



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms N Coleman  
**Respondent:** Highcroft Care Home Ltd  
**Heard at:** East London Hearing Centre  
**On:** 27<sup>th</sup> May 2021  
**Before:** Employment Judge Reid

## Representation

**Claimant:** in person  
**Respondent:** Mr Chand – owner

*This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.*

## JUDGMENT (Reserved)

The judgment of the Tribunal is that:-

1. The Claimant was unfairly dismissed by the Respondent contrary to s94(1) Employment Rights Act 1996.
2. The Tribunal's findings on a *Polkey* deduction and contributory fault under s122(2) Employment Rights Act 1996 (basic award) and s123(6) Employment Rights Act 1996 (compensatory award) are set out below.
3. The Claimant's claims for holiday pay and notice pay are dismissed on withdrawal.

Note: a remedy hearing has already been booked with the parties for **17<sup>th</sup> September 2021** (one day CVP 10 am) in the event that the parties are unable to agree the compensation within the assistance of the findings set out below as regards *Polkey* and contributory fault. Orders for that hearing if one is required are enclosed.

# REASONS

## Background and claim

1 The Claimant presented a claim form on 8<sup>th</sup> November 2020 claiming unfair dismissal, holiday pay and notice pay. The Respondent accepted that it had not had a disciplinary hearing with the Claimant in its response (ET3 para 22, page 35) and said that compensation should be reduced under *Polkey* and under s122(2) and 123(6) Employment Rights Act 1996 for contributory fault. The Respondent said it had dismissed the Claimant for falsification of records (forms regarding pressure area checks and medication), failing to follow its procedures, potentially bringing the Respondent into disrepute and insubordination in not providing to the Respondent text messages from other staff who making complaints to the Claimant (ET3 para 19, page 35). In submissions this was couched overall as a breach of trust and confidence.

2 At this hearing the Claimant confirmed that she had by now accepted the proffered payment of her notice pay and that she therefore no longer claimed notice pay. She confirmed that she also accepted that the Respondent had paid her the outstanding holiday pay she claimed.

3 The Respondent confirmed at the beginning of this hearing that it was still going to argue that the Claimant's dismissal was fair, notwithstanding no dismissal procedure had been gone through, on the basis that her conduct was so serious that it justified that failure.

4 As both parties were not legally represented at the hearing I explained the issues to them including, if the Claimant won her unfair dismissal claim, relating to a *Polkey* deduction and reductions for contributory fault.

5 I was provided with an electronic bundle in 3 parts including witness statements from the Claimant, from Mr Chand, from Mrs Gravesande (Manager) and Mrs Matjusenko (Deputy Manager). I heard oral evidence from all four witnesses. The hearing did not start till 11.30am due to technical issues with Mr Chand's sound. The hearing finished at 5.05pm. Due to lack of time to hear oral submissions the parties each provided written submissions subsequently (and in the case of the Respondent, supplemental submissions commenting on the Claimant's).

## Findings of fact

### The manner of the Claimant's dismissal

6 I find that Mr Chand, Mrs Gravesande and Mrs Matjusenko met with the Claimant on 31<sup>st</sup> August 2020 to discuss various concerns. The Respondent accepts in its ET3 that this meeting was not a disciplinary meeting and that it did not hold one. Her employment was then terminated without notice on 1<sup>st</sup> September 2020 initially by text message from Mr Chand and subsequently confirmed by email from Mr Chand. The Claimant was not told she had a right of appeal and there was no appeal hearing.

7 The Claimant's dismissal was therefore procedurally unfair because there was no disciplinary meeting and no appeal. The Respondent breached the ACAS Code of Practice (2015) (paras 9-29). The Respondent is a small employer (21 employees) but a basic fair procedure could have been followed.

8 Taking into account the findings set out below about what happened, I find that this was not a case where going through a fair dismissal procedure was pointless. The allegations against the Claimant at least merited her being able to put her case (having been informed in advance of the allegations against her) and the ability to appeal the decision to dismiss, taking into account the consequence was her potentially losing her job in a regulated sector. The allegations about failures over medication procedure, pressure area checks procedure and missing medication were serious but were not so serious justifying no procedure at all even though the Respondent has regulatory responsibilities to the CQC and obligations to the local authority.

#### The Claimant's role as Senior Carer

9 The Claimant was one of three senior employees, just below the manager Mrs Gravesande and the deputy manager Mrs Matjusenko. They were the only employees who could administer prescribed medication. The Claimant's senior position is relevant to what might have been the outcome even if a fair procedure had been gone through.

#### The allegation about the pressure area check form completed by the Claimant on 9<sup>th</sup> August 2020 (pages 77-77A)

10 I find that the Claimant had training on the new form (which had been introduced during the Claimant's period on furlough) with Mrs Gravesande on 5<sup>th</sup> August 2020. I find that Mrs Gravesande did the pressure sore checks jointly with the Claimant around 11am and that they both then signed the form to record those checks had been made. They then did the same again for the resident requiring a 2pm check and each signed the form again. It was therefore clear to the Claimant that for each check she needed to sign the form again at the time she did the check as did the other member of staff doing the check with her. The Claimant said this training never happened and that she was just handed the form by Mrs Gravesande at some point during the day to countersign (and without the Claimant having in fact done the checks with her) but I find based on Mrs Gravesande's evidence and the fact that the Claimant has countersigned the form against the 11 am checks and the 2pm check that she did these rounds with Mrs Gravesande and counter-signed the form each time.

11 I find it was also clear on the face of the form that the checks required two signatures when the check was done and this is the way the Claimant was shown how to do it.

12 The form completed by the Claimant on 9<sup>th</sup> August 2020 was not completed properly because she did not sign each time she did the checks throughout the day but signed once. This was not a minor matter of form filling but an important part of the Respondent's ability to meet regulatory requirements and demonstrate that its records were reliable and accurate.

13 There was a contradiction in evidence between Mrs Gravesande and Mrs Matjusenko as to how many forms per day shift needed to be completed as the former said it was two forms per day (ie a morning form and an afternoon form) and the latter said it was only one form per day shift. I find that the form was not particularly well designed in terms of the size of space for each check and for each set of two signatures for that check. It was however clear taking into account what Mrs Gravesande had shown the Claimant that two signatures were needed for each check and that signature was to be done when the check was done and not countersigned by the other staff member at some later point, even if they in fact also taken part in all the checks. Whether or not the forms were badly designed and whether or not one or two forms were required during the day shift, what was clear was that the checks had to be recorded and signed by both members of staff at the time they did the check.

14 The form was wrongly completed because the Claimant (and her junior colleague Elena) did not sign the form each time they did each batch of checks that day. The Claimant said at the hearing firstly that she had done the checks at the identified times, herself signed the form when she did the first check (which is why she said there is only one signature) and then given the form to Elena at the end of the day to countersign. Later she said that she and Elena had done the checks together and Elena had counter signed the form at the end of the day. This was inconsistent. I find that the Claimant did not do the first round of checks with Elena because had they done them together she would have asked Elena to countersign the form at the time of the first checks, which was the time she said she herself had signed the form, and not wait till later in the day. In any event the form as completed by the Claimant in the way she did, was not reliable to show that both she and Elena had both done checks at the times recorded because they had not both signed each time. On the Claimant's own account Elena had not signed at all until the end of the day (page 88), after Mr Chand looked at the form around 5pm.

15 When Mr Chand inspected the form around 5pm (against the backdrop of the concerns already raised by Mrs Gravesande, page 75) the form already had '6pm' written on it. The Claimant's explanation at the hearing was that when she did the check prior to this one she wrote down '6pm' in effect to note when the next check was due. However this made the document unreliable because it was saying in effect that the check at 6pm had been done (a reasonable supposition from what was written by the Claimant on the form given she had already signed it) when it could not have been done (or could have been but not at 6pm) and was inconsistent with her evidence that the timing of a check might vary across a batch done at the same time (eg an 11 am check could have times for different residents at say 10.55 am and 11.05 am) because she could not do them all at precisely the same time. She was writing down 6pm when that was only her then estimate of when she would in fact do the next check. This meant that she was representing the next check would be at 6pm when she knew it wouldn't necessarily be at that time because of that variation, evident from eg the 11am checks. This in turn reasonably cast doubt on the reliability of the document more widely as to whether what it recorded had happened, had in fact happened at the times stated and by both members of staff as required. In any event the 6pm check had not been done at 5pm. I find this was a serious matter given the Claimant's seniority and given the Respondent's obligations to residents and wider accountability to the CQC and to the local authority. The Respondent referred to it as 'falsification of records' in its response which suggests a deliberate dishonesty whereas I find it to be sloppy and inaccurate record keeping likely to have been due to the Claimant wanting to short circuit paperwork where possible despite knowing the way the form had to

be completed and signed per check, at the time the check was done.

The allegation about the medication form completed by the Claimant on 9<sup>th</sup> August 2020 (pages 76-76A)

16 This was not one of the stated reasons for dismissal in either the dismissal text or the subsequent email. Mr Chand's oral evidence was however that this had been missed out by mistake and that it had been one of the reasons. Whether or not it was a reason in his mind at the time of the dismissal it is nonetheless relevant to the issues of Polkey and contributory fault when it comes to assessing compensation.

17 The issue arose when Mr Chand looked at the form around 5pm and noticed that the 6pm medication had already been ticked as administered by the Claimant. Her explanation at the hearing was that this was because the practice was to give medications at 5pm and not 6pm, particularly where it needed to be taken with food and that she told Mr Chand that she had already given that resident their 6pm medication when he asked her. However I find that on the day she in fact said to Mr Chand (his witness statement para 12) that she had ticked off the 6pm medication and that she would give it to the resident before she left for the day, and did not give the explanation that she had already given it (and the concept of giving it with food at 5pm was not therefore relevant to her explanation on the day). Her account on the day was therefore different to her account at the hearing. She said the form was pre-prepared by the pharmacy giving the fixed times on the form but if as she said she had not given the medication at that point but was planning to give it at 6pm before she left (her account at the time), then she should not have ticked it off by 5pm as that made the document an unreliable one to record what in fact happened that day with the resident's medication. In addition if she forgot to do so the records would show it had been given when it had not been given. This was also a serious matter. Again this was not 'falsification of records' but was sloppy and inaccurate to record that something had been done at a time it had not in fact been done (her account on the day).

The allegation about the missing Ibuprofen

18 I find that on 24<sup>th</sup> August 2020 when she returned from holiday Mrs Gravesande discovered that 20 Ibuprofen tablets for a resident was missing and she completed a medication error report (page 78) having spoken to Mrs Matjusenko and the Claimant. Based on the account the Claimant gave at the time and at the meeting on 31<sup>st</sup> August 2020 that she may have put them in the kitchen bin I find that she either did that or discarded them somewhere else and put the empty box in the medication room bin. I accept their account over hers (that she in fact put the box in the 'returns box' in the filing cabinet for return to the pharmacy) because that is what she said at the time when it was discussed with her and she did not give the explanation she gave at the hearing (and in her witness statement para 10 and in her claim form) that she had put them in the returns box so could not explain how the empty box came to be in the medication room bin. She also volunteered that they could be bought over the counter implicitly suggesting that she could replace them or that it was not a big deal to replace them consistent firstly with in fact being responsible and secondly with a lack of understanding that procedures with regard to medication were very important. This was also a serious matter.

19 Taken together I find that these three matters were sufficiently serious to mean that the Claimant would have been dismissed in any event, even had a fair procedure been followed taking into account her senior role, the Respondent's obligations to its vulnerable residents, the need for clear and accurate record keeping and medication control and the regulated environment.

20 The core problem was the area pressure form had not been completed and signed by both staff members at the time of the checks (and it was her responsibility as the senior person) and the medication form recorded medication given when it had not necessarily yet been given (and might be forgotten). There was also Ibuprofen missing which was a serious issue. Whilst the Claimant might have raised arguments in a disciplinary hearing about whether the pressure area forms were properly set up and whether one or two forms were needed in a day shift making the whole situation with the form unclear, the core of it was still that the form had not been completed and signed by her and her colleague (and the Claimant was the more senior) at the times the residents had been checked and was thus not a reliable document. She might also have claimed as she did by the time of this hearing that she had in fact given the medication by 5pm but that was not what she was saying at the time. She might have insisted that the CCTV footage by the medication room be checked to see if her account that she had put the Ibuprofen in the pharmacy box in the filing cabinet was correct, but whilst footage might have shown her going into the room or in the room it would not have shown the detail required to know what boxes for which resident were in her hands or the finer detail of what she was doing.

21 I find the above conduct namely a failure to follow important procedures and complete reliable documentation to be blameworthy conduct by the Claimant, taking into account her senior role and knowing what was expected of her. This was not a case of a minor error by the Claimant or an error arising because she was not sure about procedures to be followed.

The other allegations (gossiping/not sharing staff grievances/absence of room to room handover)

22 None of the Respondent's witnesses in their witness statements covered the allegation about room to room handover referred to in the termination email and it was not mentioned as one of the reasons for dismissal in the Respondent's response. I therefore find this allegation unfounded.

23 Mr Chand in his oral evidence confirmed that the allegation in the termination letter about 'gossiping' overlapped with the allegation about not sharing staff grievances. In its response this was described as 'insubordination about text messages' because the Claimant had not provided to Mr Chand the text messages from other colleagues containing grievances about work. I find therefore that in substance this was the same allegation namely that the Claimant refused to tell Mr Chand what the staff grievances were about, having told him she had received them.

24 I find the Claimant was adopting a kind of passive-aggressive approach. She was on the one hand volunteering to Mr Chand that staff members were unhappy and had discussed problems with her but on the other hand then refused to tell him what they were about or who it involved, citing confidentiality. She said at the hearing that this was because

the things other staff were raising with her did not affect the smooth running of the home in which case it was unclear as to why she was telling Mr Chand they existed. Whilst this was frustrating for Mr Chand who could not do anything in the absence of information about what the problem was and was being stymied by the Claimant on the one hand telling him there were complaints but then not telling him what they were about, I find this issue to be less serious than the matters set out above. Mr Chand's order to deliver up the text messages by a certain time and then when she did not do so treat it as 'insubordination' (response para 19) was disproportionate. I however find that although this on its own was not a matter serious enough to mean that fair dismissal would have been the outcome even if the correct dismissal procedure had been followed, it adds to the likelihood that the Claimant would have been dismissed in any event because she was persisting in an approach which was leading to a breakdown of working relationships.

25 Whilst this matter was extremely frustrating for the Respondent I do not find this of itself to be blameworthy conduct by the Claimant in the same way as the other three matters set out above.

#### Relevant law

26 S98(4) Employment Rights Act 1996 provides that whether a dismissal is fair or not (taking into account the reason) depends on whether in the circumstances (including the size and administrative resources of the employer) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal. This includes consideration of whether a fair procedure to dismiss was followed by the employer, taking into account the requirements of the ACAs Code of Practice (2015).

27 It is only in exceptional cases that following such a procedure, including the right of appeal, is futile (*Afzal v East London Pizza Ltd t/a Dominos Pizza* EAT 0265/17).

28 It is for the employer to adduce evidence that the employee would have been dismissed in any event if a fair procedure had been followed or to support an argument that the employee would not have been employed indefinitely (a *Polkey* deduction) (*Compass Group v Ayodele* [2011] IRLR 802). *Software 200 Limited v Andrews* [2000] ICR 82 identified the need to consider whether it is not possible to reconstruct what might have happened such that no sensible prediction can be made.

29 The test for conduct dismissals is set out in *BHS v Burchell* [1978] IRLR 379, namely that the employer must have a genuine belief that the misconduct has occurred, on reasonable grounds and following a reasonable investigation. The dismissal must be within the range of reasonable responses (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439) which means that provided a dismissal is within that range (encompassing the strict employer to the more relaxed employer) a dismissal is fair. These cases are relevant to whether the Respondent would fairly have dismissed had it also carried out a fair procedure.

30 The basic award for unfair dismissal can be reduced under s122(2) Employment Rights Act 1996. This is where any conduct of the employee before dismissal was such (whether or not the employer knew about it) that it would be just and equitable to reduce the amount of the basic award in which case the Tribunal shall make that reduction. The conduct must be blameworthy (*Nelson v BBC (No 2)* 1979 IRLR 346).

31 The compensatory award for unfair dismissal can be reduced under s123(6) Employment Rights Act 1996. This is where the Tribunal finds that the dismissal was caused or contributed to by any action of the employee before the dismissal in which case the Tribunal shall reduce the compensatory award by such proportion as it considers just and equitable. If the employer did not know about the conduct, no deduction can be made. The conduct must be blameworthy (*Nelson v BBC (No 2) 1979 IRLR 346*) but does not have to amount to gross misconduct or a breach of contract (*Jagex Ltd v McCambridge [2020] IRLR 187*).

#### Reasons

#### Unfair dismissal

32 Taking into account the above findings of fact the Claimant was unfairly dismissed by the Respondent because it failed to follow a fair dismissal procedure. That failure was also in breach of the ACAS Code of Practice (2015).

#### Polkey deduction to compensatory award

33 Taking into account the above findings of fact I conclude that the percentage chance that the Claimant would have been dismissed in any event as 100% taking into account the serious nature of the first three allegations, the Claimant's senior role and responsibilities, the Respondent's obligations to vulnerable residents in a regulated sector and the need for it to have confidence in the Claimant's following of its procedures and in the accuracy of her record keeping.

34 I find however that to complete a fair procedure would have extended the Claimant's employment by a further two weeks and the loss of earnings part of her compensatory award is therefore limited to two weeks net loss of pay and benefits. After that procedure the Respondent could fairly have dismissed the Claimant within the range of reasonable responses test set out above and she would have been dismissed in any event for the same reasons as she was in fact dismissed.

#### Contributory fault

#### Basic award

35 Taking into account the above findings of fact I conclude that it is just and equitable to reduce the amount of the basic award by 75% because of the Claimant's conduct before she was dismissed.

#### Compensatory award

36 Taking into account the above findings of fact I find that the Claimant's dismissal was caused or contributed by the Claimant's actions and that the just and equitable proportion of the reduction should be 75%.



Remedy hearing

37 A hearing has been booked for 17<sup>th</sup> September 2021. The parties may however be able to agree the amount of compensation taking into account the above findings which are two of the factors in the Tribunal's decision on compensation. If they wish to do so ACAS can assist with discussions and with documenting any agreement. If not, Orders are enclosed for that next hearing. Both parties may also wish to take advice about how the compensatory award is calculated.

38 The parties' attention is drawn to <https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/> where there is guidance about compensation in the Presidential Guidance on General Case Management (at guidance note 6) where 'recoupment' of benefits is also explained.

**Employment Judge Reid**  
**Date: 11 June 2021**