

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No S/4105238/2016**

**Held in Glasgow on 27 and 28 February and  
18 and 19 April 2017**

**Employment Judge: F Jane Garvie**

**Ms C Cairney**

**Claimant  
Represented by:  
Mr M Briggs –  
Solicitor**

**South Lanarkshire Council**

**Respondent  
Represented by:  
Ms J Bonnar –  
Solicitor**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that the claim should be dismissed.

**REASONS**

**Background**

1. In her claim presented on 28 October 2016 the claimant alleges that she was unfairly dismissed. She further asserts that she was wrongfully dismissed and seeks notice pay in relation to that alleged wrongful dismissal. An Early Conciliation notification was issued with the date of receipt of 2 September 2016 and date of issue of 2 October 2016. The respondent lodged a response in which they deny the claimant was unfairly dismissed. Notices for the Final Hearing were issued on 13 December 2016 allocating 27 and 28 February 2017. It later became apparent that extra days would be required and at the conclusion of the Hearing on 28 February

2017 further dates were identified as 18, 19 and 20 April 2017. Notices for the continued Hearing were issued on 1 March 2017. Since additional days were required it was agreed that it would be appropriate to deal both with merits and remedy given the Hearing was being allocated an addition three days from 18 to 20 April 2017.

5

2. An application for strike out was made on 23 January 2017. Mr Briggs opposed that application also by e-mail dated 24 January 2017. There was then an e-mail from Ms Bonnar of 3 February 2017 in relation to an earlier Case Management Order of 30 November 2016 and an application for strike out. By Notices dated 10 February 2017 the parties were advised that there would be a Preliminary Hearing on 21 February 2017. That date was not suitable for Ms Bonnar as explained in an e-mail dated 10 February 2017 and an e-mail was also received from Mr Briggs explaining that he was seeking a postponement. This was referred to Employment Judge Ian McPherson who directed that the postponement should be refused.

10

15

3. A Preliminary Hearing was held before Judge Frances Eccles on 21 February 2017. At that Preliminary Hearing the application to strike out was refused and the application to postpone the Hearing was also refused but the Final Hearing was converted to a merits Hearing only. There was no Note issued and it appears that the parties were informed of these directions at the Preliminary Hearing. By e-mail dated 7 March 2017 information was sought by Ms Bonnar and an Additional Information Order was issued dated 23 March 2017.

20

4. Subsequently, an e-mail was sent dated 6 April 2017 in relation to information about the claimant's medical records. This was acknowledged by letter dated 13 April 2017. By e-mail dated 14 April 2017 a Statement of Fitness for Work for the claimant was provided which is dated 31 March 2017.

25

5. Evidence was given on behalf of the respondent by Mrs Lianne Bain who is a Personnel Officer. Mrs Agnes Austin, a Home Care Operations Manager

30

and Mrs Elaine Maxwell a Personnel Adviser. The claimant gave evidence on her own behalf.

6. It was agreed at the start of the Final Hearing that it would be appropriate to refer to two service users whose names appear throughout the disciplinary process to be referred to by initials rather than by name. Both service users reside in a Sheltered Housing Complex. The respondent provides care services for individuals in that Sheltered Housing Complex. One service user is referred to Mrs X and the second as Mr Y.

### **Findings of Fact**

7. The Tribunal found the following essential facts to have been established or agreed.
8. The claimant commenced employment with the respondent on 17 May 2016. She was employed as a Home Carer. In her claim form, (the ET1) and the Paper Apart she is referred to as having commenced employment on 1 May 2009 but it was accepted that her start date was 17 May 2010.
9. On Friday, 27 November 2015 the claimant was working as a Home Carer at a Sheltered Housing Complex. While there the claimant opened a blister pack for Mrs X and handed this to Mrs X so that she could take it with a glass of water which she had to hand. Handing medication in this way is referred to as “prompting” medication. The claimant was not due to be providing assistance to Mrs X that day. Another carer was due to see her later in the afternoon. There was some issue as to whether Mrs X already had this medication or whether it was given to the claimant by the Warden at the complex. Although he did not give evidence to the Tribunal the respondent’s investigation, (see below) refers to his having been questioned and he denied having done so as he is not allowed to sign for medication for residents when it is delivered to the complex. The residents must sign for medication themselves.

10. Having “prompted” Mrs X’s medication the claimant retained the medication although she should not have done so. It was accepted by the claimant that having “prompted” Mrs X’s medication she failed to record this in Mrs X’s care diary which was not with Mrs X at the time since she was in the communal area of the Housing Complex. Residents’ care diaries are kept in each resident’s own flat. The claimant retained Mrs X’s medication rather than take it to Mrs X’s flat and leave it there as she had intended to do. She forgot she still had it with her when she then visited service user Mr Y in his flat at the complex. The claimant was due to make this visit as he was on her list of service users to see that day. The claimant knew that Mr Y was to start a new antibiotic. The claimant had obtained authority to do so, having contacted the respondent’s management and having been told by Mr Y’s daughter that he was due to start this new medication. Having duly given Mr Y his new antibiotic the claimant then left his flat but, in doing so, she forgot to remove the blister pack of medication belonging to Mrs X which she had taken with her when she called in to see Mr Y. The claimant laid Mrs X’s medication down on a worktop when she arrived at Mr Y’s flat.
11. The claimant later returned to Mr Y to carry out a “tuck” visit that involves settling the resident down for the night. While she was there the claimant, in error “prompted” a tablet which she took from Mrs X’s blister pack and which was still in Mr Y’s flat since the claimant had forgotten to remove it when she left from her earlier visit. She did not record having “prompted” this medication in his care diary this being the one kept in his flat to record what has been done for the individual by the care during the visit, including the “prompting” of medication.
12. The claimant the completed her duties elsewhere in the Housing Complex. At the end of her shift she returned home at approximately 9pm. While she was running a bath she remembered having left Mrs X’s medication in Mr Y’s flat. She ordered a taxi and returned to the complex where she spoke to the Warden. He accompanied her to Mr Y’s flat. He unlocked the door so that the claimant could go inside and collect the blister pack belonging to Mrs X. Mr Y was asleep and the claimant did not speak to him. The

Warden then accompanied her to Mrs X's flat where she returned the blister pack. The claimant then returned home.

- 5 13. The respondent operates a telephone out of hours emergency service for carers but the claimant did not contact them on the evening of Friday, 27 November 2017 to advise them that she had forgotten to remove Mrs X's medication when she left Mr Y's flat.
- 10 14. However, on Saturday evening, 30 November 2015 the claimant was attending church with her mother. This time she left the service in order to telephone the respondent's out of hours service to say that she had "suddenly" remembered that, when she returned to Mr Y's flat before the end of her shift on 29 November 2015 she had in error given him (that is she "prompted" him) with one of the tablets from the blister pack belonging to Mrs X.
- 15 15. The claimant spoke to a Mrs Margaret Tanner who was on duty covering the out of hours service. She is a Social Work Assistant and reports to an Operations Manager, Ms Ciana Stewart. She emailed Mrs Stewart on 29 November 2015 times at 00:01 hours, (pages 1.32/1.33). The e-mail was copied to Mr Jamie Brown who is a Co-ordinator with the respondent.
- 20 16. The e-mail indicates that Mrs Tanner spoke to the carer who was on duty at the Housing Complex on Saturday evening, 28 November 2015. This carer had been the "tuck carer" for both Mr Y and Mrs X that evening. This carer confirmed that Mrs X's medication was in her flat but she was unable to check Mr Y's medication as he had been admitted to a local Hospital. Mrs Tanner then contacted the Hospital's General Emergency Care Unit. She spoke to a member of staff who advised that they would consult a doctor in case there was an impact on Mr Y's admission/treatment as a result of the error in medication having been given to him the previous evening. Mrs Tanner also contacted Mr Y's daughter. She subsequently contacted the claimant to inform her not to attend for her shift on Monday, 30 November
- 25

2015. Instead the claimant was asked to attend a meeting with her line manager on the 30 November 2015.

17. Thereafter, the claimant continued to attend work but she did so alongside a colleague in a process known as “buddying up” so that she was no longer working on her own and was not “prompting” individuals’ medication on her own.
18. The respondent commenced an investigation which started on 7 December 2015. This was initially conducted by a Ms Adele Healey but she was then on maternity leave and Mrs Bain took over the fact finding thereafter. The claimant attended a formal fact finding interview on 21 December 2015, (pages 1.44/1.46). This interview was carried out by Mrs Healey with a Mr Mark McLaughlin in attendance as the note taker. The claimant advised that she did not wish a companion present although this was offered to her.
19. The claimant was asked about her role and she was then asked about what happened on 27 November 2015 in relation to service user Mr Y. The claimant provided an explanation, indicating that she had been given Mrs X’s blister pack by the Warden and she then “prompted” medication to Mrs X from that blister pack.
20. The claimant’s explanation was that Mrs X asked her to take the medication to her flat and she agreed to do so. However, she first visited Mr Y in his flat as she was on duty that day as his carer. She gave that is “prompted” him with his new antibiotic. She then mistakenly left Mrs X’s blister pack in his flat. The claimant explained that she later returned to Mr Y’s flat for his “tuck” visit. While there she gave or “prompted” him with a tablet from Mrs X’s pack in error. The Note records that she then “took the pack with her to Mrs X’s without thinking”. That does not accord with what happened with the claimant’s explanation that she realised later on Friday, 27 November 2015 after the end of her shift that she had left Mrs X’s medication in Mr Y’s flat and so she called a taxi to take to the Complex where she then went

with the Warden to Mr Y's flat and collected Mrs X's medication and then went with the Warden to Mrs X's flat where she left the blister pack.

21. The claimant then explained at the Fact Finding interview that she had realised on the Saturday evening, (28 November 2015) that she had given the medication belonging to Mrs X to Mr Y in error and so she telephoned the respondent's Emergency Social Work Services number. The claimant's explanation was that she had "a lot on her mind but that was no excuse. It was her mistake", (page 1.44). The claimant confirmed that she had been a regular home carer for Mr Y since the start of her employment with the respondent. The claimant knew that Mr Y was very elderly and has a lot of health issues.
22. The claimant was asked about the procedure used for issuing medication. In relation to Mr Y. She had given the new medication (i.e. the antibiotic) to Mr Y following a call she made to the Community Support Co-ordinator as this was a new antibiotic and was not in a blister pack. She had therefore clarified that she could do so as it was not in a blister pack and was given permission to do so, (page1.45)
23. During this fact finding interview the claimant admitted that she had returned to Mr Y's flat later in the day and, it was at that point, that she gave him medication from Mrs X's blister pack in error. She then said that she "took the pack with her to Mrs X", (page 1.46).
24. All service users have care diaries which require to be written up. In the event of medication being "prompted" there is a requirement to complete that information in the individual's care diary.
25. 25. The claimant was asked to sign the notes of the interview as being an accurate reflection of what was discussed. She did so, (page 1.46).
26. The claimant then attended a further fact finding interview with Ms Bain on 13 January 2016, (pages 1.48/1.51). Again, the claimant chose to attend on her own. The claimant was asked about the earlier fact find interview which

she had signed. The claimant is recorded as having “nothing new to add” to that statement, (page 1.48).

- 5 27. The notes record that she was then shown an e-mail from the Sheltered Housing Complex Management and was asked to provide comments. This was an e-mail from them to the respondent’s line manager sent on 23 December 2015, (page 1.38) which refers to an interview having been carried out at the Sheltered Housing Development. The Warden’s position was that the delivery of medication for Mrs X had been signed for by her. The claimant maintained that she had been given Mrs X’s medication.
- 10 28. The claimant was asked if she had returned to the Sheltered Housing Complex on 27 November 2015 and she confirmed that she had done so.
29. More questions were asked as to what had happened when the claimant returned to Mr Y’s flat on 27 November 2015.
- 15 30. The claimant had not mentioned returning to Mr Y’s flat on the Friday night at the original fact finding as “it has slipped her mind and she was sorry for that”, (page 1.50).
31. The claimant signed the notes on 17 January 2016, as being an accurate reflection of what was discussed, (page 1.51).
- 20 32. Next, Mrs Bain carried out a fact finding interview on 1 February 2016 with a Mr James (Jim) Kelly) who is described as being a “Mobile Support Worker” who had been present at the Sheltered Housing on 27 November 2015. He denied having provided the claimant with the medication for Mrs X, (page 1.56). He confirmed having accompanied the claimant to Mr Y’s flat on 27 November between 9.30 and 9.45pm. He did not recall the claimant having said that she had given (or “prompted”) Mr Y with the medication belonging to Mrs X, (page 1.58)
- 25 33. The claimant then attended a further fact finding meeting on 21 March 2016, again with Ms Bain present. Mr McLaughlin was also present as the note



taker, (pages 1.52/1.54). Once again, the claimant chose to attend on her own. The claimant signed the notes from this meeting on 27 March 2016 (page 1.55).

5 34. Mrs Bain completed the fact finding report on 22 March 2016, (pages 1.26/1.30).

35. Her report was then referred to another member of the respondent's management, a Mrs Audrey Cowan. It was referred to Mrs Cowan for her to consider whether disciplinary procedures should be taken against the claimant. She decided that it was appropriate to do so.

10 36. By letter dated 27 April 2016, (pages 1.98/1.99) Mrs Austin wrote to the claimant, informing her that she was required to attend a disciplinary hearing on 16 May 2015. The letter refers to Mrs Austin as being the "Disciplining Officer". The reasons for the disciplinary hearing were set out as follows:-

15 • Breach of SLC Code of Conduct, Social Work Code of Conduct and SSSC Code of practice by issuing a service user with another service user's medication on 27 November 2015.

• Attended visits to two service users on 27 November 2015 which were not an allocated part of recorded work schedule.

20 You will be given the opportunity to explain your views on the allegations, including presenting any documentary and witness evidence."

25 37. The claimant was informed of her right to be accompanied by a companion who could be either an accredited trade union representative or a work colleague. She was also advised that she should provide any written submission she wished to make and any witnesses she intended to call on her behalf. The letter notes that a copy of the respondent's "management submission has been given to you."

38. The letter continued that Mrs Bain would not be calling any witnesses to the hearing.
39. The claimant was unwell and unable to attend the disciplinary hearing. Accordingly, a further letter in the same terms was issued dated 16 May 2016, (pages 1.100/1.101).
40. The claimant attended the disciplinary hearing on 25 May 2016. Mrs Bain was present and a Ms Grier Hamilton, Personnel Officer was also present to take the notes of the meeting.
41. The claimant confirmed that she did not wish a representative present. She was advised that a decision would not be issued on 25 May. Mrs Bain was asked to present the findings from her report and these were set out as numbered bullet points in the Notes from the hearing, (pages 1.72/1.73).
42. The claimant explained that she had provided Mrs X with the medication from the blister pack as she was insisting that her medication was due. The claimant knew that another carer was due to carry out Mrs X's scheduled visit later that afternoon at 4.30pm. The claimant took issue with one of the points made by Mrs Bain in her presentation to the effect that she maintained that the support worker (referred to by the claimant as the Warden) had given Mrs X's medication to the claimant and that he later accompanied the claimant to Mrs X's flat in the evening as she would not have been able to access the flat without him being present to unlock the door, (page1.73).
43. The claimant is noted as having then explained that she had made a genuine mistake for which she had taken full responsibility, (page1.74). Her position was that had she realised that she had given the wrong medication on the Friday then she would have contacted the emergency number but it was not until the Saturday that she realised she had done so.

44. The claimant explained that she had visited Mr Y's flat to give him a new antibiotic which she had been asked to do by his daughter and, before doing so, she had obtained permission from the Community Support Co-ordinator.
45. The claimant accepted that she had not written down in the care diary for Mr Y that she had given the antibiotic to Mr Y.
46. The claimant accepted that she had not written into Mrs X's care diary that she had prompted her medication during the afternoon when the service user was sitting in the communal area in the Sheltered Housing Complex.
47. The claimant was questioned by Mrs Austin as to why she had not mentioned at the original fact finding interview that she had returned to the complex on Friday evening, 27 November 2015. The claimant explained that during the week this incident occurred she had "a lot of personal issues and had just forgotten as her "head was all over the place"". She explained that her mother had been re-diagnosed with cancer and her father had a nervous breakdown. She was asked if she had discussed this with her line manager or asked for support and said she had not done so, (page 1.75).
48. The claimant maintained that it was a genuine oversight that she failed to mention that she had returned to the complex on the Friday evening when she removed the blister pack of medication from Mr Y's house and delivered it to Mrs X's house.
49. Mrs Bain was asked to provide a summary, (page 1.75). This was set out as bullet points. The claimant accepted that it was her mistake and she reiterated it was a genuine mistake, (again page 1.75).
50. By letter dated 7 June 2016, (page 1.102) Mrs Austin informed the claimant that the disciplinary hearing would be reconvened on 13 June 2016 and that she would provide her decision in relation to the two allegations previously set out in the earlier letter inviting the claimant to the disciplinary hearing namely and which was repeated in the letter of 7 June 2016, namely:-

- “• Breach of SLC Code of Conduct, Social Work Code of Conduct and SSSC Code of practice by issuing a service user with another service user’s medication on 27 November 2015.
- Attended visits to two service users on 27 November 2015 which were not an allocated part of recorded work schedule.”

5

51. The claimant was reminded that she could be accompanied by a companion at this hearing. The claimant attended the reconvened disciplinary hearing on 13 June 2016 on her own. Ms Hamilton was again present as was Mrs Austin. Notes were prepared headed, “Disposal – 13 June 2016, (page 1.76).

10

52. Mrs Austin explained that she had considered “all the facts, all the evidence, length of service, qualifications, training, experience and “all mitigation. She then summarised the facts and mitigation.

53. The Note records that she then continued:-

15

“A Austin advised that grounds were found on both allegations. She advised that (the claimant) had accepted that she prompted medication to Mr Y which belonged to Mrs X and provided support to service users who were not recorded on her schedule and could give no reasonable explanation why this was not recorded within the care diary of Y or confirm with the scheduled carer for Mrs X that medication had been given. This could therefore result in further medication errors.”

20

54. Mrs Austin is recorded as also having advised that she was concerned that the claimant had returned to the complex following the end of her shift to transfer medication from Mr Y’s house to Mrs X’s (house) and “to try and cover up her error.” It was noted that the claimant had contacted the Emergency Social Work on Saturday, 28 November 2015 to advise of the medication error when she had given Mr Y medication belonging to Mrs X

25

but that “she did not disclose during the conversation the return to the complex the previous evening.”

55. Mrs Austin stated that “this medication error may have contributed to Mr Y being admitted to hospital.” The notes also record that the claimant had  
5 also provided medication to service users who were not on her schedule and there was no clear recording of how this was communicated to the named scheduled carers.

56. Mrs Austin continued that, in her view, the claimant had only provided  
10 “minimal information to investigating officers and her honesty, professional conduct and integrity as a South Lanarkshire Council employee proved to be questionable. She stated that there had been “a breach of employer’s trust and therefore the disposal was that her actions constitute gross misconduct and she would be dismissed with immediate effect.”

57. Mrs Hamilton explained that the decision would be confirmed in writing and  
15 she was also advised of her right of appeal. The claimant was informed of her right to appeal and that she could do so within 14 days of receipt of the letter.

58. A letter confirming the decision was issued to the claimant dated 13 June  
20 2016 by Mrs Austin, (page 1.104). The reasons for dismissal were set out as follows:-

“Breach of SLC Code of Conduct, Social Work Code of Conduct and SSSC Code of practice by issuing a service user with another service user’s medication on 27 November 2015.

25 Attending visits to two service users on 27 November 2015 which were not an allocated part of recorded work schedule.”

As this is a summary dismissal you are not entitled to any notice. If entitled to payment in lieu of leave, this will be calculated on the basis of the Working Time Regulation entitlement.”

59. An appeal was duly submitted on the claimant's behalf by her union representative, (page 1.83).
60. A report was then compiled for the Appeals Panel which was due to meet on 25 October 2016 (pages 1.84/1.89). It did not take place on that date but was re-arranged for 17 November 2016. A report was prepared for the Appeal Panel and copied to the claimant's union representative, (pages 1.90/1.96).
61. The claimant attended the appeal hearing with a union representative. A Mrs Gail Robertson attended for the respondent as the Personnel Adviser who was to present the respondent's case. There were three councillors present and Mrs Elaine Maxwell. The latter's role was to provide advice/guidance to the councillors should they require this. Mrs Austin was called by the respondent to give evidence.
62. Mrs Robertson set out the position as to the reasons for the claimant's dismissal, (page 1.90).
63. She then questioned Mrs Austin, (pages 1.91/1.92). Mrs Austin was then questioned by the claimant's union representative, (again page 1.92/1.93). There were no questions from the Appeals Panel.
64. The claimant's case was then presented by her Union Representative, Mr Adam Adnyana. He explained the claimant was appealing against the level of disciplinary action taken. It was accepted by her that she had made a genuine mistake and had done "all in her power to advise management of her mistake" and that the decision to dismiss her had had a significant impact on her, (page 1.93).
65. The claimant was then questioned by him. She was also questioned by Mrs Robertson, (page 1.94). Questions were then asked by the Panel, (again page 1.94).

66. A summing up was provided for the respondent, (page 1.95) and then one by Mr Adnyana, (page 1.96).

67. As indicated above, the purpose of Mrs Maxwell's attendance was to be available to provide advice/guidance to the Appeal Panel.

5 68. The hearing was adjourned at 11.05am and, following consideration, the parties returned and were informed at 11.35am of the decision of the Appeal Panel which was as follows:-

10 "The Appeals Panel was of the opinion that the investigation had been carried out in accordance with the Council's Disciplinary Procedures and the Resource had acted reasonably. Consequently, it was the decision of the Appeals Panel that the grounds of the appeal had not been substantiated and the appeal was rejected."

69. The respondent has a detailed disciplinary procedure, (pages 1.110 -1.135). There is also the Code of Practice, (pages 1.136/1 -151).

15 **Respondent's Submission**

70. Ms Bonnar said she would deal with two categories in relation to the facts in this case as some are admitted by both parties but some are not.

20 1. On 27 November 2015 at approximately 4pm at a Sheltered Housing Complex where the claimant was working as a carer she had in her possession medication belonging to service user, Mrs X who was not on her work schedule that day.

25 2. She "prompted" that medication to Mrs X at approximately 3.45pm although another carer was due to attend about 4.30pm and there was no record of the "prompting" of that medication in the service user's diary although the claimant knew that medication "prompts" were supposed to be recorded.

3. The claimant retained Mrs X's medication and took it with her to service user Mr Y's accommodation. She was not scheduled to visit Mr Y but had been asked to prompt an antibiotic for him by his daughter and she had sought permission to do so before making this additional visit.
- 5 4. She left Mrs X's blister pack of medication in Mr Y's accommodation. She returned to Mr Y to carry out a "tuck" visit and during that visit she prompted Mrs X's medication to Mr Y. She failed to check the blister pack before doing so. She then left this medication in Mr Y's accommodation and she did not record either that she had "prompted" an antibiotic for him earlier or that she had "prompted" Mrs X's medication in Y's care diary.  
10
5. Later that evening the claimant returned to the complex and made two unscheduled visits to the two service users. She entered Mr X's accommodation while he was sleeping and uplifted Mrs X's medication and then went to Mrs X's accommodation to return the medication there.  
15
6. The medication error was not reported by her until approximately 6pm the following evening, Saturday 28 November 2015 which was about 24 hours after it had been prompted. When the claimant reported this error on 28 November 2015 she stated that she did not know what she had done with the medication afterwards.  
20
7. On Monday 30 November 2015 when she was interviewed she said she went to Mrs X's flat after Mr Y's scheduled tuck visit and she reiterated that at the first fact finding meeting in December 2015.
8. At the second fact find in January 2016 the claimant stated that once she was in possession of Mrs X's medication she "prompted" it to her in the communal area of the complex but that had not been mentioned before. She was also shown an e-mail from the Managers of the Sheltered Housing Complex which confirmed that the claimant had made a return unscheduled visit to the complex on the night of the  
25



medication error namely, 27 November 2015. The claimant stated she had not mentioned this before because it had slipped her mind.

9. During the fact finding process and then the disciplinary hearing the claimant stated that she had “prompted” Mrs X’s medication to Mrs X because Mrs X’s carer had not arrived yet and Mrs X wanted her medication. At the appeal hearing she stated she had been told that Mrs X’s carer would be late and therefore she had “prompted” the medication. Ms Bonnar thought that the claimant had also admitted that the carer had not been late as the carer was not due to arrive until 4.30pm.
10. Following the fact finding investigation the claimant attended a meeting with the fact finder, a nominated manager and she was then invited to attend the disciplinary hearing. Letters were sent advising her about the medication error and the sanction of dismissal could be imposed.
11. Lastly, the claimant was an experienced carer and had been in the respondent’s employment in this capacity since 2010. She had received a six week induction course at the start of employment. She knew how to “prompt” medication. She knew she was supposed to record any “prompts” of medication in the care diaries of the service users. She knew she should not have medication belonging to a service user who was not on her list. She had been providing care to Mr Y for a couple of years and she was aware of his particular needs.
12. There were a number of facts which were disputed.
  - (i) An issue which arose of how the claimant came to be in possession of Mrs X’s medication. She indicated that the Warden had given medication to her but he disputed this. The disciplining officer in her evidence confirmed that she accepted the claimant’s evidence in this matter and, in any event, she did not consider it to be material. The issue was not how she came by the medication since it was having the medication at all that

raised the difficulty. Mrs Bonnar's position was that the claimant should not have had the medication at the relevant time because Mrs X was not on her list.

5 (ii) Most central and crucial in the dispute was when the claimant recalled that she had "prompted" Mrs X's medication to Mr Y. The claimant said she did not recollect having done so until 24 hours later when she was in church but this was not accepted by the dismissing officer. The disciplining officer explained that she was concerned by the explanation because the claimant  
10 gave incomplete and contradictory explanations in the disciplinary hearing and the fact finding interviews.

(iii) In particular, the failure to disclose the return visit was of relevance to the dismissing officer. She accepted that giving the medication that is in "prompting" it to the wrong service user,  
15 meant in the dismissing officer's view that the evidence suggested that the claimant realised the previous evening having done so, but delayed reporting it until Saturday 28 November 2015.

(iv) In terms of further dispute as to issues which arise the claimant  
20 claims not to have known until the appeal hearing that her honesty and integrity were an issue in terms of her dismissal. This was despite accepting that she gave contradictory accounts of events. She did not say that she understood her account of her actions/explanations had not been believed.

(v) The respondent's position is that she was challenged both  
25 during the fact finding meetings and at the disciplinary hearing on these contradictory statements and whether she was telling the truth.

(vi) Lastly, the facts that were not agreed about the documentation.  
30 The respondent's witnesses all gave evidence that the relevant

documents were sent to the claimant at different stages of the process. Ms Bain said that the fact finding was provided at the outcome meeting with the manager. Mrs Austin stated that the minutes of the disciplinary hearing were sent following the conclusion of it. The claimant disputes that but does accept that the entire package of papers was sent to her representative i.e. her union representative in advance of the appeal hearing.

5

10

15

20

25

13. Ms Bonnar invited the Tribunal to find that the respondent's witnesses' evidence should be believed and that, on the issue of credibility and reliability, they should be preferred.
14. The respondent's case was fully documented. There were a detailed fact finding supporting documents and then the disciplinary and appeal hearing. The respondent's witnesses were credible and reliable in terms of the evidence they gave.
15. Ms Bain was able to explain the fact finding process and she was evidently an experienced Personnel Officer. She was used to carrying out fact finding investigations and she clearly articulated her role from her memory and with reference to the paperwork.
16. In relation to the dismissing officer, Mrs Austin she was both credible and reliable. She was able to clearly articulate what happened at the disciplinary hearing from her memory and the paperwork and to fully explain the conclusions she had reached. She noted that the claimant maintained that she had not remembered having made the medication error until the following night. Mrs Austin gave reasons for why she did not believe the claimant with specific reference to the contradictory statements that had been provided by the claimant during the process.
17. She was also clear in her evidence that the claimant had been challenged on the contradictory statements and the implications.

- 5 18. Very briefly, Mrs Maxwell's evidence was credible and reliable. She too was a very experienced personnel adviser and she gave a credible account of the appeal process and the deliberations of the Appeal Panel. By contrast, it was submitted that the claimant was neither credible nor reliable. She failed to come up with any reasonable explanation for her actions on the date in question. She was evasive as to her failure to report her return visit on the Friday evening to the complex and she had provided contradictory statements which she made throughout the process, during the course of the fact finding and the disciplinary hearing. Regarding returning Mrs X's medication to Mrs X's flat, she gave three separate accounts. The first was that she did not mention it at all, the second was that, at a later stage, she said that the other carer had not arrived and so she had "prompted" the medication to Mrs X and the third point was at the appeal hearing where she said that the scheduled carer was late. The claimant was very vague in her evidence to the Tribunal as to why she said these different things at different stages.
- 10
- 15
- 20 19. In relation to the medication being taken back to Mrs X's flat after the claimant had left Mr Y's flat following the tuck visit as was at one point suggested by the claimant, this cast considerable doubt on the claimant's not remembering the medication error until the following evening, Saturday 28 November 2015.
- 25 20. Lastly, the claimant was present throughout the evidence of the various witnesses and was fully aware of the issues arising in cross-examination and she was aware that her honesty was at issue. Much of the claimant's evidence in relation to that point was after she had heard the other witnesses and her evidence could have been influenced by what she had heard of those witnesses.
- 30 21. Turning to the law, misconduct is potentially a fair reason for dismissal in terms of section 98 of the Employment Rights Act 1996. Ms Bonnar referred briefly to the **Burchell** test. The employer must believe the

misconduct had occurred, it must have reasonable grounds to sustain the belief and at the stage when that belief was formed there must have been a reasonable investigation in the circumstances.

5 22. Taking these in reverse order, Ms Bonnar's submission was that there had been a very reasonable investigation. It was a very robust investigation. The Tribunal had heard in detail from the fact finder that the claimant was interviewed on three occasions and, as such, it was a very thorough investigation indeed.

10 23. In terms of points 1 and 2, these were also met with many of the facts establishing misconduct. There was a failure to follow procedures by the claimant. There was the failure by her to check the blister pack before "prompting" the medication to Mr Y. There was the failure to complete the case diaries and in "prompting" the medication to the service user Mrs X who was not on her schedule which then put that  
15 service user at risk and could have been ground for dismissal. The dismissing officer stated that the failure to report the medication error as soon as it was realised and the attempt to cover up the claimant's actions and her lack of candour during the investigation and at the disciplinary hearing, caused the consequent breach of trust when the  
20 dismissing officer took into account the various explanations. This led her to the conclusion that there had been gross misconduct and that dismissal was the appropriate sanction. It was submitted on the facts that the respondent had established, that the dismissing officer had a belief that the misconduct had occurred and that there were reasonable  
25 grounds to sustain that belief.

24. It is well established in the case law that the Tribunal must not substitute its own view for that of the employer and the Tribunal must only consider whether the decision to dismiss was within the band of reasonable responses.

25. Ms Bonnar submitted that, considering all the facts in this case, it could not be concluded that a reasonable employer would not have come to the same conclusion.
- 5 26. Moving to procedural fairness, as Ms Bonnar understood it, there was a complaint that the procedure was flawed in that letters were not issued to the claimant in advance of the fact finding and the disciplinary hearing and following dismissal. This was indicated by Mr Briggs as being one of the reasons for the dismissal having been flawed as well as the issue of dishonesty arising as an issue for consideration by the dismissing officer.
- 10 27. The respondent conceded that while correspondence was sent to the claimant it could perhaps have been more detailed by setting out the allegations in more fully rather than simply referring to the two breaches set out at the bullet points in the correspondence.
- 15 28. However, all the other paperwork including the statements the fact findings and the disciplinary hearing paperwork were provided to the claimant. The claimant was told the basis for her dismissal and there was reference to the relevant Codes of Practice.
- 20 29. In Ms Bonnar's submission this was not dishonesty as Mr Briggs was suggesting as a separate charge but rather that Ms Austin as the Dismissing Officer believed that the claimant was dishonest in her explanation.
- 25 30. While it was conceded that the paperwork may not be perfect in relation to the letters issued and what was set out in them, there was sufficient detail to inform the claimant of what was involved and the respondent had carried out a detailed and robust investigation as was evidenced by the witnesses giving evidence at this Final Hearing.
31. In Ms Bonnar's submission any failure to notify the claimant in relation to what was set out in the letter summoning her to the disciplinary

hearing did not amount to procedural unfairness and also the claimant was represented at the appeal hearing and was given the opportunity to have her position set out there.

5 32. In the event of there being a finding against the respondent in relation to unfair dismissal, then Ms Bonnar submitted that there was contributory conduct and it would be just and equitable for compensation to be reduced by such amount as the Tribunal considered appropriate. In the event of the dismissal being found to be unfair, then Ms Bonnar submitted that this would be a case where it would be appropriate to  
10 reduce compensation by 100%. Ms Bonnar submitted that the claimant's answers to questions at the Tribunal demonstrated a fairly casual attitude by her to her job so perhaps it was not unsurprising that a medical error had taken place.

15 33. Ms Bonnar noted that no compensatory award is sought although loss of statutory rights is sought and also an award in relation to wrongful dismissal.

20 34. Mr Briggs accepted that the relevant sections are section 122(2) and 123(6) of the 1996 Act. He further accepted that it would be unusual for a Tribunal to use a different percentage for a reduction between the basic and compensatory awards although, in this case, the only award sought is the basic award, apart from the loss of statutory rights and the claim made for wrongful dismissal.

25 35. Ms Bonnar's position was that a **Polkey** reduction if this was to be applied should be very high because it was quite clear from the facts that dismissal would have been the inevitable result.

36. The claimant continued to work from the date of the incident on 27 November 2015 until 16 May 2016 although she was absent from work for part of this time on sickness leave. In continuing to work she was doing so with another colleague in a "buddying".

37. There was therefore no prejudice to the claimant because she was continuing to work and therefore continuing to be paid.

71. **Claimant's Submissions**

5 1. Mr Briggs explained that he did not intend to refer to the facts and accepted what was said in relation to facts which had been outlined by Ms Bonnar although he took issue with some of them. In his submission, the letter setting out the reason for dismissal raised the question of the claimant's dishonesty, (see page 1.100) where there is no reference to dishonesty. Page 1.93 sets out the matter raised at the appeal hearing and, in particular, the last bullet point where Mrs Austin stated that:-

10

“◆ Advised that, if the matter had been purely a medical error, she might have decided on a different disposal, however, she had had a real difficulty with the trust issue.”

15 2. In relation to Section 98(1) of the 1996 Act what was the reason for dismissal? Mr Briggs referred to the grounds set out in the response to the ET3 at 1.23A where there is reference to the fact finding investigation and disciplinary process and the assertion by the respondent that:-

20 “...the claimant had provided minimal and sometimes contradictory information leading the Disciplining Officer to conclude that her honesty, professional conduct and integrity had been questionable, and that there had been a breach of employer's trust.”

25 3. Mr Briggs' position was that the primary evidence of Mrs Austin is that she may not have decided to dismiss the claimant but for the third allegation that is dishonesty but there is no reference to that in the Notes of the disciplinary hearing at pages 1.72-/1.75.



4. Page 1.102 sets out the reasons for dismissal and there are the two points set out in that letter of 7 June 2016.
5. Mr Briggs then referred to the appeal from Unison and the grounds of appeal. In Mr Briggs' submission, there was a phantom third ground and various allusions to it in relation to assertions about the claimant's dishonesty. In his submission, this calcified the dismissal into a substantive unfair dismissal with the claimant not being aware of the allegation ahead of the disciplinary hearing and so not able to prepare.
6. He accepted that paragraph 9 of the Code states that an appeal has to be considered using the appropriate form and be completed in full, stating the grounds of appeal. The claimant's position was that for the disciplinary hearing she was aware that there were two bullet points as set out in the letter but that, at no time prior to the disciplinary hearing, was it either explicitly or implicitly explained to her that the issue of honesty was to be taken into account. He referred to page 1.75 where the claimant was "cross-examined" about the points discussed with her. There was nothing to suggest that it was put to the claimant that she had been dishonest. Mr Briggs referred to the first two bullet points on page 1.75. It is not clear from that that there was a new allegation and the claimant did not appear to have been challenged as to the explanation she provided.
7. At page 1.76 (the disposal hearing) two distinct points are raised. Mr Briggs' position was that the first cover up is alleged to be the failure to disclose to the Emergency Social Work that the claimant had been back to the complex the previous evening when she contacted them on 28 November. The second was that she provided medication to service users not on her schedule and this was a continuation of the approach towards the claimant but it was not clear even at the disciplinary hearing that this point was being taken.

8. Mr Briggs noted that at the appeal hearing, (page 1.94) the claimant was questioned and she stated, "Advised that she found out that her colleague would be late and that she knew what her colleague's task were and had tried to help out."
- 5 9. Mr Briggs accepted there was some consideration of these points in the appeal letter at 1.83.
- 10 10. Mr Briggs' next point was that at the time of the appeal hearing the claimant was not in possession of enough information as to the reason for dismissal. The disposal hearing, in his submission, did not then set out in the letter the reasons but this brought him back to the point that at page 1.76 (the disposal hearing) the allegation of dishonesty had not been spelt out.
- 15 11. In Mr Briggs' submission, the issue of the claimant covering up what had happened was that on the Friday evening she made no attempt to speak to the helpline.
- 20 12. In his submission, the respondent was not able to show that they had a reasonable belief in terms of **Burchell**. In his submission, the respondent failed to carry out sufficient investigation.
- 25 13. Accordingly, any allegation of there being a cover up by the claimant where there was something that she had fully confessed to raises the fact that the claimant had accepted that she gave the wrong medication but had not realised it until the next day. It was not in dispute that she then contacted the emergency helpline.
14. Mr Briggs submitted that there was no reference to the claimant having returned to the complex and, in his submission, the respondent had not carried out sufficient investigation.
15. In his submission, there could not be contributory fault by the claimant if she had not been made aware of the issue.

5 16. On the issue of the Schedule of Loss, Mr Briggs confirmed that what is sought is a basic award, damages for wrongful dismissal and loss of statutory rights. In his submission, if there were to be any reduction by way of contribution it should be minimal perhaps 10% and, at the very most, 25%.

17. In relation to **Polkey** in his submission the defect in the process was so substantial as to render the dismissal unfair and if there was to be any reduction in **Polkey** it should be minimal of say 10%.

10 18. Ms Bonnar was asked if she had anything she wished to say about way of response. In her submission, much had been made of the allegation about a failure to give proper notification of the allegations against the claimant but the respondent's position was that the claimant had not adduced any new arguments or explanation during the process. She was accompanied and represented at the appeal hearing while she  
15 chose to attend the disciplinary hearing on her own. In Ms Bonnar's submission, all the proper procedures were followed and she referred again to page 1.76 where the disposal hearing set out the reasons for the dismissal. There had been the initial fact finding to ingather facts and it was not part of that process to challenge the claimant's honesty.

20 19. Ms Bonnar accepted that the specific word, "liar" was not used but it was apparent that Mrs Austin questioned the claimant's honesty as set out in the disposal hearing note on 13 June 2016 at page 1.76.

25 20. Mr Briggs, in response, said it was never suggested that the claimant had denied making the medical error or that she had attempted to cover up that error.

### **Relevant Law**

72. Section 98 of the Employment Rights Act 1996

**“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 –

5 (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.

10

(2) A reason falls within this subsection if it –

(a) .....

(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 was fair or unfair (having regard to the reason shown by the employer) -

15

(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

20

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

Section 122 deals with basic awards and reductions at Section 122(2) as follows:-

- 5 (1) Where the tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

Section 123 deals with compensatory award at 123(6)as follows:-

- 10 (1) Where the tribunal finds that the dismissal was to any extent caused or contributed to by the action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

15 **Observations on the Witnesses**

73. The respondent's evidence was given clearly by each of their witnesses. As Ms Bonnar indicated, they were each able to deal with the points raised during examination-in-chief and cross-examination as to how they dealt with their respective parts in the proceedings. The claimant's evidence was rather less impressive as she tended to give very short answers. The Tribunal formed the impression that she did not see why there was an issue with her having returned to the Sheltered Housing Complex on the Friday evening, 27 November 2017, contacting the Warden and then being given access to Mr Y's flat where she retrieved Mrs X's medication and then going to her flat, again with the Warden so that she could leave the medication there. Why she did not contact the emergency out of hours telephone number on that Friday evening to explain that she had left Mrs X's medication in Mr Y's flat remained unclear.
- 20
- 25

**Deliberation and Determination**

74. In reaching its decision the Tribunal began by considering the terms of section 98 (1) of the Employment Rights Act 1996 (ERA) which makes it clear that it is for the employer to show the reason for dismissal which should be one of the potentially fair reasons set out in section 98. If an employer can show that the reason for the dismissal is one falling within the scope of section 98 the tribunal must then go on to consider whether the dismissal is fair or unfair. This will depend on whether in the circumstances (including the size and administrative resources of the undertaking) the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee and is to be determined in accordance with equity and the substantial merits of the case.

75. The Tribunal throughout was mindful of the fact that it must not substitute its own decision for that of the employer. Rather, it must decide whether the employer's response fell within the range or band of reasonable responses open to a reasonable employer in the circumstances of the case (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439). The Tribunal bore in mind throughout what this test means in practice. In a given set of circumstances one employer may decide that dismissal is the appropriate response while another employer may decide, in the same circumstances, that a lesser penalty is appropriate. Both of these decisions may be responses which fall within the band of reasonable responses in the circumstances of the case.

76. In this case the Tribunal also bore in mind the test set down by the Employment Appeal Tribunal in **British Home Stores Ltd v Burchell** [1978] IRLR 379 with regard to the approach to be taken in considering the terms of what is now section 98(4) ERA:

“What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to

a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the Tribunal would itself have shared that view in those circumstances.”

15 77. In this case the Tribunal again reminded itself that it is not for it to determine whether or not the claimant genuinely overlooked the fact that she had returned to the Sheltered Housing Complex on the Friday evening but it was apparent that this only became known to the respondent during the course of the investigation. It was not something that the claimant had volunteered at the outset when she was first interviewed on Monday, 30 November 2015 which was only three days after the incidents in question.

25 78. In relation to the investigation, the respondent carried out a very lengthy fact finding and interviewed the claimant on three separate occasions. She chose not to be accompanied. She was asked to and agreed to sign the notes from each meeting. It was not suggested that she did not understand what was being put to her at those meetings. For various reasons, the completion of the investigation process and the disciplinary and appeal processes were spread out over many months. However, it was not suggested that this in any way tainted the outcome. The claimant remained at work with the exception of a period when she was absent on sickness leave.

- 5 79. In relation to the letters summoning the claimant to the disciplinary hearing and the outcome letter these were subject to some criticism with the suggestion that they might have set out some more details as to the issues for consideration. Against this, the claimant knew that there were two issues for discussion.
- 10 80. At the conclusion of the disciplinary process on 13 June 2016 the claimant was informed by Mrs Austin that her “honesty, professional conduct and integrity as a South Lanarkshire employee proved to be questionable”, (page 1.76). The claimant was informed that there had been a breach of employer’s trust and therefore the disposal i.e. the decision of Mrs Austin was that she would be dismissed summarily.
- 15 81. The claimant accepted that her union representative was provided with a full set of papers in advance of the Appeal Hearing. The union had written on her behalf following her dismissal to the respondent to set out the grounds of the appeal. The appeal letter accepts that the claimant had made an error with the wrong medication being given (that is “prompted”) to one of the service user. The claimant had not attempted to cover up the error, (page 1.83).
- 20 82. In relation to the other service user the ground of appeal was that there was not a full investigation. The appeal letter also refers to this being against the level of disciplinary action taken by the respondent.
83. The Appeal Hearing was detailed in that the claimant and Mrs Austin were each questioned and, in effect, cross examined by the other side’s representative.
- 25 84. Much of Mr Briggs criticism of the process was in relation to Mrs Austin being recorded as stating at the Appeal Hearing that had the “matter been purely a medical error, she might have decided on a different disposal, however, she had a real difficulty with the trust issue.”



- 5 85. As the Tribunal understood it, Mr Briggs also took issue with the fact that the issue of trust, honesty and integrity was taken into account by Mrs Austin when she met the claimant on 13 June 2016 to deliver her decision, (the disposal meeting). There is no reference to this in the Paper Apart to the ET1, (page 1.14).
- 10 86. In relation to the issue of the claimant's "honesty, professional conduct and integrity" what Mr Briggs appeared to suggest was that this should have been set out in advance of the disciplinary hearing but it was unclear to the Tribunal how this could have been raised until the disciplinary hearing itself since it was only at that stage that Mrs Austin had the opportunity to meet the claimant and question her about the events of 27 November 2015.
- 15 87. Mr Briggs also referred repeatedly to the Appeal Hearing notes where Mrs Austin was recorded as explaining to the Appeal Panel that she might have decided on a different disposal had it "purely been a medical error" but she had a "real difficulty with the trust issue".
- 20 88. As indicated above, the impression given by the claimant to the Tribunal in her evidence was that she did not see why her returning to the Sheltered Housing Complex on the evening of 27 November 2015 and removing Mrs X's medication from Mr Y's flat and taking it to Mrs X's flat was an issue. She did not seem to see that as she was by then off duty the obvious thing to have done would have been to contact the emergency out of hours service as she did the following evening when she realised that she had given Mrs X's medication to Mr Y in error.
- 25 89. Dealing with the issues for determination, the Tribunal concluded that the respondent had reasonable grounds to believe the claimant had committed the acts of misconduct. The Tribunal also concluded that the respondent carried out a reasonable investigation and disciplinary process, including the Appeal Hearing where the claimant was represented, having declined to do so during the investigation and disciplinary hearing. In relation to Mrs Austin concluding that there was an issue so far as she was concerned with the
- 30

claimant's "honesty, professional conduct and integrity" the Tribunal concluded that she was entitled to reach that view based on the contradictory explanations from the claimant at various stages in the process. In all the circumstances, the Tribunal also concluded that the respondent's decision to dismiss the claimant on the ground of misconduct was a fair reason and was within the band of reasonable responses open to an employer. The Tribunal concluded that it was one which it was entitled to reach in the circumstances.

5

10

90. The Tribunal was satisfied that the respondent believed that the claimant was guilty of the misconduct, that the respondent had in mind reasonable grounds to sustain that belief and at the stage when that belief was formed by Mrs Austin at the disciplinary stage, it had carried out as much investigation into the matter as was reasonable in the circumstances.

15

91. It therefore follows applying the law to the above findings of fact that this claim should be dismissed.

20

25

Employment Judge: F Jane Garvie  
Date of Judgment: 09 May 2017  
Entered in register: 10 May 2017  
and copied to parties

30