Case Number: 1800017/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mrs G Pugh-Bennett**

Respondent: **Muhammad Sharif t/a Orchard View Residential Home**

Heard at: **Sheffield** **On: 14 June 2018**

Before: **Employment Judge Little (sitting alone)**

Representation

Claimant: In person (assisted by Ms E Dolby, PSU)
Respondent: Mr W Haines, Consultant (Croner Group Limited)

RESERVED JUDGMENT

1. The name of the respondent is amended to Muhammad Sharif trading as Orchard View Residential Home.
2. It was not reasonably practicable for the claimant to present her Claim within the extended time period and so the Tribunal does have jurisdiction.
3. The complaint of unfair dismissal succeeds to the extent that this was a procedurally unfair dismissal.
4. However it is inevitable that the claimant would still have been dismissed even if an entirely fair procedure had been followed.
5. Accordingly the claimant is not entitled to any financial remedy but only the remedy which is the declaration that she was unfairly dismissed.

REASONS

1. **The complaint**

Mrs Pugh-Bennett complains that she was unfairly dismissed by the respondent. The respondent contends that the dismissal was fair and that the claimant had committed gross misconduct because of her alleged treatment of a resident. To protect that resident's right to privacy we have referred to her as CS within these proceedings.

2. **The correct identity of the respondent**

The claimant had named the respondent in her claim form as Omar Sheriff. In it's response the respondent contended that the correct respondent was Mr Muhammad Sharif. One of the respondent's witnesses has been Mr Omar Sharif and he has explained that he is the grandson of Mr Muhammad Sharif and that it is his grandfather who is the proprietor of the residential home. Mr Omar Sharif has the title Operations Director. The claimant's contract of employment (pages 30 to 35 in the bundle) is not helpful because it describes the employer as "Orchard View Residential Home", which is not a legal entity. I have not seen any pay slips. On the material before me I am satisfied that on the balance of probability the correct respondent is Mr Muhammad Sharif trading as Orchard View Residential Home and accordingly the title of these proceedings has been amended.

3. **Case management and non compliance with the Tribunal's case management order**

The Tribunal issued standard case management orders on 22 February 2018. These have largely been ignored by both parties. The claimant is unrepresented and it seems may not have understood what was required of her. The respondent's representative seems to have had difficulty communicating with the claimant. In waiting for the claimant to do things that were required under the case management order before it did them, the respondent has perhaps accidentally contributed to the delays and non compliance.

Some of the results of this are that the claimant had not until today disclosed any documents to the respondent. All she has disclosed at today's hearing is an enhanced DRB certificate issued to her post dismissal and a letter from her General Practitioner, Dr Ashton, dated 30 November 2018 – as to which more later.

The claimant has not prepared a witness statement and the respondent only served it's two witness statements on the claimant at approximately 2.30pm on the day prior to the hearing. The claimant appears to have difficulty with the medium of email and the internet and it seemed that she had not looked at those witness statements on screen, still less printed off copies to bring today. Although the claimant was today given hard copies of the two relatively brief witness statements of the respondent, it transpired that at the point when the claimant was due to cross-examine the respondent's witnesses, she had not read those statements. Time was allowed.

The respondent has produced a trial bundle. The claimant appeared to have brought various loose papers with her and in the circumstances I suggested that as the day proceeded if the claimant felt that she had a relevant document which was not in the bundle she should alert me to that fact. As mentioned above nothing else was produced other than the two documents mentioned.

Croner Group Limited had been instructed to represent the respondent on or about 20 March 2018. On 8 June 2018 the consultant appointed by Croner to represent the respondent wrote to the Tribunal seeking a postponement on the basis that the claimant had not complied with her disclosure obligations and because the dismissing officer, whose evidence was unsurprisingly described as being crucial, was unavailable as she was on holiday. It transpires that that

person is Melanie Heaton who conducted the disciplinary hearing on 13 October 2017 which led to the claimant's dismissal.

The respondent's application to postpone was refused by Employment Judge Wade on the basis that it had been made too late. The respondent did not renew it's application before me.

I should add that I checked with the claimant that the purpose of her providing the letter from her GP was not on the basis that she was seeking a postponement because of any health reasons. The claimant confirmed that that was not the case.

4. **Evidence**

The claimant has given evidence. I sought to elicit her evidence in chief by questioning her (in the absence of a witness statement). I should add that fortunately on the day the claimant was able to receive some support and assistance from Ms Dolby of the Personal Support Unit (PSU) based within the court building. The respondent's evidence was given by Ms Dawn Paley the registered home manager. Ms Paley conducted the investigation into the claimant's alleged misconduct. The respondent's other witness was Mr Omar Sharif who conducted the appeal hearing – although he had also been present at the disciplinary hearing, ostensibly as a note-taker.

5. **Documents**

The bundle prepared by the respondent comprised 84 pages.

6. **Time issue**

The claimant presented her claim to the Tribunal on 3 January 2018. However the claim was rejected on the basis that the name of the respondent given in it did not match the name of the respondent given in the claimant's ACAS early conciliation certificate. The Tribunal wrote to the claimant, by email, on 13 January 2018 notifying her of the rejection and the reason for it. Included with that letter was information about applying for a reconsideration of the decision to reject. The letter was sent by email because in the ET1 the claimant had expressed that to be her preferred means of communication. Nothing was heard from the claimant until she telephoned the Tribunal office on 15 February 2018 saying that she had heard nothing since submitting her claim. The clerk who spoke to her on that occasion informed her of the rejection. The claimant said that she had not received the 13 January email. The clerk arranged to send a further copy. On 18 February 2018 the claimant sent an email to the Tribunal giving further information about the correct name, as she believed it to be, of the respondent. Regional Employment Judge Robertson granted a reconsideration so that the claim would now be accepted. The Tribunal sent a letter to the claimant on 22 February 2018 informing her of this, but also explaining that the claim form would now be treated as having been received on 18 February 2018 – that being the date when the claimant had provided the missing information. The Tribunal's letter to the claimant was not copied to the respondent.

The implications of this for the Tribunal's jurisdiction are as follows. The claimant's employment ended on 13 October 2017. The ordinary time limit of three months would therefore have expired on 12 January 2018. However the time during which ACAS early conciliation was taking place is in effect to be added back to extend that limitation period. The claimant had sought ACAS

early conciliation on 27 November 2017 and the early conciliation certificate had been issued on 20 December 2017. The result is that there were therefore 23 non-counting days. That extended the time limit to 4 February 2018. The claimant was not entitled to any further extension of time under the Employment Rights Act section 207B(4). On the basis that the claim was now deemed to have been presented on 18 February 2018 the claim was out of time.

Because the claimant is unrepresented it is hardly surprising that she was unaware that there was any jurisdictional problem. On the basis that the respondent had quite properly assumed that the claim had been presented on 3 January 2018 and was not aware of the deemed date of 18 February 2018,it had not raised the issue.

7. **Resolution of the time point**

As the Tribunal must be satisfied that it has the power to hear the complaint before it and as I would not have the power (jurisdiction) to hear an unfair dismissal complaint if it had been presented out of time, it was necessary at this hearing as a preliminary issue to determine whether time should be extended. The Employment Rights Act 1996 at section 111(2)(b) requires me to consider whether it had been reasonably practicable for the claimant to have presented the claim in time. If I were to consider it not reasonably practicable I then have to go on to consider whether the actual date of presentation was reasonable.

In order to obtain the necessary information the claimant has given evidence by answering the questions I have posed and also by answering questions raised by the respondent's representative. The claimant accepted that although on 15 February she had told the Tribunal clerk that she had not received the Tribunal's letter of 13 January 2018, the reality was that she had probably received it in the sense that it had come into the in-box for her email account but she had not read it. It was clear that the claimant was not computer literate and was not used to the medium of email, despite unfortunately requesting this as her preferred means of communication. She explained that it was her daughter who assisted her with email and that she would have to ask her daughter (who did not live with her) from time to time to see what emails had come in. One might think that as a person expecting to hear something about a claim which they had begun, the claimant would have been astute to ensure that she was checking, via her daughter her email in box on a regular basis. However this is where the claimant's ill health comes in. As this Judgment will be published on line, I do not propose to give the detail of the GP's 30 May 2018 report. Suffice to say the claimant was suffering from chronic depression. As she put it to me her 'head was a mess' at the relevant time. She was hardly getting out of bed.

In these circumstances I am satisfied that the combination of the claimant's unfamiliarity with email and her chronic depression meant that it was not reasonably practicable for the claimant to act promptly in response to the Tribunal's letter of 13 January 2018 and similarly it was not reasonably practicable for the claimant to take the steps which would lead ultimately to the reconsideration of rejection in a timely fashion. In the context of this case, 'presentation' includes dealing with a rejection by making a reconsideration application. I find that it was not reasonably practicable for the claimant to take action so as to ensure that the deemed date of presentation was on or prior to 4 February 2018. Accordingly the Tribunal does have jurisdiction.

8. **The relevant facts**

8.1. The claimant's employment with the respondent began on 18 July 2014. She was employed as a care assistant at the respondent's Orchard View Residential Home at Barnsley.

8.2. On 8 October 2017 the respondent became aware of an incident on the previous day when one of the residents, CS, who has learning difficulties, had allegedly been mistreated by three members of staff. The claimant was said to be one of those three. That information came to the respondent from another carer who had worked on 7 October who had utilised the respondent's whistle blowing policy.

8.3. Mr Omar Sharif, the respondent's operations director, instructed Dawn Paley the registered home manager to investigate the matter.

8.4. As part of that investigation Ms Paley carried out an interview with the claimant. That was done on 9 October 2017. The clamant was not given any notice that there was to be such an interview. Also present at that meeting was a Jane Field and it was she who took the fairly brief handwritten notes that are at page 36 in the bundle. That note records that the claimant was asked about the CS incident and if "she mentioned to CS about masturbating" and if she had seen and heard about the plastic sausage incident. The note records that the claimant confirmed that she was aware. The Claimant went on to say that she was in CS's room with two other carers but she could not remember what had been said or done. However the note also records information, apparently gleaned from the claimant, which refers to Anita (one of the other carers) going into CS's bedroom and coming out to say that CS was masturbating. The claimant said that another carer, Audrey was also there. The claimant then referred according to the note to "everyone kept going in and laughing". In the note there is also an oblique reference to sausages and the claimant said that there had been a comment that "they look like Stuart". The claimant went on to say, according to the note, that Audrey had been the instigator of it all. The claimant's signature appears at the end of this note. In her evidence to me the claimant contended that she had not read this note before signing it. Ms Paley's evidence was that she had taken time to read it before signing it. On the basis that it is a relatively short note I find on the balance of probability that the claimant had read it before she signed it.

8.5. At this meeting the claimant was suspended and subsequently a letter was written to her by Ms Paley dated 9 October 2017 (page 37). The reason given for the suspension was "an incident that has come to our attention over the weekend regarding CS". The claimant was asked not to contact anyone from the home to discuss the matter "because of the severity of the accusation".

8.6. The respondent also suspended Audrey and Anita.

8.7. Ms Paley then carried out further investigations by interviewing all other members of staff who were present at the time of the alleged incident. Copies of these statements in anonomised form appear at pages 38 to 43. The only blanks in those statements are where the maker of the

statement's name would have appeared. Throughout most of the hearing before me I had assumed that the respondent wished to keep confidential the names of the makers of those statements on the basis that promises to that effect may well have been made during the course of the investigation and in particular in compliance with the respondent's whistle blowing policy. However, somewhat to my surprise, during the course of Ms Paley's evidence, when I asked her whether these typewritten versions had been transcribed from handwritten notes or statements from the individuals, or whether they had been compiled on the basis of interviews with those individuals, I was told that it was the former and that these documents were with the respondent today and could be seen by me if desired. Initially Mr Haines expressed some concern that confidentiality might be breached and so I allowed an adjournment so he could take instructions specifically on this point. On resumption of the hearing it was confirmed that it was in order for the original documents, or at least copies of them, to be seen by the claimant and by me. It is regrettable that the respondent did not take this decision much earlier and disclose those original documents to the claimant within these proceedings. However there have been the problems with disclosure that I have mentioned above where essentially it seems the respondent delayed disclosing to the claimant in circumstances where the claimant was not responding to the respondent's request for disclosure.

8.8. "Statement 1" as it appears at page 38 in the bundle can now be seen to be the statement of a care worker who I will refer to as AS (although the claimant now knows the actual name and the names of the other statement makers). It appears that AS was the whistle blower. She says that on Saturday 7 October at around tea time she came along a corridor to find the claimant and Anita outside CS's bedroom laughing and telling other members of staff that CS was masturbating. AS subsequently saw the claimant, Anita and Audrey in the foyer with some plastic sausages. AS says that she saw the claimant go into CS's bedroom followed shortly thereafter by Audrey and Anita. AS then goes on to say that she heard the claimant say to CS that she had brought some sausages with words to the effect that she could "slide them up". The claimant was also heard to say to CS something along the lines of "smell your fingers now".

8.9. "Statement 3" (page 39) is now known to be the statement of VP who was the Senior in charge at the time. She reports that she was informed by AS at approximately 18.45pm on 7 October that the claimant had been in to CS's bedroom with the plastic sausages and that there had been the reference to smelling her fingers.

8.10. "Statement 4" is on page 40 and it is now known that this is the statement of AC. AC was not a witness to the events of 7 October and her evidence is about what she had been told on 8 October by VP. However AC also states that on 8 October CS came to her to say that she was really angry with the situation and said "whose' that Gillian (the claimant) to come to my room with plastic sausages and tell me to go fuck myself, it's my room and nothing to do with them".

8.11. "Statement 5" on page 41 is now known to be the statement of GR who was not a direct witness, although had heard of the incident from others.

8.12. "Statement 6" on page 42 is now known to be made by Audrey. Audrey who had also been suspended (and subsequently dismissed) was I was told at the time a close friend of the claimant and had been a bridesmaid at her wedding. Her statement was that on 7 October the claimant had come to the kitchen and told her that CS was masturbating in her bedroom. Audrey had gone along the corridor and found AS and the claimant at the bedroom door. Audrey said that she had not gone into CS's bedroom and instead went to sit in the foyer. Audrey went on to say that she had been told that someone had taken the plastic sausages into CS's bedroom. Audrey had seen and heard nothing else.

8.13. "Statement 7" is now known to be that of Anita. She said that the claimant had done the tea trolley in the afternoon (of 7 October) and had told her that CS was masturbating. Subsequently she was aware of the claimant laughing in the corridor and that the claimant had gone into CS's bedroom a couple of times, laughing. She then saw the claimant trying to push AS into CS' room and at that stage the claimant was still laughing. Anita then saw the claimant with some plastic sausages and at that stage she was walking down the corridor. A little later in the day, when care plans were being prepared Anita said that the claimant had referred to seeing CS naked with a towel across her lap and made the comment that CS had been nearly ready to come and she must have disturbed her so she will have to start all over again. Anita goes on in her statement to say that she told the claimant that her behaviour was inappropriate and commented that the claimant had changed since getting married and had been unprofessional.

8.14. On 12 October 2017 Ms Paley wrote a letter inviting the claimant to a disciplinary meeting scheduled to take place the following day at 10.30am. A copy of that letter is at page 44. The reason for the disciplinary meeting is described as "the incident that happened on 07/10/17. This is regarding the allegations of verbal/sexual nature of abuse made to a resident here in the care of Orchard View". The letter went on to say that Ms Paley had tried, unsuccessfully, to contact the claimant by telephone from 8.30am that morning and so the letter would be hand delivered "giving you over 24 hour notice of your hearing".

Ms Paley's evidence was that one of her colleagues had tried to hand deliver the letter to the claimant on 11 October (which seems rather unlikely as the letter was not written until the following day). Her evidence was then that there was a second attempt on 12 October and that the colleague reported that at approximately 9.35am she had personally delivered the letter into the claimant's hands at her home. In contrast the claimant's evidence was that the delivery was not made until around 'tea time' on 12 October, with the result that she had less than 24 hours notice.

8.15. The claimant attended the disciplinary hearing on 13 October 2017 and that hearing was conducted by the manager of another residential home operated by the respondent, Dearne Lea. That manager was Melanie Heaton. As mentioned above Mrs Heaton has not prepared a witness statement and has not attended today's hearing. There are some notes of this meeting at pages 45 to 47. Mr Omar Sharif was also present and he was the note-taker. His evidence to me was that he

restricted his role to note-taking unless he needed to check an answer which the claimant had given.

8.16. The claimant's evidence was that Mr Sharif took a more proactive role.

8.17. One of the pre-prepared questions which appears at page 45 is "Can you tell me in your own words in detail what happened on 7.10.17?" The reply given by the claimant is recorded as "only thing I remember was hearing staff laughing, finished with residents so went to see who was laughing". There is then a note saying that the claimant thought that it was Audrey and Anita who opened CS's door.

The claimant is also recorded as saying:

"I hate myself for what happened as I know it was wrong" (see page 46).

The claimant's evidence before me was that although she had said that she hated herself for what had happened, she had gone on to say that what she meant was she should have reported it, rather than that she knew that it was wrong.

Subsequently the claimant is reported as saying that everybody was "on about" the sausages shown to CS. The claimant accepted that before the sausages were shown to CS she the claimant had held them but it had been Anita who said – "Ask her if she needs those because they look like Stuart". The claimant also said that it had been Anita and Audrey who kept opening the door to see what CS was doing.

At the foot of the note (page 47) is the claimant's signature. The claimant again alleges that she signed without reading the note.As before the respondent disputes this.

On page 49 of the bundle is a note headed "Findings after meeting 13 October 2017" and I was told that this was a note made by Mrs Heaton. This records that the claimant, Anita and Audrey would be dismissed from duty from 13 October 2017 due to gross misconduct. The note goes on to say that various other individuals involved in the 7 October incident would be given further training or supervision. The note also records that Dawn (Paley) was to correspond with the CQC and the Police regarding the incident.

8.18. On the same day, 13 October 2017, a letter of dismissal was written. Whilst the decision had been taken by Mrs Heaton, it was Ms Paley who wrote that letter (page 50). The letter read - "I'm writing to inform you further regarding the incident that happened on 07/10/17. The allegations of verbal/sexual nature of abuse made to a resident here in the care at Orchard View (sic). After viewing all the evidence, we have concluded that this was gross misconduct and we are terminating your contract of employment with immediate effect".

8.19. The claimant appealed against that decision in an undated letter, a copy of which appears at page 69 in the bundle. The claimant's grounds of appeal were that she had been given less than 24 hours notice of her disciplinary hearing; she had not been provided with any evidence beforehand and the statements that were used against her were only sent to her on 14 October after the decision to dismiss and that those statements were all anonymous "which does not given (sic) me the fair

and reasonable chance to question the statements or the person making the statement".

8.20. The parties' respective positions on the anonymous statements and their provision or otherwise at the 13 October meeting is as follows. The respondent acknowledges that copies of those statements were not sent to the claimant in advance of the hearing. They were not for instance enclosed with the letter of invitation. However the respondent says that those statements were "on the table" during the course of the disciplinary hearing. It appears however that even on the respondent's case the claimant was not invited to look at those statements nor it seems did Mrs Heaton quote from those statements or ask the claimant to comment on any specific point raised therein. The claimant's evidence is that she simply did not see the statements until after she had been dismissed.

8.21. By now the claimant had asked her Union to assist her and the claimant was receiving advice from a union official who she can only name as Michael. The intention was apparently that Michael would accompany the claimant to the appeal meeting which had now been scheduled for 9 November 2017. In the event Michael could not attend on that date because he was on holiday. I asked the claimant whether she had considered asking the respondent to postpone the meeting to a date when the union representative could attend. The claimant accepted that Michael had suggested to her that she should ask for an adjournment in those circumstances. However the claimant's evidence to me was that she just wanted to get it over with. It is in those circumstances that she attended the appeal hearing alone.

8.22. Notes of the appeal hearing appear at pages 70 to 72. The appeal was conducted by Mr Omar Sharif (although he was described as Omar Khan in the notes). Mr Sharif had of course been the note taker for the dismissal hearing. The note taker for the appeal hearing was Melanie Heaton, the dismissing officer. The minutes begin by recording that the claimant stated that she did not need the Union and rather than delay it she wanted to get it over and done with.

8.23. The claimant raised the issue that the statements against her were all anonymous. Mr Sharif explained that that was because of the whistle blowing policy. The claimant denied that she had gone into any bedroom. On the question of short notice for the disciplinary hearing Mr Sharif described 24 hours notice as the legally required time. In this meeting the claimant said that she had not got the letter until 11am on 12 October (although as noted she told me that it was much later in the day). The claimant said that although she had been told by Ms Paley that the matter would be reported to the Police the claimant had been to the Police herself who had apparently told her that there was no evidence.

On the appeal point about not receiving the statements until after dismissal, the note records Mr Sharif saying that the evidence was "on the table we gave you the opportunity to speak and asked us (sic) so we could give you the evidence and stopped the meeting". The claimant's reply to this suggests that she did not know that that could be done. The claimant reiterated that she had not gone into the bedroom and she

intended to take it further. Mr Sharif went on to say that the respondent had evidence from several witnesses to say what had happened. The claimant accused Mr Sharif of having an attitude towards her. The claimant reiterated that she did not do anything and she was not going to back down in taking it further. The claimant signed the respondent's note of this meeting (see page 72).

8.24. On 14 November 2017 Mr Sharif wrote to the claimant (see page 73). He stated that he had carefully considered all the facts presented and listened to what the claimant had said. However the decision to terminate the claimant's employment stood.

9. **My conclusions**

The essence of the claimant's case is that she was an innocent bystander to the events on 7 October 2017 in relation to CS. Whilst seeing and hearing what happened the claimant had taken no part in the mistreatment. In the very brief details of claim given in the ET1 claim form the claimant had written:

"I was dismissed as I was wrongly accused of gross misconduct and psychological harm against a resident. I was not involved in this. They said other employees had made statements against me but I was not shown this evidence before being dismissed. I appealed but didn't get anywhere. They also didn't follow disciplinary procedures".

9.1 Can the respondent show the potentially fair reason of conduct?

The Employment Rights Act 1996 sets out the various reasons for dismissal which will potentially be fair reasons. One of those is a reason which relates to the conduct of the employee. It is that reason which this respondent seeks to show. Bearing in mind that there is a difference between a potentially fair reason and an actually fair reason it must be the case here that the respondent has shown a potentially fair reason because they rely upon gross misconduct which naturally comes within the statutory formulation I have just referred to.

9.2 Was that reason actually fair?

Here the statutory test is:

"Where the employer has (shown a potentially fair reason to dismiss) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and (b) shall be determined in accordance with equity and the substantial merits of the case".

As noted above, the claimant's written case is very brief.

As far as substantive unfairness is concerned the claimant's case is essentially that she did not do it. In addition the claimant also says that the dismissal was procedurally unfair. In her appeal grounds (page 69) she has referred to the short notice for the disciplinary hearing; the respondent's alleged failure to provide her with copies of the evidence it was relying on before dismissal and the fact that those statements when subsequently seen were anonymous which the claimant says did not

give her a fair chance to question the statements or the people making those statements.

I have also sensed that the claimant believes that her dismissal must be unfair as neither the Police nor the CQC followed up the allegations made against the claimant with the result that the claimant has subsequently been able to obtain her enhanced DRB certificate that she has shown me.

9.3 Procedural fairness - the law and general principles

The procedure adopted and put into effect by an employer when conducting a disciplinary process must observe the principles of natural justice. One of those principles is that a person against whom allegations are being made needs to have sufficient information about those allegations and the evidence which supports them in order to properly put forward their defence or explanation for the charge against them.

An employer is also expected to follow the minimum level of procedure as set out in the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Code provides that a failure to follow it does not in itself make a person liable to proceedings but notes that Employment Tribunals will take the Code into account when considering cases. One of the basic principles set out in the Code is that employers should inform employees of the basis of the problem (in this case the allegations about the 7 October incident) and give the employee an opportunity to put their case in response before any decisions are made.

As far as the investigation by the employer is concerned, the Code says that where practicable different people should carry out the investigation and the disciplinary hearing.

When the employee is informed of the problem, that notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It will normally be appropriate to provide copies of any written evidence, which may include witness statements, with that notification.

The law recognises that in certain cases an employer will be permitted to rely upon evidence from an informant who wishes to remain anonymous. The Employment Appeal Tribunal (EAT) gave some guidance about the approach to be followed in this type of case in **Linfood Cash and Carry Limited v Thomson** [1989] ICR 518.

Part of the guidance given was that the informant's written statement should, with redactions if necessary, be made available to the employee. If the employee raised an issue that needed to be put to that informant there might be a need to adjourn the preliminary process so that whoever is chairing that meeting can put that question to the informant him or her self. These are not hard and fast rules in the sense that the EAT in the Linfood case acknowledged that every case would depend upon it's own facts. Moreover there is no general rule that a failure to make the evidence itself available to an employee will always amount to a breach of natural justice. It remains essential that the employee is fully aware of the case against them and has a full opportunity to respond to the allegations.

The ACAS Code goes on to provide that the disciplinary hearing should be held without unreasonable delay but the employee must be allowed a reasonable time to prepare their case. The Code does not define what a reasonable time is, as naturally that is likely to differ depending upon the complexity and seriousness of the issues. Whilst the respondent has placed emphasis on having given 24 hours notice, I am not aware that this is regarded as a universally acceptable minimum notice period.

In terms of how an appeal should be conducted, the Code provides that it should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case.

Ultimately the question is whether the employer's procedure comes within a reasonable band. Regard must also be had to the size and resources of the employer.

9.4 Procedural fairness -application of these principles in the case before me

9.4.1 Although the claimant accepted that when called to the investigation meeting on 9 October 2017 she anticipated what it would be about, the respondent subsequent to that meeting never provided the claimant with detailed information about the charge against her. It was only described as what happened on 7 October 2017 and an allegation that there had been verbal or sexual abuse of a resident.

9.4.2 There is then the question of the claimant not seeing the evidence against her prior to being dismissed. The respondent failed to enclose with the invitation to the disciplinary hearing copies of the statements it had taken from the other individual's involved or those who had witnessed the incident.

9.4.3 It is clear that in principle the respondent had no objection to the claimant seeing the anonomised statements. It seems that they were "on the table" at the disciplinary hearing. However as the claimant was unrepresented and no doubt unused to this type of procedure, I find that it was incumbent on a reasonable employer to draw the claimant's attention to those statements, invite her to read them and briefly adjourn the disciplinary hearing so that the claimant could take stock of what she had read. All the statements were relatively brief.

9.4.4 Although in her appeal letter the claimant complained about not having the chance to question those who had made the statements, there is no right for an employee in the claimant's circumstances to have that opportunity. In fact in a case where the witnesses are anonomised for good reason at the time (which I find applies here) it would obviously be impossible for that to occur.

9.4.5 I find that giving the claimant only 24 hours notice of the disciplinary hearing – or possibly a little less – is not ideal. However, ironically, as the respondent had failed to disclose it's evidence to the claimant there was really little preparation that she could undertake prior to the hearing.

9.4.6 It could be said that giving short notice meant that the claimant could not arrange for her Union to attend with her. However the claimant's approach to union representation at the appeal hearing must cast some doubt on whether she would have taken any steps in that regard for the disciplinary hearing anyway.

9.4.7 There is then the arrangements the respondent made about who would be present at both the disciplinary and the appeal hearings. Although I accept that the respondent's operation is relatively small, it is clearly undesirable for a person who has been the note-taker at the disciplinary hearing (and on the claimant's case has actively participated in a disciplinary hearing) to be then the person who conducts the appeal. In a similar way, to have the dismissing officer present at the appeal hearing - albeit probably only as the note-taker is unlikely to give the employee confidence that the appeal is going to be considered in an impartial way. Indeed it could be seen as somewhat intimidating to have present at that meeting the person who made the decision you are appealing against.

For all these reasons I find that the claimant's dismissal was procedurally unfair.

9.5 Substantive fairness

As I have explained to the claimant, it is not a question of whether I would have decided that the claimant should be dismissed. Instead the question is whether a reasonable employer could have dismissed.

It is necessary for the reasonable employer to carry out a reasonable investigation; to have a belief in the employee's guilt and to have reasonable grounds for that belief.

I find that this respondent did carry out a reasonable investigation as it interviewed the key witnesses to the incident and it's aftermath. Those statements were unanimous in describing the claimant as having a very substantial involvement in the quite appalling treatment to which CS was subjected. Rather than being an innocent bystander, she was on the basis of the accounts that the respondent had, the instigator.

The respondent was entitled to regard some of the claimant's answers during the disciplinary process as tacit admissions of her guilt or at least some esponsibility.

The respondent also had the benefit of knowing the identities of those who were giving evidence against the claimant. Those included Anita and Audrey who they knew were good friends of the claimant and in fact such good friends that they had recently been her bridesmaids. The claimant was not able to suggest any reason why those witnesses had a reason to lie. They had no axes to grind - although a reasonable employer would have treated with some caution the statements of the claimant's "co-accused" who might want to seek to minimise their own responsibility by casting the claimant as the ringleader.

Despite the latter observation, I am satisfied that the respondent had an overwhelmingly valid reason to conclude that the claimant had committed gross misconduct and that the appropriate sanction was summary dismissal.

9.6 No action taken by other authorities

The claimant told me that no action was taken by CQC or the Police and she has subsequently been able to obtain a new DRB certificate. However that misses the point. Those bodies had quite properly been notified of the incident by the respondent and of the outcome. Those

authorities took the view that in the circumstances no further action was required from them and it is presumed that there was no criminal complaint from CS herself. It is therefore not a case of the respondent coming to one conclusion and the CQC and the Police coming to a different conclusion. No other authority had come to a conclusion other than that they were satisfied with the action which the respondent had taken.

9.7 The overall result – would a fair procedure have made any difference and if so what?

In the case of **Polkey v A E Dayton Limited** ICR 1988 142 the House of Lords (Judicial Committee) was considering a case where the employer had failed to consult properly, or at all, in a redundancy situation. A principle was established that if a dismissal was found to be unfair purely on procedural grounds a consideration in terms of compensation was whether the employee would still have been dismissed in any event even if a fair procedure had been followed. This principle was based on the provision now contained in the Employment Rights Act 1996 section 123 which provides that the amount of a compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal.

In the circumstances of the case before me I am satisfied that even if the procedural irregularities that I have found to exist had not been present it is inevitable that the claimant would still have been dismissed. It follows that she has suffered no loss by being unfairly dismissed because, bar the procedural failings, she would have been fairly dismissed.

9.8 Contribution.

I have the power to reduce, potentially to nil, compensation in an unfair dismissal case if I find that the employee has contributed by their own actions to the unfair dismissal. On the basis that I have already found that there should be a reduction to nil because of the Polkey principle mentioned above I refrain from making any findings with regard to contribution as it is unnecessary.

If I had been considering that matter a factor that I would have taken into account is why, as a very experienced care worker, the claimant whilst contending to be an innocent bystander to actions which she must have realised were wholly wrong took no steps to report the matter in the way that,

to her credit, AS did. Clearly the claimant had the opportunity to do that because she worked on the following day, Sunday and indeed she worked on the Monday until such point as she was suspended.

Employment Judge Little

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Date 4th July 2018