUDGMENT

1. The complaint of disability discrimination has been withdrawn and is dismissed

2. The Claimant was not unfairly dismissed.

REASONS

1. This case relates to the Claimant's employment as a care worker in an establishment caring for the elderly and vulnerable. Her employment commenced on the 7th June 2011 to the 1st November 2013 when she was dismissed on grounds of gross misconduct. The dismissal related to events at a much earlier time. In September 2016 the internal procedures were delayed by the trial of criminal charges brought against the Claimant. We have not been given the details of the charge or charges but Mr Shaw tells us that they related to the alleged neglect of a resident in the Respondent's care.

2. The Case comes before us today in a poor state of preparation. There have been three preliminary hearings, two case management discussions and a

hearing to determine the question of whether the Claimant was at the material times disabled within the definition provided by Section 6 of the Equality Act 2010. That hearing was aborted as certain relevant evidence was not available and the point was listed before us to consider as party of the full merits hearing. Orders relating to the preparation of the case have been given and explained on three separate occasions.

3. The Claimant arrived at the outset of the present hearing without any witness statements at all. Mr Shaw (who was preset at the preliminaries) said that he thought he would just ask his mother questions. We have not found this to be a genuine or reasonable mistake. It could only flow from a failure to listen to orders made orally at three earlier hearings all of which were attended by Mr Shaw and a culpable failure to take account of the detailed written orders which followed those hearings.

4. Initially we adjourned for the morning to enable the Claimant to prepare a statement relating to her ability to carry out ordinary day to day activities. It being our view that we could progress by determining the disputed question of disability in the remainder of day one, and affording the opportunity of the overnight adjournment to the Claimant to prepare a statement in respect of the remaining matters. The Claimant did not produce such a statement; at some point in the afternoon Mr Shaw provided a very short handwritten document which appeared to be a list of unspecified allegations (said to be disability discrimination) which were said to have occurred at the outset of the Claimant's employment. We invited his attention to the Claim Form and he accepted that it did not contain details of any specified claims of disability discrimination. The following morning he sought to amend, he had not provided a draft and we allowed a further adjournment for him to prepare one. When completed it did not contain any relevant detail. We refused the application. It is necessary for Claimant to set out the specific acts complained of for two reasons, firstly Respondents are entitled to know the case they have to meet, and secondly we only have jurisdiction to consider specific complaints *(Ali v Office of National Statistics (20050 IRLR 201 CA)*. The amendment sought did not advance the Claimant's interest, since it did not set out with even moderate clarity what the issues to be tried and met were and as framed it was potentially prejudicial to the Respondent since it would not have adequately informed them of the case they had to meet. Having heard our decision on this point Mr Shaw explained that he couldn't give more detail either in the application to amend or the statement because the events were a long time ago and his mother couldn't remember the details.

5. It is pertinent to note that the Respondents too were in some difficulties albeit of a different nature. The Respondent Company has ceased trading and was placed into voluntary liquidation in (we understand) early 2016. The staff have all dispersed and some (particularly a Ms Jaqueline Raymond – who conducted the disciplinary hearing) has moved house and cannot be located. In short, the only witness they have is Ms Lawn who conducted the appeal against dismissal.

6. In the light of these factors we raised the question of whether a fair trial of the issues was still possible. We allowed a further short adjournment for the parties to consider the point. Upon their return Mr Shaw withdrew the complaint of disability discrimination. Mr Ridgeway informed us that the Claimant (albeit not in strict compliance with orders) had sent him a copy of a statement from the Claimant dealing with the unfair dismissal claim some time in 2016. They both consider it is possible for the unfair dismissal claim to be determined on the evidence that is available (namely the Claimant's statement and Ms Lawn's together with the documents they refer to, and that is the course we took.

THE FACTS

7. The factual matrix of this case is relatively simple and the evidence upon which the Respondent dismissed the Claimant lies mainly in records. On the night of the 5th September 2012 and the early hours of the 6th the Claimant was on night shift. It was her duty to carry out regular checks on the residents whose rooms were on the first floor of Greenfields Residential Care Home. Other members of staff had like responsibility for other floors. This is readily established by the Night Allocation List which appears in our bundle at page 107. We can see that it was, amongst other duties, the Claimant's obligation to put the residents on that floor to bed and to take them morning tea and assist them to get up the following day. A lady whom we have referred to as MS was one of the Claimant's charges on that night. MS is some 88 years of age, is frail and vulnerable, and she suffers from a heart condition and Alzheimer's. At page 118A we have a copy of the record form completed and initialed by the claimant detailing the hourly checks she was obliged to make on MS on the night in question. We can see that the form contains ticks confirming that a check has been carried out each hour between 20:30 hours on the 5th September to 07:30 hours on the 6th September. These documents were before the Respondent at both the disciplinary and appeal hearings. Their conclusion that these entries were false arises from the fact that at 06:00 hours on the morning of the 6th September MS was found alone and injured in an unoccupied room on a different floor of the building. She was still wearing the clothes she had worn the day before and her bed had not been slept in. An ambulance was called and their attendance form shows them to be in attendance at some point between 06:00 and 06:09 hours.

8. The Claimant was discovered shortly afterwards altering her check form (page 118) in respect of the entries at 04:30, 05:30, 06:30 and 07:30 hours to show MS as being awake rather asleep. The form clearly shows this. The matter was reasonably regarded as serious and all three members of the night staff were suspended. Before she left the Claimant was required to give an account of the matter. This appears at page 117B of our bundle. She was interviewed by a Ms Cross and a Ms Cousins took the note. Neither of these two persons took any part in the decision to dismiss. The Claimant was asked why she was changing the record and her reply was that she wasn't changing it she made a mistake. She insisted that MS was in her own bed in her own room at 06.00 hours. When reminded that she was receiving

attention from the ambulance crew elsewhere at this time the Claimant declined to comment. She was reminded that if she had put MS to bed and she had subsequently got up during the night an alarm would have sounded as there are pressure pads under each resident's mattress and on the floor beside the bed to alert night staff to such an occurrence. The Claimant said she didn't know that MS was not in bed. When asked why the records did not show that MS had been offered fluids all night the Claimant shrugged. And when asked if she could explain why MS was found fully clothed in a vacant room when her bed had not been slept in her reply was "You're always picking on me. I'm going. I've got nothing to say to you". The Claimant has not challenged this record in her evidence and has not established any basis to support Mr Shaw's contention in submissions that Ms Cross was biased.

9. As we have indicated the Police became involved and the Claimant was charged with a criminal offence. The Respondent was asked by the Police not to progress the internal matter until the conclusion of the Crown Court Trial and they agreed. We find this to be reasonable. This is a convenient point for us to address certain points raised in argument by Mr Shaw. One of his principal contentions throughout has been that his mother was not convicted and that fact alone makes the dismissal unfair. We have not been told what the criminal charge was and we have no knowledge of the criminal proceedings. Mr Shaw states that it established certain facts but a criminal trial does not generate a judgment with specific findings of fact. A jury is empanelled, they hear evidence followed by a summing up from the trial judge and then ultimately they return a verdict. What view they take of the witness's credibility and what decisions of fact they make are forever protected by the sanctity of the Jury room.

10. On the 21st October the Respondent wrote to the Claimant requiring her to attend a disciplinary hearing on the 25th October 2013. The letter at page 148 of our bundle which lists a further hearing indicate that the Claimant did attend but refused to participate. The Claimant was accompanied by her Trade Union Representative who apparently stated that the Respondent had breached procedure as she was not aware how to raise a grievance. The letter however states that contrary to the point raised by the Trade Union Representative the Claimant was saying that she had raised a grievance. The Respondents had not received any such document from the Claimant and asked for proof of postage since the Claimant is said to have stated that it was sent recorded delivery and for a copy. The disciplinary hearing was adjourned to the 1st November 2013. That same letter recited the disciplinary charges as follows:-

    1. *Failure to carry out hourly night checks on Service User MS.*

    2. *The documentation that you provided was not consistent with the events of the 5th September 2012 to 6th September 2012.*

11. The disciplinary hearing was conducted by Ms Raymond. The notes of the disciplinary hearing are at pages 150 to 160. The Claimant and her representative had the opportunity to check them and make amendments at

the time and their accuracy has not been challenged by the Claimant before us. Today the Claimant has sought to suggest that her dismissal was for making the self evident alterations to the inspection record. Examination of the notes shows that she was not under any such misapprehension at the hearing. Ms Raymond's made it quite clear that the nub of the matter was the fact that the Claimant had completed the form showing that all the checks she was required to make on MS had been done when they had not. It being the case that the record showed the checks being completed after MS had been found.

12. The decision to dismiss and the reasons for it are set out in Ms Raymond's letter to the Claimant of the 3rd November 2013 at pages 161 to 164. She found that the Claimant had neglected her duties and had not carried out the checks she had claimed as MS was found at 06:00 hours not in her room and injured. She found that the Claimant had initially ticked the form showing MS to be asleep without having carried out the necessary check. She dismissed the Claimant's assertion that she was not allocated to care for MS at that time in the face of the clear evidence on the allocation record that she was. She found the charges proved. She considered whether an alternative sanction was appropriate and concluded that the gravity of the matters precluded any course other than summary dismissal. We find each of Ms Raymond's conclusions to be supported by the evidence available to her and summary dismissal to fall within the band of reasonable responses.

13. The Claimant appealed and her letter is at page 165. Mrs Lawn (the Respondent's Operations Director) dealt with the appeal and allowed it to proceed notwithstanding that the Claimant had submitted it later than the Respondent's procedure permitted. On the 18th November 2013 she wrote to the Claimant inviting her to an appeal hearing on the 21 November 2013. She enclosed copies of the documentation available at the disciplinary hearing and the minutes (as amended). She asked the Claimant to bring evidence of a diagnosis of disclosure and a copy of the grievance which the claimant claimed to have raised. It appears that she had not provided a copy or proof of postage when required to do so in October.

14. The Hearing did not take place on the 21st November as the Claimant's Trade Union Representative asked for it to be moved. It was rescheduled for the 26th November 2013. The notes are at pages 170 and they confirm Mrs Lawn's account that the Claimant's Trade Union Representative asked for it to be moved again as she had not had time to read the documents. It was moved to the 3rd of December 2013.

15. The notes of that hearing are at pages 171 to 185. The Claimant produced for the first time the 'grievance' she claimed to have sent. She did not produce proof of postage. It is minimal in its terms simply stating '*In response to your letter of the 11th February 2013 I now wish to start a grievance against the Company'.* She does not say what it is.

16. It appears from Ms Lawn's evidence (supported by the notes) that the Claimant's main contention was that the notes and papers relating to the care

of MS had been altered and were lies. Mr Shaw has taken a similar point before us, but has not been able in cross examination to focus the point on any relevant document. We take Mr Ridgeway's point that the critical document is the check record which the Claimant accepts she completed and admits 'altering' and the report of the ambulance crew which confirmed the falsity of the Claimant's record, but these have not been the subject of Mr Shaw's point. Ms Lawn's conclusions in respect of the appeal are set out in her letter of the 5th December 2013 at pages 186 – 188. She noted that the Claimant had not produced evidence of her dyslexia as requested, and that there was no trace of her claiming to have this condition at any other time during her time with the Respondent. She found the point not to be determinative since it was not capable of explaining the fact that MS bed had not been slept in and the pressure mats not being checked. In short she found that whereas Dyslexia might explain inaccurate records the matter related to a failure to carry out the checks at all and this was proven by other evidence incapable of being affected by Dyslexia. She had carried out a careful check and had been unable to find any trace of a grievance being submitted. She noted that despite the Claimant's assertion that it had been submitted in February 2013 it was strange that the Claimant had made no effort to pursue it. She investigated the assertion that documents had been tampered with and found no evidence to substantiate it. She found as a fact that the Claimant and her representative had been given copies at the conclusion of the hearing and that in terms of any difference there were one or two marks (not alterations to text) which Ms Raymond had made when going through them to make a decision. She was a trusted employee and Ms Lawn accepted her account. She found there had been evidence before Ms Raymond that established the Claimant's culpability, that evidence persuaded her of the claimant's culpability and she found there to be nothing in the Claimant's appeal capable of upsetting the finding and she upheld the summary dismissal.

CONCLUSIONS

17. By virtue of Section 98 of the Employment Rights Act 1996 it is for the employer to show the reason for the dismissal. If that dismissal is for one of the potentially fair reasons described in that section it is then for me against a neutral burden of proof to determine whether in all the circumstances of the case, including the Respondents size and access to administrative resources, they acted reasonably in treating the reason as a reason to dismiss. The Respondent is a relatively large employer with a well populated management structure. There is no evidence that they are deficient in administrative resources. The reason they rely upon and have sought to prove is a reason related to conduct. It is not for us to determine the Claimant's guilt or otherwise, the task for us is to determine whether the Respondent held a genuine belief in the Claimant's guild on reasonable grounds following such investigation as was reasonable in all the circumstances. *(British Home Stores v Burchell (1978) IRLR 379).*

18. It is right to say that we have little in the way of direct evidence of the investigation given the matters we have referred to at the outset of our

judgment. We do however have the product of the investigation in the form of the documentary evidence which forms the nub of the matter. We also have the notes of the disciplinary and appeal meetings. We know that the Claimant was represented at those meetings by her Trade Union Representative. No deficiency in the investigation has been argued before us. The notes of the initial interview with the Claimant on the day of her suspension have not been challenged on the basis of any specific falsity, and in any event the Claimant had every opportunity at the hearings to challenge them at the subsequent hearings but did not do so. The Claimant has not been able to explain any material effect of any grievance that she might have tried to lodge and has not sought in her evidence before us to establish its relevance.

19. We find that the Respondent had clear and cogent evidence to support their belief that the Claimant had failed to carry out the checks she was required to undertake and that she had falsely indicated on the requisite form that she had done so. Our unanimous decision is that the Respondents belief in her guilt was both genuine and reasonable. As we have stated the sanction was within the band of reasonable responses. The Respondent was a provider of care to and elderly and frail resident. The Claimant was employed and trusted to provide that care whilst she was on shift, she was found to have neglected her duty and of maintaining a false record. In those circumstances alone, even without the fact of the injury to MS, we conclude that summary dismissal was within the band of responses and we find this dismissal to have been fair. We dismiss this Claim.

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Employment Judge Moore, Huntingdon.

Date: 9 June 2017……..

Sent to the parties on: .....

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For the Tribunal Office