



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs M Garner

**Respondent:** Cooper Residential Homes Limited

**Heard at:** Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE

**On:** 4 July 2024, 13 November 2024

**Before:** Employment Judge Adkinson sitting alone

## Appearances

**For the claimant:** Mr M Gordon, Counsel

**For the respondent:** Ms V Hall, Litigation representative

## JUDGMENT

UPON hearing from Counsel for the claimant and legal representative for the respondent

AND UPON considering the evidence

IT IS THE TRIBUNAL'S JUDGMENT THAT

1. Mrs Garner's employment began on 14 October 2000;
2. the respondent unfairly dismissed the claimant on 3 October 2023;
3. there will be no reduction in any financial award:
  - 3.1. under the rule in **Polkey v AE Dayton Services Ltd [1988] AC 344 UKHL**, or
  - 3.2. for contributory fault.
4. Remedy will be determined at a future hearing.

## REASONS

### Introduction

5. The claim is for unfair dismissal. The respondent says the dismissal was fair and the reason for dismissal was gross misconduct. There is no claim for wrongful dismissal, however.

## The hearing

6. The hearing proceeded as follows:
  - 6.1. Mr M Gordon, Counsel, represented the claimant;
  - 6.2. Ms V Hall, litigation representative, represented the respondent;
  - 6.3. I heard the following oral evidence:
    - 6.3.1. On the claimant's behalf from:
      - 6.3.1.1. the claimant herself, and
      - 6.3.1.2. Mrs J Wright, care home manager from 2000 to July 2021;
    - 6.3.2. On the respondent's behalf from:
      - 6.3.2.1. Mrs E Lumb, at all material times the respondent's sole owner and director,
      - 6.3.2.2. Mr A Lumb, husband of Mrs E Lumb and at all material times who works with the respondent from time to time on a self-employed basis;
- 6.4. I have taken all of their oral evidence into account.
- 6.4. There was an agreed bundle of 275 pages. I have taken into account those pages to which the parties have referred me to in either evidence or submissions.
- 6.5. The case was listed for one day, on 4 July 2024. The day proved insufficient and the parties presented only their case. There was no time to hear the submissions.
- 6.6. It postponed and resumed on 13 November 2024. Each party made their oral submissions that day.
- 6.7. During the hearings, we took appropriate breaks. No particular reasonable adjustments were requested. There was nothing about the hearing that alerted me to the need for any, either.
- 6.8. No party has complained this was an unfair hearing. I am satisfied the hearing was fair.
- 6.9. I decided that I would reserve my decision. This is that decision.

## Issues

7. The issues before the Tribunal at this hearing are as follows:
  - 7.1. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
  - 7.2. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular, whether:
    - 7.2.1. there were reasonable grounds for that belief;

- 7.2.2. at the time the belief was formed the respondent had carried out a reasonable investigation;
  - 7.2.3. the respondent otherwise acted in a procedurally fair manner;
  - 7.2.4. dismissal was within the range of reasonable responses.
- 7.3. The “Polkey” issue:
- 7.3.1. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
  - 7.3.2. If so, should the claimant’s compensation be reduced? By how much?
- 7.4. The issue of contributory fault:
- 7.4.1. If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?
  - 7.4.2. If so, would it be just and equitable to reduce the claimant’s compensatory award? By what proportion?
8. Other issues that relate to remedy are for the remedy hearing.

**The facts**

- 9. I begin with my observation of the witnesses. I am satisfied that each witness has done their best to assist the Tribunal.
- 10. I make the following finding of facts on the balance of probabilities. The facts represent arrangements at the times material to this case.
- 11. The respondent is a company that runs a care home in Earl Shilton, Leicestershire. Mrs Lumb bought the company on 9 July 2021 when she purchased the shares in the company. She is the sole shareholder and director. The care home is subject to regulation by the Care and Quality Commission (CQC). She is the registered manager with the CQC. She has an obligation to ensure the care home maintains to the CQC’s standards.
- 12. The respondent employed the claimant as a care assistant.
- 13. There is a dispute about when the claimant’s employment began. Mr and Mrs Lumb do not know personally when Mrs Garner began her employment because they do not have the complete business records from before they took over. They rely on a payroll record that suggests it was 31 March 2008. There is no other documentary evidence (such as a contemporaneous contract of employment) that shows that date.
- 14. Mrs Wright was the previous manager of the home from February 2000 to July 2021. She says that the respondent employed Mrs Garner from October 2000. This is supported by two statements of main terms of employment which say that Mrs Garner’s continuous employment began with the respondent on 14 October 2000. The first is dated 4 September 2012. The second is dated October 2019. Neither is signed by Mrs Garner. Both are signed on the respondent’s behalf.

15. I conclude that Mrs Garner's employment began on 14 October 2000. It is supported by evidence of the former manager and by 2 documents signed on the respondent's behalf. The circumstances in which the payroll record was created or data entered into it is not known. Mr and Mrs Lumb cannot point to any personal knowledge or other documents to assist. Therefore I prefer the claimant's case.
16. Events began in late August 2023. The respondent employed a Mr Buckley in the home involved in providing care. I am unclear what his job was, but do not consider it matters.
17. Mr Buckley had been a "plus 1" at Mr and Mrs Lumb's wedding. In a previous role, Mr Lumb and Mr Buckley had worked in the same industry but not for the same employer. They have not worked together. Beyond that, they did not know and did not socialise with him. The connection was in effect purely as employer and employee. Mrs Garner suggested that there was a close connection between then and that somehow this tainted events. I see no evidence of that. It is an unfounded, unevicenced assertion and conspiracy and I reject the suggestion accordingly.
18. Mr Buckley resigned without notice or explanation on 23 August 2023. He had telephoned the team leader on duty at the time, Mrs S Tansley. He told her it was because of incidents involving Mrs Garner and incidents on shift the previous day.
19. Mrs Lumb eventually managed to communicate with Mr Buckley about it via Facebook. He told her that he resigned because he [sic.]  
"could not bear any more homophobic silly or nasty comments from [Mrs Garner] even Carol [a fellow employee] made a nasty comment I really wanted to stay." He reported that:  
"gossip is already out on the Internet about me leaving your home."  
He later said he was "very much on the edge of going public this time in spite of any consequences my sister says it's all on Facebook."  
He also cited in which the claimant had told a resident to mind his manners. Eventually he made a formal complaint of homophobic abuse by Mrs Garner. The respondent treated it as a grievance.
20. Mrs Lumb appointed Mr Lumb to conduct the investigation process into the allegations against Mrs Garner. There was no investigation into the allegations against the person identified as Carol. He did so on the respondent's behalf and with its authority.
21. On 26 August 2023, Mr Lumb spoke to Mrs Tansley, who confirmed the above phone conversation.
22. On 27 August 2023, he spoke to Mrs Garner. She admitted the "manners" incident but denied the homophobic remarks.
23. On 27 August 2023, Mr Lumb started to interview members of staff. He used a series of pre-typed questions on forms to which he wrote the answers, and then each member of staff signed them to confirm the accuracy of the answers. He described it in evidence as a general

questionnaire on equality and diversity issue, though the questions went wider than that and asked about whether the recipient had witnessed abuse or been subject to inappropriate behaviour of anyone, whether people knew of the whistleblowing procedures and asked each respondent if they wanted to add anything else.

24. It is disproportionate to quote each of them, but the following points emerge from the answers:
- 24.1. One member of staff mentioned Mrs Garner had massaged Mr Buckley's back, and that he appeared uncomfortable throughout;
  - 24.2. A number of replies cited that the claimant, could be short or exhibit low-level frustration with residents in how they reply to questions. However one member of staff said this was true of other members of staff too;
  - 24.3. Another member of staff said she had heard someone (but could not identify who) saying "he looks scary and looks like a paedo." She does not say to whom the unknown speaker was referring;
  - 24.4. A third said the claimant had been clumsy with equipment and loud while people were trying to sleep;
  - 24.5. A fourth was concerned about the claimant and another manipulating allocation working.
25. In summary:
- 25.1. None of them cite homophobic abuse towards Mr Buckley;
  - 25.2. None of them explicitly cite Mrs Garner telling a resident to mind his manner; and
  - 25.3. A number cite her being abrupt with residents. However one questionnaire also names other members of staff behaving similarly. Those other staff members were not investigated.
26. On 29 August 2023 Mr Lumb suspended Mrs Garner on contractual pay. The letter made clear it was not a sanction itself or an indication that the respondent believed Mrs Garner to be guilty of anything. He handed this letter to her at a meeting. She again admitted the "manners" incident but denied the homophobic remarks.
27. On or about 5 September 2023 Mrs Lumb held a grievance meeting with Mr Buckley. Mr Lumb did not attend, even though he was tasked with investigating the alleged misconduct that Mr Buckley had cited. However the respondent prepared notes of the meeting and Mr Buckley wrote a statement which would have assisted Mr Lumb in his investigation.
28. In the meeting Mr Buckley made a number of allegations, recorded in the signed statement, including that Mrs Garner had made homophobic remarks about him in front of other staff and a resident. These included allegations that:
- 28.1. At some unknown date Mrs Garner had said by the notice board that Mr Buckley "[doesn't] like fanny [he] like[s] cock", that on the last of his employment in front of him she had remarked that

undoing a bottle was like peeling back a foreskin and that she had repeated the earlier comment in front of a Ms C Legg;

- 28.2. Mrs Garner said she did not wash residents, but if asked she told people she did;
- 28.3. Mrs Garner had demanded a resident to say “please” before she handed him what he had asked for;
- 28.4. Mrs Garner had threatened to “twat” Mr Buckley if he did say “something” – the context suggests that that something is to raise a grievance or complaint.

It is notable that none of the allegations were mentioned or supported by the comments staff made on the questionnaires I described earlier. It is also notable that the respondent did not investigate an allegation of not washing residents despite such an allegation almost certainly being of concern to the CQC.

29. On 15 September 2023, Mr Lumb held an investigation meeting with Mrs Garner. It was minuted. While it is not verbatim, I am satisfied it is an accurate record. In summary Mrs Garner maintained her denial of homophobia and of the incidents above, but admitted she told a resident to say “please” and “thank you” i.e. to mind his manners.
30. There then followed a number of statements from members of some members of staff. They are dated between 27 and 29 September 2023.
31. The circumstances in which the statements came to be taken and signed is important. Mr Lumb says he met with the staff who gave statements. It is unclear when he met with the staff members. He makes no mention of the date in his evidence-in-chief. However the structure and tenor of his witness statement that he adopted in chief implies it was before he held an investigation meeting with Mrs Garner. I conclude this implication represents what happened.
32. He made no notes of the meeting with staff. I note the respondent was able to minute the meeting with Mr Buckley and with Mrs Garner. There is nothing to suggest the meetings with staff were different in some way to make the taking of a minute unreasonable. I find as a fact the respondent had access to the resources and had the knowledge and experience to have noted those meetings.
33. He wrote up the statements and they were signed more than a week afterwards. I conclude that they were not typed up until after the investigation meeting with Mrs Garner. This is because the meetings were before he met with Mrs Garner on the 15<sup>th</sup>, yet they are not signed until between the 27<sup>th</sup> and 29<sup>th</sup>. I consider the timeline makes it unlikely he was able to type them before the meeting, and if he did then I would have expected them to be signed either before or about that time. This is supported by Ms Legge’s statement. The statement is dated 27 September 2023 but notes it arises from meetings on 26 August 2023 and an unminuted meeting on 14 September 2023.
34. There are a number of issues therefore surrounding the statements.

- 34.1. The only evidence as to their accuracy is that the employees concerned signed them. However they were doing so about 2 weeks or so after their meeting with Mr Lumb. They were being handed statements from the husband of the director to sign. There are no notes of the meetings to refer back to in order to check the accuracy. There is no suggestion the staff were asked to check their accuracy before signing or given an opportunity to correct them. There was therefore a risk that the staff may have been signing the documents because the boss's husband had produced them and they did not want to demur, that they were simply signing documents without concern to their accuracy.
- 34.2. There is a concern that Mr Lumb would have had in mind the outcome of the interview with Mrs Garner. As has oft been observed, the human memory is frailer than we wish to admit and memories are influenced by other events (see comments from Leggatt J in **Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor [2013] EWHC 3560 (Comm)** on this). A lack of notes mean that could not guard against this and there is real doubt as to their accuracy. The gap between the meetings and the statements being signed emphasises or adds to this doubt.
- 34.3. Those who gave statements and also completed questionnaires have given wildly different accounts.

34.3.1. For example Ms Duke says:

"It is alleged that [Mrs Garner] made a comment to [Mr Buckley] that quote he didn't like fanny, he likes cock". Even though I cannot remember exactly what was said I know that the comments were inappropriate as I know I said to [Mrs Garner] at the time '... just leave him alone'. It was clear that [Mr Buckley] looked uncomfortable and unhappy."

It is notable she does not confirm that Mrs Garner made the alleged remark.

However in response to the equality questionnaire on 28 August, Mrs Duke makes no mention of this event at all – even though she (like all recipients of the questionnaire) was asked "Have you witnessed any inappropriate behaviour towards residents or staff colleagues wither physical or verbal?" She does however cite an example of behaviour that could be harassment related to age. That was never followed up.

34.3.2. Ms Porter and makes no mention of any complaints but does cite issues in the kitchen. They were not followed up either. However in her statement she said Mrs Garner said that:

"He looks weird. He looks like a paedo" in reference to Mr Buckley.

It is surprising that she did not mention this when asked the open question about inappropriate behaviour. She says that “she let the comment go over [her] head”. That is not an excuse. It suggests that the fact it is now in a statement means that Mr Lumb had asked her leading questions about it to extract the information.

- 34.3.3. Ms Tares similarly in her questionnaire cites no issues with Mrs Garner on 27 August 2023 but in her statement on 29 September specifically recalls Mrs Garner saying, “[Mr Buckley] looks like a paedo.” In her statement she wrote that she did not remember this, but did when asked:

“directly regarding whether I knew about this particular incident.”

I find it surprising that she did not recall this incident when asked an open question because it is clearly “inappropriate behaviour”. Her statement again suggests leading questions.

- 34.4. Based on the above, I conclude that Mr Lumb asked her leading questions. This undermines the value of their evidence. Mr Lumb did not reflect on this however in his investigation.

- 34.5. Mr Lumb did not consider the significant difference between what was in the statements and in the questionnaires – particularly that most of the questionnaires identify no concerns or that those who gave statements that seemed to damn Mrs Garner were significantly different to the questionnaires. He did not reflect on why this was. At this time there was already gossip circulating about the alleged events. He did not consider if that may have influenced the statements (assuming of course they accurately reflect the witnesses’ recollection in the first place). As a result he did not go back to seek to understand why there was a difference.

- 34.6. The lengthiest statement is from a Ms C Legge. She specifically remembers the comment:

“Don’t look at him in the eyes, he likes cock not fanny.”

And that Mrs Garner was “on to” Mr Buckley about his sexuality. She does not however remember other comments except, possibly, Mrs Garner saying she had “had enough”.

Oddly, Mrs Legge was never asked to complete a survey even though Mr Buckley identified her as a witness. There is no good reason for this omission.

35. Mr Lumb did not tell Mrs Lumb, who was conducting the disciplinary meeting, that the statements were not contemporaneous with when they were taken, that he typed them after interviewing Mrs Garner or that he had typed them from his memory. She proceeded on the assumption they



represented the contemporaneous record of what each witness said in their respective meeting.

36. It is as good a point as any to deal with a suggestion Mr and Mrs Lumb discussed this matter with each other informally out of the workplace and that therefore this affected the fairness because the investigation would have in essence merged into the disciplinary decision. There is no evidence they did have such discussions. That said, they are husband and wife and it is reasonable to presume they discuss work. I would find it unlikely they did not discuss this. I am content to conclude they did discuss this outside of work. However that is in my view a long way from saying that Mr Lumb as the investigator fed to Mrs Lumb information she otherwise would not have or somehow they influenced each other as they discussed matters so that it was a joint decision, and not hers alone. Mrs Lumb struck me as someone well able to make up her own mind on matters. Her evidence persuaded me she made the decision to dismiss alone. I am satisfied that any such discussions between them about this were not of the type that could be described as improper or to undermine the fairness of the decision. However there is a weakness in the process.
37. On 29 September 2023, Mr Lumb invited Mrs Garner to a disciplinary meeting. There were 9 charges. Four were allegations specifically labelled "homophobic abuse". One was related comments about Mr Buckley's sexuality. Others related to "inappropriate comments" including the "mind your manners" incident. Mrs Lumb was to chair the meeting. There is nothing about the meeting itself that is worthy of mention. The notes suggest it was conducted in a straightforward manner.
38. In the dismissal letter of 3 October 2023 or thereabout, she decided to uphold some, but not all, of the allegations. She found proven the following charges:
- 38.1. "Comments made in public about your colleague's sexuality;"
  - 38.2. "Homophobic abuse the notice board incident in the kitchen foyer way referred to Mr Buckley's genitalia preference;"
  - 38.3. "Homophobic abuse incident in the dining room where you referred to Mr Buckley's genitalia preference and you will twat him if he says anything;"
  - 38.4. "homophobic abuse comment made in the kitchen area that 'he looks like a paedo' referring to Mr Buckley";
  - 38.5. "inappropriate comments made to residents in dining room about his manners";
  - 38.6. "inappropriate comment 'I've had enough' made by you in dining room in front of residents".

She concluded that these were allegations of gross misconduct. She decided on summary dismissal and offered a right of appeal. She dismissed other allegations because:

"The other allegations have not had third party confirmation and therefore have been discounted."

39. Mrs Lumb conceded in evidence that the inappropriate comments would not justify dismissal and were not misconduct, yet alone gross misconduct. There is no good reason why then these allegations that are not capable of being misconduct were presented as charges or found proven.
40. Mrs Lumb did not take into account there had been staff gossip which may have influenced the evidence about what happened. More importantly as I noted above she assumed the statements from witnesses were taken contemporaneously with their interview and not written by Mr Lumb over a week after the meeting based on his memory alone.
41. More significantly she found proven allegations that were not supported by the evidence or where the evidence appeared to have shifted over time. For example:
  - 41.1. None of the statements or questionnaires support the allegation Mrs Garner said she would “twat” Mr Buckley;
  - 41.2. None of the questionnaires support the noticeboard incident, and Mrs Lumb did not reflect that one of the apparent witnesses did not remember the words in her later statement;
  - 41.3. Mrs Lumb did not reflect on the fact that the “paedo” comment was mentioned in 2 witnesses’ statements but in none of the earlier questionnaires and specifically neither of those witnesses mentioned it when asked an open question about inappropriate behaviour;
  - 41.4. Mrs Lumb did not therefore investigate or have investigated or take into account the reason for the apparent discrepancies between the questionnaires and the statements, or specifically ask why people remembered later incidents they did not consider mentioning when asked if they had witnesses “inappropriate behaviour”.
  - 41.5. Mrs Lumb did not reflect that Ms Legge’s statement says only that she thought Mrs Garner had said “I’ve had enough.”
42. I conclude that Mrs Lumb did not really believe Mrs Garner was guilty of the misconduct she was charged with because the evidence simply does not support the allegations and because 2 of the proven charges were, even on Mrs Lumb’s own evidence, not misconduct. I am fortified in this view by the following taken together.
  - 42.1. Mrs Lumb came across as nervous in evidence. I reflect that giving evidence is not a natural or comfortable event and it is natural and expected for there to be nerves. However her demeanour and answers to questions (such as conceding two items of misconduct are not misconduct) left me with the impression she was unsure about the process and decision she had made.
  - 42.2. This began because of messages on Facebook with Mr Buckley at one point suggesting he would go public with his allegations. That threat would be intimidating and frightening to any business owner – especially in a business focused on personal services

to those who are vulnerable and in a business regulated by the CQC. I was left with the impression that Mrs Lumb genuinely believed Mrs Garner had done something wrong, but not necessarily what she was charged with, and that she had to go;

- 42.3. Mr Buckley made allegations about Carol making a nasty comment, but the respondent took no steps to look into that, which leads me to conclude that their attention was focused on getting rid of Mrs Garner;
  - 42.4. There was an allegation that Mrs Garner was boasting about not washing residents but lying about it if asked. If Mrs Garner was not washing residents when she should then that would undoubtedly be of interest to the CQC. If there were a genuine concern about whether Mr Buckley's allegations were misconduct on Mrs Garner's part, I would expect this to be part of the disciplinary process;
  - 42.5. There was no investigation of the other staff being abrupt with residents, whereas Mrs Garner was subject to a disciplinary process and dismissed in part for similar conduct that was not even misconduct;
  - 42.6. She did not reflect on the fact that some parts of the allegations were not supported by witnesses' evidence even though she said she had dismissed other uncorroborated allegations. This inconsistency in approach leads me to conclude that she was looking for something to justify dismissing the claimant.
43. As an aside, Mrs Garner points out the letter of dismissal pre-dates the disciplinary meeting and bears the same date as the invitation letter. In my view this is more likely to be because of reuse of the original letter because it contained the charges. The remainder of the dismissal letter is quite different, and as I noted some charges were dismissed. It would require a level of cynicism and sophistication – neither of which are proven in this case - to conclude the respondent pre-determined the outcome and foresaw the need to make it look credible by deciding to drop some charges and not others. In my view the date of the letter does not assist me to decide the issues in this case.
44. Mrs Lumb appealed. The respondent referred the appeal to Croner Consulting and Mr J Crouch from Croner acted as the appeal officer. He met with Mrs Garner on 7 November 2023. His report is dated 23 November 2023.
45. The appeal is unsatisfactory.
46. It is also unclear exactly who made the decision on appeal. Mrs Lumb told me in evidence-in-chief that:
- “I report was Julie completed on 23 November 2023, and the recommendation was the decision to dismiss could be upheld. We informed the claimant of this decision on the 29 of November 2023.”

The appeal outcome letter says:

“Having carefully considered the report of their findings and recommendations, it is our decision not to uphold your appeal. This means the decision to dismiss will stand for the following reason.”

It then quotes the conclusion of the report.

There was no critical analysis by the respondent of why it was appropriate to accept the recommendation. In effect the report is simply implemented as is.

This is in spite of the report itself. The report makes clear in paragraph 15, Mr Crouch is not able to dictate what steps the business should take and does not make the decision itself. Rather the respondent must decide for itself whether to accept the recommendations or not or if it agrees with the findings.

Based on the oral evidence and the outcome letter, I find as a fact that the respondent in effect delegated the decision to Mr Crouch.

47. The report is clumsily written and in parts makes little sense. It does not appear to engage with the grounds of appeal. Specifically it appears to choose the evidence to allow the appeal to be dismissed. One such example is:

“41. JCR considers on the balance of probability that conversation was had with CL and MG at the end of the evening but is unsubstantiated as no other witnesses were present that that time, and contradictory accounts have been provided.”

He then immediately goes on to find those comments were made despite his own observation about the contradictions, without explaining why.

In paragraph 63-64, Mr Crouch deals with an allegation of Mrs Garner putting her hands on Mr Buckley’s shoulders. He found it proven. This however was not an allegation in the disciplinary proceedings. He did not recognise this, nor does the respondent in accepting his report. In my view this further undermines its value. I conclude from the above the appeal was treated as a “rubber stamping” exercise – i.e. to go through the motions to maintain the decision to dismiss, rather than as a genuine review of the decision to dismiss.

## Law

48. **Employment Rights Act 1996 section 98** provides (as far as relevant):

“(1) In determining ... whether the dismissal of an employee is fair or unfair, it is for the employer to show—

“(a) the reason (or, if more than one, the 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.

“(2) A reason falls within this subsection if it—

“ ...

“(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 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.

“ ... ”

49. The employer bears the burden of proving on the balance of probabilities that the claimant was dismissed for misconduct. If the if the employer fails to persuade the tribunal that had a genuine belief in the employee's misconduct, then the dismissal is unfair.
50. When it comes to reasonableness the burden of proof is neutral. The tribunal should consider all the circumstances including the employer's size and administrative resources.
51. The tribunal has had regard to **British Home Stores Ltd v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Ltd v Jones [1993] ICR 17 EAT; Foley v Post Office [2000] IRLR 82 CA** and **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA**.
52. The tribunal understands of the effect of these cases is to ask as follows:
  - 52.1. Was there a reasonable basis for the respondent's belief?
  - 52.2. Was that based upon a reasonable investigation?
  - 52.3. Was the procedure that the employer followed within the “range of reasonable responses” open to the employer?
  - 52.4. Was the decision to dismiss summarily within the “range of reasonable responses” open to the employer?
53. The range of reasonable responses is not infinitely wide, however.
54. The Tribunal is not entitled to substitute its own view for that of the employer.
55. The Tribunal must assess the totality of the dismissal process and decision. In particular it must consider the decision as a whole: **Smith v Glasgow DC [1987] ICR 796 UKHL**.
56. The **ACAS Code of Practice on Disciplinary and Grievance Procedures** sets out the basic requirements for fairness applicable in most conduct cases. While it is not part of the code, the guide on how to implement the code advises on keeping notes of formal meetings.
57. Despite the code of practice and guidelines in the cases, ultimately each case must turn on its own facts and be broadly assessed in accordance

with the equity and substantial merits: **Jefferson (Commercial) LLP v Westgate UKEAT/0128/12 EAT; Bailey v BP Oil Kent Refinery [1980] ICR 642 CA.**

58. When a person is dismissed for gross misconduct, but the only claim is one of unfair dismissal, then the Tribunal does not have to determine if there is gross misconduct to decide if the dismissal is fair or unfair. The factual enquiry is in relation to the matters dictated by the **Employment Rights Act 1996 s.98**, not what happened which is dictated by the contractual enquiry: see **West v Percy Community Centre [2016] ELR 223 EAT**
59. As to remedy, the rule in **Polkey v AE Dayton Services Ltd [1988] AC 344 UKHL**, explained in **Software 2000 Ltd v Andrews [2007] IRLR 568 EAT**, **Hill v Governing Body of Great Tey Primary School [2013] ICR 691 EAT** requires a Tribunal to predict if possible the chance that the employer could fairly have dismissed the employee, using common sense, experience and sense of justice. It need only be able to draw some conclusions about how matters may have developed.
60. When considering both the basic award (see **Employment Rights Act 1996 section 122(2)**) compensatory award (see **Employment Rights Act 1996 section 123(6)**), the Tribunal must consider if the claimant's conduct before dismissal is such that it is just and equitable to reduce or further reduce the amount of the basic award to any extent. What amounts to contributory fault is the same for both the basic and compensatory award: **Langston v Department for Business, Enterprise and Regulatory Reform UKEAT/0534/02 EAT**. Contributory fault is "culpable and blameworthy" conduct that includes conduct that is foolish or "bloody minded" conduct: **Nelson v BBC (No2) [1980] ICR 110 CA**. It is an objective test and therefore the employee's knowledge is not determinative: **Allen v Hammett [1982] ICR 227 EAT; Department for Work and Pensions v Coulson UKEAT/0572/12 EAT**.

## Conclusions

### *Commencement of employment*

61. Mrs Garner's employment began on 14 October 2000, as found above.

### *What was the reason or principal reason for dismissal?*

62. In paragraph 42 above I found as a fact that Mrs Lumb did not really believe Mrs Garner was guilty of the misconduct she was charged with. I set out my reasons there and repeat them here.
63. As **Burchill** makes clear at **304C-D**, it is belief in the misconduct in question that matters. Here there is no belief in the misconduct in question, just that Mrs Garner is guilty of some unspecified misconduct. This is not enough. The respondent therefore fails to prove a potentially fair reason for dismissal and so the claim succeeds. As an aside, there is no evidence of what actual misconduct they did believe her to be guilty of.

***If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?***

64. If I were to assume that in fact the respondent did prove it honestly believed the claimant to be guilty of the alleged misconduct then I conclude the claimant would still succeed. I rely on my findings of fact and from them draw the following conclusions.

64.1. There were no reasonable grounds for that belief.

64.1.1. As Mrs Lumb said, two of the proven charges were not misconduct but she took them into account when deciding whether there was misconduct. A reasonable employer (the size of an with the resources of the respondent) would have dismissed them.

64.1.2. Her decision depended on an assumption that statements were taken contemporaneously from witnesses and not based on her husband's recollection when he wrote them later. A reasonable employer would have told the decision maker that there was a notable delay between the meeting and statement being written, and that it was being done from the investigator's memory only;

64.1.3. She did not recognise or consider the significant difference between the allegations in the statements and the lack of allegations in the questionnaires. A reasonable employer would have at least queried why this was so if relying on the evidence to terminate someone's employment;

64.1.4. She did not reflect on the fact the allegations had been the subject of gossip within the home. A reasonable employer would recognise that the memories of witness may have been corrupted by the gossip because they mention much later detail that they did not recall initially;

64.1.5. She did not reflect on the fact that some parts of the allegations were not supported by witnesses' evidence even though she said she had dismissed other uncorroborated allegations. A reasonable employer would have been consistent or clear on the reasons for different treatment of different allegations.

64.2. There was no reasonable investigation.

64.2.1. There were no notes of the meetings with staff that resulted in the statements. The respondent had the resources to make notes and knowledge to understand it was important and helpful, because it did it for other meetings. A reasonable employer

- would have made notes to assist with the investigation.
- 64.2.2. Mr Lumb relied on recollection. However he wrote the statements after meeting with Mrs Garner. This undermines the reliability of the statements. A reasonable investigator would not have relied on memory alone to write a witness's statement.
- 64.2.3. Mr Lumb did not consider the discrepancies between the questionnaires and the statements. A reasonable investigator would have been concerned that events mentioned in a statement much later were not mentioned in reply to an open question about inappropriate behaviour.
- 64.2.4. Mr Lumb asked leading question of the witnesses which undermined the independence of their evidence. A reasonable employer would not. The respondent was capable of asking open questions, as the earlier questionnaire demonstrates.
- 64.3. The appeal was flawed.
- 64.3.1. The respondent accepted the report as is without critical consideration of whether to do so. In short they effectively delegated the decision to Croner Consulting. The reasonable employer would retain the decision and would consider the report before making up their own mind.
- 64.3.2. The report is badly written and not easy to follow. It appears illogical where it for example says there is no evidence on the one part before finding the allegation proven. No reasonable employer would do this.
- 64.3.3. The appeal considered and found proven allegations that were never charges that the claimant faced. No reasonable employer would do this.

### ***Polkey issue***

65. I turn then to the "Polkey" issue. I conclude that it would not be appropriate to make a reduction. It would be pure guesswork to predict what may have happened if there had been a fair process. There are so many issues, in particular with the evidence, that it cannot be said with any degree of certainty there was a chance that the respondent would have been able to end Mrs Garner's employment fairly for this or another reason.

### ***Contributory fault***

66. Finally I consider contributory fault. In my view the nature and quality of the evidence shows that the only potentially relevant act is Mrs Garner telling a resident to mind his manners. The respondent accepts this is not misconduct. I cannot see how something even the respondent considers is not misconduct could reasonably be described as culpable and



blameworthy. In any case, if the respondent would not have treated it alone as misconduct then leads me to conclude it would not be just and equitable to take it into account.

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Employment Judge Adkinson

Date: 14 November 2024

JUDGMENT SENT TO THE PARTIES ON

..... 15 November 2024.....

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FOR THE TRIBUNAL OFFICE

**Notes**

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