



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

Ms AE Lees

Quilaana Limited

HELD AT Birmingham

ON 20th and 21st November
2019

EMPLOYMENT JUDGE Choudry

Representation:

For the claimant: Mr N Brockley (Counsel)

For the respondent: Ms S Chahal (Director)

RESERVED JUDGMENT

The claimant's claim for unfair dismissal, wrongful dismissal and unlawful deduction of wages fails and is dismissed.

REASONS

Background

1. The Claimant brought a claim for unfair dismissal, wrongful dismissal and unlawful deduction of wages following the termination of her contract of employment by the Respondent on 2nd November 2018 by reason of gross misconduct.
2. The Respondent operates the Woodthorne Care Home at which the Claimant was employed as a senior carer.

Evidence and documents

3. At the start of the hearing Mr Brockley indicated to me that the Claimant had not received a copy of the Response and therefore those representing the Claimant had proceeded on the basis that no Response had been filed and, as such, there was no agreed bundle. Mr Brockley also raised concerns that the Respondent had served their statements and bundle only the night before the hearing and this put the Claimant at a substantial disadvantage. It subsequently transpired that the Respondent had not received the Claimant's bundle either which was handed over during our discussions.
4. I advised Mr Brockley that a copy of the Response had been sent to the Claimant by the Tribunal on 6th July 2019. Mr Brockley indicated that his instructions were that this letter had not been received. I pointed out that if this were the case then I was surprised that those instructing him had made no contact with the Tribunal to ascertain whether a Response had, in fact, been filed and, if not, to make an application for a Default Judgment. The Respondent's position was that it had repeatedly informed the Claimant's solicitors that they had filed a Response.
5. It was disappointing that further attempts were not made to try and agree the bundle as per the Tribunal's directions as even if the Response had not been filed it was a matter for the Employment Judge hearing the case to determine the extent to which the Respondent would have been permitted to participate in any final hearing as per Rule 21(3) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
6. Given the situation I gave the parties extra time to read each other's bundles (from 10.55am to 2pm) and I also indicated that despite this extra time if either party felt they still needed to make an application for an adjournment then they could do so after the break. Whilst not ideal, in line with the overriding objective and to ensure that the claim could be heard within the timeframe allocated to, it I determined that we should work from two bundles rather than trying to agree a bundle at this late stage. The Claimant's bundle consisted of 141 pages including her witness statement and exhibits. The Respondent's bundle consisted of 149 pages including statements and exhibits. In the event both bundles were largely the same with the exception of the Respondent's bundle which also included transcripts of WhatsApp messages with the Claimant and other employees. I read both bundles and all the statements in their entirety.

7. On the second day of the hearing I was provided with 2 documents by the Claimant comprising of WhatsApp messages between the Claimant and Ms Nina Crooks on 19th and 20th August 2018.
8. I heard evidence from the Claimant and for the Respondent from Ms Satwant Chahal, Ms Rajwant Chahal and Ms Nina Crooks.

Issues

9. The issues for the Tribunal to consider were as follows :
 - 9.1 What was the reason for the dismissal and was it a potentially fair reason for the purposes of section 98(1) and (2) of the Employment Rights Act 1996 (“ERA”) ? The Respondent relying upon misconduct as the reason for dismissing the claimant ?
 - 9.2 Did the respondent carry out a reasonable investigation ?
 - 9.3 Did the respondent reasonably believe that the claimant had committed the act of misconduct, namely neglecting service users and neglecting to safeguard service users from potential harm?
 - 9.4 Was dismissal a sanction within the range of reasonable responses?
 - 9.5 Was the dismissal procedurally unfair ?
 - 9.6 If the dismissal was procedurally unfair, what difference, if any would a fair procedure have made?
 - 9.7 Did the claimant contribute to her dismissal ?
 - 9.8 If the Respondent is found to have unfairly dismissed the claimant, has the claimant mitigated her losses, and to what extent ?
 - 9.9 Was the Claimant entitled to notice pay?
 - 9.10 Had the Respondent made any unlawful deduction from the Claimant’s wages?
10. The claimant accepts that the reason for her dismissal was conduct although she disputes that her conduct was sufficiently serious as to amount to gross misconduct to warrant her dismissal.
11. The claim for unlawful deduction of wages is in respect of alleged underpayment for 33.52 hours amounting to £266.15. This relates to the Claimant receiving 35 hours a week at the rate of £7.94 and any excess hours at the rate the national minimum wage. The Claimant asserts that she should not be paid two different rates of pay.

Facts

12. I make the following findings of fact :

- 12.1 The claimant commenced employment with the Respondent on 18th August 2018 as a Night Care Assistant, at the Woodthorne Care Home which is operated by the Respondent. She was contracted to work 30 hours per week.
- 12.2 Around 5 years ago the Claimant became a Senior Carer working 35 hours a week. As at the termination of her employment the Claimant was paid £7.94 for each hour that she worked as a Senior Carer. Any hours above the 35 hours per week were paid at the national minimum wage.
- 12.3 Between the hours of 8am to 10pm the Respondent operates the following staff ratios : 1 – Senior Carer, 2 Care Assistants and 2 auxillary staff which comprises a cook in the mornings and a cleaner from Monday to Friday.
- 12.4 The Woodthorne Care Home is run and owned by Ms Satwant Chahal, her partner Ms Nina Crooks and her sister Rajwant Chahal. Ms Crooks mainly deals with orders with regards to food and other purchases. There is also a forth shareholder, Ms Balvinder Chahal who does not appear to be involved in day to day operational matters. There are 21 residents at the Woodthorne Care Home who receive 24 hour care, many of whom are frail and elderly and who have dementia. Two residents are regarded as high dependency and require the assistance of 2 staff and a hoist due to lack of mobility.
- 12.5 On 7th August 2018 Ms S Chahal, her sister Ms R Chahal and her partner Ms N Crooks all went on holiday to Thailand to celebrate Ms Crooks' 40th birthday. The intention was that Ms R Chahal would return to the UK after 14 days whilst Ms S Chahal and Ms Crooks would return after 21 nights. Staff at the care home had been informed that the mother of Ms S and Ms R Chahal would be visiting the care home during this time. Even though they were on holiday it was made clear to staff that apart from the time they were flying Ms S Chawal, Ms R Chawal and Ms Crooks would remain available. Indeed, they remained in regular contact with the care home and its staff via WhatsApp answering operational questions and even dealt with a query from the Claimant in relation to her pay.
- 12.6 On 19th August 2018 the Claimant was working 7.45am to 4pm. The Claimant was on duty as the Senior Carer. As the Senior Carer it was her duty to ensure that the residents of the care home were cared for and were safe, that they had sufficient food and water, that their dignity was preserved and the other carers knew what their responsibilities were. Also working on that day were two junior carers (Wendy Windsor and Lynn Chambers) and a cook (Donna Windsor). Ms Windsor was also a Senior Carer but on 19th August 2018 was working in the capacity of the cook as the usual cook was also on holiday.

- 12.7 The Claimant was informed by Ms Windsor that there was insufficient food and drink – there was sufficient meat and potatoes for lunch but there was no vegetables and there was not enough food and drink for dinner.
- 12.8 It was decided that more food and drink had to be bought. The Claimant was of the view that a failure to purchase more food would be in breach of the safeguarding rules of the Care and Quality Commission and as the Senior Carer she would be liable for the breach. It was decided that the Claimant and Ms Chambers would go to Farmfoods to buy the food and drink required. Farmfoods was slightly further afield compared to Morrisons and other local shops.
- 12.9 On her return the Claimant WhatsApped a copy of the receipt for the shopping which she had bought for £110.19 to Ms Crooks. In her message the Claimant stated *“Hello nina, had to go shopping, hope that’s ok”*. Ms Crooks was clearly not pleased about this and responded *“No it’s not ok, did you get approval for such amount from sally?”* Sally being Ms S Chatwal. The Claimant responded by saying *“No sorry had nothing to eat we used our initiatives sorry xx. Sorry again. I went out and brought food the residents didn’t have one dinner come tomorrow, their was no frozen veg no meats nothing for tea times or any juice, washing powder went to farm foods and got multi buys. Didn’t think sally would mind, also you are on holidays so didn’t want to disturb you both over a food shop.*
- 12.10 Ms Crooks responded the following day questioning why the shelves were so empty so quickly when she had arranged for a home delivery only on 11th August. Ms Crooks expressed surprise as the Claimant was in *“constant communication”* with Ms S Chatwal. The Claimant was advised to speak to Ms S Chatwal or Ms Crooks before undertaking any further big shops. Ms Crooks was concerned that firstly the care home did not have extensive storage facilities to stock pile food but she was also perplexed by the items actually purchased which included fish fingers when 90 fish fingers had been purchased two weeks previously for a 4 week rotating menu. In addition, Ms Crooks had purchased 80 sausages, 15 large bags of frozen vegetables as well as fresh vegetables. The Claimant had purchased 4 chicken burgers, two steak pasties which were not on the menu and which would not, in any event, be sufficient to offer all residents. As such, Ms Crooks was not satisfied that the purchases had been borne out of necessity.
- 12.11 I am satisfied based on the evidence before me that at this point the Respondent was not aware that the Claimant had done the shopping on 19th August 2018 during working hours nor that she had taken another member of staff with her to do the shopping thereby only leaving 1 carer and the cook on the premises with her.

- 12.12 On 18th September 2018 the Claimant was called into the office by Ms S Chatwal. Ms Chatwal informed the Claimant that she had had an anonymous email stating that the Claimant had left the care home unsafe when she had gone shopping on 19th August 2019. The Claimant was suspended on full pay.
- 12.13 In her witness statement the Claimant alleged that Ms S Chatwal told her whilst she was outside the care home "*Best if you put your notice in*". This allegation was not put to Ms S Chatwal during cross examination and I am not satisfied on the evidence before me that Ms S Chatwal did suggest that the Claimant resign as an alternative to facing disciplinary action.
- 12.14 The Claimant's suspension was confirmed in writing. The Claimant was informed that the allegations were that "*whilst on duty as a senior carer, [the Claimant] had left the home with a colleague who was also on duty to go shopping for groceries for the home. The residents' were left vulnerable as only one member of care staff remained on the premises for a period of 1.5 hours*".
- 12.15 Ms S Chatwal undertook an investigation into the matter obtaining statements from the employees who were working on 19th August 2018 as well as the Claimant. This was done on an anonymous basis so as to protect the identity of the individuals. Four individuals including the Claimant were interviewed in total. Two of these individuals indicated either there was no shortage of food or that there was enough food for lunch and in fact lunch was cooked whilst the Claimant went shopping with the other member of staff and that they were not waiting for anything for lunch. The third member of staff who had indicated that they were running short of supplies was the colleague who had gone shopping with the Claimant.
- 12.16 On 4th October 2018 the Claimant was sent a letter inviting her to attend a disciplinary hearing on 7th October 2018. The Claimant was informed that the allegations against her were that (1) she had neglected service users at Woodthorne Care Home, who were under her care, whilst working in the capacity of senior carer on Sunday 19th August 2019; and (2) that she neglected to safeguard users from potential harm. The Claimant was advised that these allegations potentially amounted to gross misconduct. Under the Respondent's disciplinary policy acts justifying summary dismissal include (but are not limited to) : actions which may harm the well-being of a service user or a serious breach of health and safety.
- 12.17 The Claimant was also provided with copies of the statements from the witnesses; a copy of the Respondent's Safeguarding Policy; a copy of the Disciplinary Policy and a

- copy of the receipt for the shopping which she had done at Farm Foods.
- 12.18 Notwithstanding the change in wording in the allegations it was clear from the evidence given by the Claimant during the hearing that she knew what the disciplinary allegations against her were – namely going shopping during shift and taking another member of staff with her thereby creating a potential safeguarding issue and she had the opportunity to respond to them.
 - 12.19 At the disciplinary hearing the Claimant raised the issue of the witness statements not being signed. As such, the disciplinary hearing was adjourned in order to consider the Claimant's representations in this regard. The Respondent sought permission from the witnesses to provide copies of their signed statements the witnesses refused their consent as they did not want their identity to be disclosed. There was also a further investigation into allegations that the Claimant had discussed the investigation into the incident on 19th August 2018 with other staff thereby undermining the investigation and also potentially threatening staff. The Claimant denied breaching confidentiality or threatening staff and in the event nothing came of this second investigation.
 - 12.20 As such, on 25th October 2018 the Claimant was invited to attend a re-arranged disciplinary hearing to deal with the allegations which were originally set out in the Respondent's letter of 4th October 2018. The Claimant was also provided with a copy of her contract of employment at her request and advised of her right to be accompanied.
 - 12.21 The disciplinary hearing was conducted by Ms Raj Chahal over the telephone. The Claimant chose not to be accompanied. In her findings Ms R Chahal concluded that the Respondent had not been able to prove or disprove that the Claimant had left the premises with a colleague as there was no food. However, Ms R Chahal took the view that the Claimant's explanation for leaving the premises whilst she was on duty and taking a colleague with her was not satisfactory. Furthermore, the amount of shopping purchased was not reflective of the purchasing alleged. Even if there has been such an emergency the immediate required items should have been bought by the Claimant alone and the Claimant should have returned back to work swiftly. Ms R Chahal noted that when the Claimant was asked whether she would do anything differently the Claimant remained adamant that the decision she had taken to go shopping during working hours and to leave the premises with a colleague for at least 1 hour was the correct thing to do notwithstanding the fact that the Respondent had a service user who required hoisting to meet their toileting needs. The Claimant was also of the view that the potential

- for any other major incident occurring in the Claimant's absence was insignificant.
- 12.22 Ms R Chahal noted that the Claimant had no active warnings on her disciplinary record. Irrespective of this Ms R Chahal took the view that the Claimant's actions were so serious as to amount to gross misconduct warranting summary dismissal given the fact that the Respondent operated in the care sector which is very heavily regulated and care providers have a big responsibility to ensure it safeguards all parties with service users being at the heart of this duty.
- 12.23 On 31st October 2018 Ms R Chahal tried to call the Claimant several times to advise the Claimant of her decision. However, she was not able to speak to her.
- 12.24 In the event, on 2nd November 2019 the Claimant was hand delivered a letter setting out the outcome of the disciplinary hearing. The Claimant was advised of her right of appeal.
- 12.25 The Claimant did not exercise her right of appeal.
- 12.26 Disciplinary action was also taken against the colleague who accompanied that Claimant on the shopping expedition. This colleague was issued with a final written warning as opposed to summary dismissal on the basis that she was simply following the instructions of the Claimant.

Applicable law

13. Section 98 (1) Employment Rights Act 1996 provides that 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 principle reason for the dismissal).

(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.

A reason falls within the subsection if it –

(b) relates to the conduct of the employee,

14. Section 98(4) provides that 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 reasons shown by the employer) -

(a) *depends on whether in the circumstances (including the size and administrative resources of the employers 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.*

15. The guidelines set out in the case of **.British Home Stores Limited -v- Burchell [1978] IRLR 379** applies to this case in that the test to be satisfied is that:-

- The respondent honestly believed that the claimant was guilty of the misconduct alleged;
- The respondent had reasonable grounds on which to sustain that belief; and
- The Respondent had carried out an investigation that was reasonable in the circumstances.

16. The Tribunal must finally consider whether dismissal was a reasonable sanction for the alleged misconduct. In determining whether the respondent's decision to dismiss for conduct is reasonable pursuant to Section 98(4) of the ERA, the Tribunal is assisted by the band of reasonable responses approach which is proved in the case of **British Leyland (UK) Limited -v- Smith [1981] IRLR 91**. It was stated that:-

“the correct test is:

was it reasonable for the Employer to dismiss [the Employee?]. If no reasonable Employer might reasonably have dismissed him, then the dismissal was unfair. But if a reasonable Employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all cases, there is a band of reasonable responses within which one Employer might reasonably take one view whereas another might reasonably take a different view”.

17. The Tribunal cannot substitute its own decision for that of the Respondent (affirmed by the Court of Appeal in **Sainsbury's Supermarkets Limited -v- Hit [2003] IRLR 23** even if it believed that the decision to dismiss was harsh in the circumstances,. The dismissal will be fair unless the respondent's decision to dismiss was one which no reasonable employer could have reached.

18. The case of **Polkey –v- A E Dayton Services Limited 1987 IRLR 503 HL** indicates that generally an employer will not have acted reasonably in treating a potentially fair reason as a sufficient reason for dismissal unless or until it has carried out certain procedural steps which are necessary, in the circumstances of that case, to justify the course of action taken. In applying the test of reasonableness in Section 98 (4) the Tribunal is not permitted to ask whether it would have made any difference to the outcome if the appropriate procedural steps had been taken, unless doing so would have been “futile”. Nevertheless, the **Polkey** issue will be relevant at the stage of assessing compensation. **Polkey** explains that any award of compensation may be nil if the Tribunal is satisfied that the Claimant would have been dismissed in any event. However, this process does not involve an “all or nothing” decision. If the Tribunal finds that there is any doubt as to whether or not the employee would have been dismissed, the **Polkey** element can be reflected by reducing the normal amount of compensation accordingly.

19. Tribunals are also obliged to take the provisions of the ACAS Code of Practice on Discipline and Grievance Procedures 2009 into account in that it sets out the basic requirements of fairness which are applicable in most cases of misconduct.

20. Section 123(6) of the ERA states:

“where the Tribunal finds dismissal was to any extent the cause or contributed to by any action of the complainant, it shall reduce the amount of compensation by such proportion as it considers just and equitable having regard to that finding”.

21. Section 13 (3) of the ERA provides:

“where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.”

Conclusions

22. In reaching my conclusions I have considered all the evidence I have heard and considered the bundle in its entirety. I also considered the oral submissions made by and on behalf of the parties. I have also considered the authorities which Mr Brockley referred me to.

23. I am satisfied that the reason for the claimant's dismissal was conduct due to the Claimant leaving the Respondent's premises for at least an hour when she was on duty as the Senior Carer in order to buy food for the resident and taking a colleague with her thereby creating a potential safeguarding issue. I am therefore satisfied that the respondent had a potentially fair reason for dismissal under Section 98(2) of the Employment Rights Act 1996.
24. The first issue is whether the respondent followed a fair procedure. In this particular case, whether the respondent had reasonable grounds for holding a belief that the claimant had committed an act of gross misconduct and having conducted as much investigation into the circumstances as was reasonable.
25. I am satisfied that the investigation was as thorough as the circumstances warranted. All relevant witnesses were spoken to and it is noted that much of the evidence is not disputed. The Claimant accepted that she left the premises whilst on duty and took a colleague with her to do some shopping. The Respondent's concern was that by her actions the Claimant created a safeguarding issue when it was not necessary. Any shortage of food could have been dealt with by other more proportionate means.
26. Mr Brockley also argues that the dismissal is unfair as the Respondent had changed their case against the Claimant and points to the fact the wording in the suspension letter differs from the letter inviting the Claimant to the disciplinary hearing. I do not accept Mr Brockley's submission in this regard. It was clear from the evidence and from the Claimant's own submission that she was aware of the case against her and she had the full opportunity to respond to the allegations against her.
27. Mr Brockley also queries the extent to which the Claimant was on notice to the relevant policies and procedures. However, the Claimant was provided with copies of relevant policies in advance of the disciplinary hearing and understood her safeguarding obligations.
28. Mr Brockley is also critical of the disciplinary outcome letter arguing that it does not make clear the reasons why the Claimant was dismissed and pointed to sentences which he argues are grammatically incorrect. I do not accept Mr Brockley's assertion in this regard. The basis upon which Ms R Chahal reached her outcome is clear.
29. I also do not accept any argument of unfair dismissal based on inconsistency of treatment as a result of the Claimant being dismissed for gross misconduct and her colleague only receiving

a final written warning. The Claimant was the most senior person on duty and was ultimate responsible for the care home. The other employee was more junior and followed orders.

30. I conclude in all the circumstances that a fair procedure has been followed by the respondent and that dismissal was in the bands of reasonable responses. In the circumstances, I am satisfied that the dismissal is a fair and reasonable one taking into account equity and the substantive merits of the case. The claimant's complaint of unfair dismissal therefore fails and is dismissed.
31. In the circumstances, the Claimant is not wrongfully dismissed and her claim for notice pay fails and is dismissed. I am also satisfied that the Claimant has not suffered any unlawful deduction from her wages as she has no contractual right to be paid at the rate of £7.94 for any hours worked in excess of 35 hours. The Claimant did not raise an issue about receiving the national minimum wage for hours worked in excess of 35 hours per week until after her dismissal. In the circumstances, I am not satisfied on the evidence before me the rate of £7.94 was properly payable for all hours worked. As such her claim for unlawful deduction of wages also fails and is dismissed.

Employment Judge Choudry
24/01/2020