EMPLOYMENT TRIBUNALS

Claimant: Mrs S Knowles

Respondent: Gradestone Limited

Heard at: Newcastle Tribunal (by CVP) **On:** 8 & 9 March 2021

Before: Employment Judge Langridge
(sitting alone)

REPRESENTATION:

Claimant: Mr L Mann, Solicitor
Respondent: Mrs F Lennon, HR Manager

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed.

2. A remedy hearing shall be fixed to determine the question of compensation.

REASONS

Introduction

1. This hearing was originally scheduled to begin on 22 February 2021 by the CVP video platform. During the initial discussion that morning about the issues in the case, it soon became apparent that the respondent had not complied with the Tribunal's direction to produce written statements from the witnesses it intended would give evidence at the hearing. No such statements had been prepared and no good reason for failing to comply with the direction was offered, other than Mrs Lennon suggesting that the manager of the care home where the claimant had worked might have had a conflict of interest if she had given evidence. During this same discussion it became apparent that the bundle had some key omissions such

as the claimant's contractual terms, and the claimant also requested payslips from the last six months of her employment.

2. The respondent agreed to provide those documents that same day, but following further discussion it became apparent that it would not be possible to proceed fairly with a hearing over the original two day period and that a postponement was necessary to enable the respondent to provide witness statements. The resumed hearing dates of 8 and 9 March 2021 were agreed with the parties before the postponement, which was not opposed by any party. The respondent was ordered to provide copies of all its witness statements to the claimant's solicitor by no later than 26 February 2021. The question of costs was postponed to be dealt with when the hearing resumed on 8 March 2021. By then, the claimant had submitted an application for costs, and by the end of the resumed hearing the respondent consented to the making of such an order and consented to the amount requested, namely £379.60 plus VAT.

3. By the time the hearing resumed, the respondent had produced witness statements from Mrs Fameeda Lennon, from the manager of the care home Mrs Bharathi Panjadka, and from Mr Vinod Hukkeri, the sole director of the respondent company. Mr Mann confirmed on 8 March that he and the claimant had had the statements for sufficient time to prepare for today's hearing.

4. The claimant gave evidence on her own behalf and she called her sister, Mrs Margaret Mackenzie, and her nephew, Mr Andrew Mackenzie, as witnesses.

Issues & relevant law

5. This was a constructive unfair dismissal claim requiring the claimant to establish that she had been dismissed within the meaning of section 95(1)(c) Employment Rights Act 1996 ("the Act"). The claimant produced evidence that there had been an earlier purported dismissal by a text message and letter received from the respondent, but she conceded that the actual termination arose on her later resignation and that the respondent's actions had not in fact resulted in a termination of the contract at that time.

6. This case revolved around disputed facts about the events on 25 May 2020 when the claimant left work early in her shift. She says she reported to the nurse in charge that she felt unwell and was unable to continue working. She felt that the stress of working in a care home in the early months of the Covid-19 pandemic had been taking their toll and that an argument with a colleague that morning was the last straw, leading her to leave work. For its part the respondent disputed that ill health was the reason that the claimant left work, focussing on the argument with the colleague, and treating that as a serious disciplinary offence on the grounds that the claimant did not report to her line manager before leaving work, such that it was an unauthorised absence.

7. The claimant relied on a breach of the implied duty of trust and confidence entitling her to resign. Having become unwell on 25 May 2020, the claimant's subsequent dealings with the respondent culminated in a decision to reinstate her employment by granting an appeal against termination, but at the same time imposing a final written warning on the grounds that the claimant was guilty of gross misconduct. The standards established in the case of BHS v Burchell therefore have

some relevance to the facts of this case, even though there was no express termination by the respondent, given the close relationship between the allegation of gross misconduct and the decision to resign.

8. For the claimant to succeed in showing that she had been dismissed under section 95(1)(c) of the Act, she had to satisfy the Tribunal that she was entitled to resign by reason of her employer's conduct. In examining the facts of this case, the Tribunal took into account the key authorities relating to constructive unfair dismissal claims, including the decision of the Court of Appeal in London Borough of Waltham Forest v Omilaju [2005] IRLR 35, which helpfully summarises the key authorities of Western Excavating v Sharp [1978] 1 QBD 761, Malik v BCCI [1998] AC 20 and Woods v WM Car Services [1981] ICR 666. In essence, an employer must not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Conduct which is merely unreasonable does not meet the required threshold. The conduct has to be a fundamental breach of the contract going to the root of the relationship.

9. A breach of the implied duty of trust and confidence will be regarded as a repudiatory breach going to the root of the employment relationship: Morrow v Safeway Stores [2002] IRLR 9.

10. Where a last straw is relied on, the act in question does not have to be of the same character as the earlier acts in the series, provided that "when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant." – Omilaju.

11. The Tribunal had also to determine whether the claimant resigned in response to the breach, or whether she resigned for another reason.

12. If the claimant persuaded the Tribunal that she was dismissed, it was then for the respondent to show the reason or principal reason for dismissal. The respondent relied on the claimant's conduct as the reason it took the steps it did, a potentially fair reason for dismissal under s.98 of the Act. The final stage would be to consider whether that dismissal was fair or unfair in all the circumstances of the case, pursuant to section 98(4) of the Act. In keeping with the guidance in Iceland Frozen Foods and other authorities, it was not for the Tribunal to substitute its own view of the case but rather to consider whether the dismissal fell within or outside a range of reasonable responses.

Findings of fact

13. The claimant initially began working for the respondent as a care worker in 2002, although the respondent alleged (without evidence) that the correct date of continuous service began in 2007, if not later. The claimant worked at several care homes operated by the respondent including Roseworth Lodge in Stockton, where she was based in the latter part of her employment.

14. In around mid-May 2020 the claimant was experiencing stress at work caused by working in a care home environment during the Covid-19 pandemic. She spoke about this informally with the home manager, Mrs Panjadka, though no written

record of this conversation was made nor any action taken. At the same time, the claimant asked Mrs Panjadka if it was possible to reduce her working hours. She was told it was not possible then because the rota had already been drawn up, but that such an option might be available the following month.

15. On bank holiday Monday 25 May 2020, the claimant and her nephew, Andrew Mackenzie, were scheduled to be at work at Roseworth Lodge along with nurse in charge Alison Diaz and two other care workers. The claimant and Mr Mackenzie were assigned on the rota to work in the Elderly Mentally Ill (EMI) unit, and the two other carers were allocated to the residential unit on the floor below. The intention was to have Ms Diaz on duty as the senior nurse floating between the two units.

16. Early in the day the staff handover was being carried out but one of the care workers (Ms Stephenson) arrived late. She joined the discussion at the end of the meeting in the EMI unit and asked whether she was working there that shift. The claimant told her that she was not, because she and Mr Mackenzie were scheduled to work in the EMI unit, with Ms Stephenson and her colleague assigned to the residential unit. Immediately following this meeting the claimant went downstairs to speak to Ms Stephenson and this led to an altercation between them. Both were upset and angry, and Ms Stephenson used offensive and abusive language towards the claimant, who was upset and stressed as a result. She went back upstairs to report to Ms Diaz that she was leaving work. The claimant explained that she had had a row with Ms Stephenson and that she felt too unwell and stressed to continue working. Mr Mackenzie was within earshot of this conversation and overheard it.

17. Ms Diaz asked the claimant not to leave, saying “Don’t go, it’s your job”, but this was not an instruction to stay at work so much as encouragement for the claimant to stay. However, the claimant was too unwell to continue working and left the care home.

18. Ms Stephenson was also angry and upset and walked off the job, though not for long. She went out to the car park and sat in her car for about ten minutes before returning to work and apologising to Ms Diaz. She admitted that she had used abusive language to the claimant.

19. After the claimant left work, Ms Diaz took over in the EMI unit so as to provide cover alongside Mr Mackenzie. The respondent saw no need to arrange cover for the claimant's absence, having already arranged for an additional person to be on duty for the bank holiday weekend. The consequence of Ms Diaz working in the unit alongside Mr Mackenzie was that she was unable to deal with paperwork that day, such as care plans. No residents were put at risk.

20. Later that morning the claimant phoned Mrs Panjadka to explain that she was unwell and would not be attending work the following day as she was seeing her doctor in the morning. The GP issued a fit note dated 26 May advising that the claimant was unfit to work for a four month period due to stress. The claimant arranged for Mr Mackenzie to deliver the fit note to the respondent by hand on 29 May.

21. Before becoming aware of the fit note, on 26 May Mrs Panjadka wrote to the claimant saying:

> "Your employment has been terminated [with immediate effect] for the following reason(s):
>
> - Leaving the building on 25th May 2020 without informing the nurse on charge and did not return for the rest of the shift.
>
> - Leaving the care home short of staff, putting vulnerable residents at risk.
>
> This decision is not reversible."

22. The letter was typed on the respondent's letterhead and bore Mrs Panjadka's typed name. It was signed on her behalf by an unnamed person whose initials appeared to be "MM", suggesting that it was the respondent's secretary.

23. On around the same day as this letter was written but before the claimant received it, Mrs Lennon, an accountant who manages the respondent's payroll and HR functions, phoned the claimant telling her that it was serious to walk out of work and it may lead to her dismissal. The claimant informed Mrs Lennon that she had notified the nurse in charge that she was too unwell to continue working. On 27 May Mrs Lennon wrote to the claimant inviting her to a factfinding meeting on 1 June. The purpose of the meeting was to discuss:

> "Leaving the building on 25th May 2020 without informing the nurse on charge."

24. On Friday 29 May at 16:05 the claimant received the following text message from Mrs Panjadka's mobile phone, the text of which is reproduced below:

> "hi Sue fameeda already phoned you & said that your contract with roseworth will be discontinued with immediate effect as you left the home short, putting residents safety at risk & also not informing the nurse i charge on duty and also you will be followed by letter from post. today you send the sick note with Andrew we can't consider the sick note as your employment is terminated already. you must have received the letter if not it's on way in post."

25. The claimant's sister, Margaret Mackenzie, phoned to ask why her sister had been dismissed and was told a letter had been posted that day.

26. Although the respondent had stated that the claimant was dismissed with immediate effect, it did not in fact take steps to implement the termination of her employment, and at some point made the decision to ensure the claimant received sick pay during her absence. No P45 was issued.

27. On 30 May short statements were obtained from three of the four colleagues on duty on 25 May, by Mrs Panjadka and Mrs Lennon who were acting jointly as investigators at the request of Mr Hukkeri. Statements were obtained from Alison Diaz, Ms Stephenson and the other care worker assigned to the residential unit that day. Those statements were not obtained by interview with the managers but rather the individuals were spoken to and asked to write out their own version of the events that had happened. Mr Mackenzie was not approached to provide a statement, nor asked if he had anything relevant to say. The content of the two statements from the care workers, though brief, focussed only on the altercation rather than the fact that

the claimant had left work. This point was dealt with only in the statement of Ms Diaz, very briefly. When the respondent later compiled the Response to this claim, through Mrs Lennon, it stated that although the claimant said she had informed the nurse in charge that she was leaving work, "the nurse in charge statement states otherwise". In fact this is incorrect as Ms Diaz confirmed in her statement that the claimant "said she was going home" and that this was due to the way she had been spoken to by her colleague. In the context, the Tribunal is satisfied that Ms Diaz also knew that the claimant felt too unwell to continue working.

28. Later that day Mrs Lennon phoned the claimant about attending a fact-finding meeting on 1 June. The invitation to the meeting said its purpose was to discuss:

> "Leaving the building on 25 May 2020 without informing the nurse in charge."

29. At the meeting the respondent also raised the second allegation mentioned in its letter of 26 May, namely that the claimant had left the care home short-staffed and put vulnerable residents at risk.

30. In advance of the fact-finding meeting the claimant requested that her sister attend with her, as she felt unable to attend by herself, and this was agreed by the respondent. This was conceded by the respondent during evidence to this hearing, though again the Response to the claim contained an incorrect contrary assertion:

> "During the meeting the claimant did arrive with her sister, with no prior notice that she will be attending with a family member."

31. The meeting of 1 June was conducted by Mrs Panjadka and Mrs Lennon together. If any notes of the meeting were made, they were either not retained or not disclosed during the course of the Tribunal proceedings. The respondent's witnesses gave conflicting accounts as to the existence and extent of such notes. Mrs Lennon wanted to ask the claimant for her account of the events of 25 May but the claimant was seriously unwell and unable to cope with the questions. Mrs Mackenzie wanted to intervene on her behalf but without appreciating that it was not her role to answer questions for her sister. The respondent pointed out, as it was entitled to do, that questions ought to be answered by the claimant herself. The meeting became difficult and the claimant felt she was being bullied by reference to the tone and manner in which it was being conducted. The claimant was told that witness statements had been obtained from members of staff but that she was not allowed to see them. Mrs Mackenzie asked questions about why no cover had been arranged after the claimant left work, but the respondent did not provide an answer. Mrs Mackenzie also mentioned the text message in which the claimant was told that she was dismissed and asked for a copy of the letter which was supposed to have been sent confirming this.

32. In her evidence Mrs Mackenzie said the meeting was ended by Mrs Panjadka, who left saying that the outcome was "irreversible" and it was "all in the letter". Although Mrs Lennon and Mrs Panjadka both left immediately after the meeting ended, they arranged for someone in the office to provide the claimant with a hard copy, while she and her sister waited in the building.

33. At no time did the respondent consider asking the claimant to set out in writing her account of the events of 25 May, unlike the other members of staff who had provided their statements in just such a manner.

34. Later on 1 June Mrs Mackenzie wrote to the respondent invoking her sister's right of appeal against dismissal. The letter was headed "Appeal against termination of employment" and referenced the 26 May letter (which had still not arrived by post). The letter explained that the claimant had indeed told the nurse in charge that she was unwell and had to leave. The appeal also relied on the fact that there had been no investigation or procedure carried out before the dismissal. No appeal meeting was requested by the claimant, only that she hoped the issue could be "resolved in a professional and timely manner". Mrs Mackenzie wrote requesting the respondent's disciplinary and grievance policies and its safeguarding policy, none of which were provided to her. A request for the witness statements was also made but again these were not provided. The first time the claimant had sight of them was when the Response to her claim was filed with the Tribunal.

35. On 15 June Mrs Lennon phoned the claimant about coming to a further meeting, saying that the claimant may be given "a second chance" and that she should disregard all correspondence before 30 May. The claimant asked that that be put in writing but it was not. On the same day Mrs Mackenzie wrote to the respondent confirming that she had permission from her sister to deal with these matters on her behalf, and setting out some "grave concerns" about the disciplinary procedure.

36. On 15 June the respondent's director, Mr Hukkeri, wrote a letter inviting the claimant to an appeal meeting on 18 June. His letter referred to her request for an "appeal against termination of employment". It did not seek to correct that as inaccurate. The letter also omitted to make any reference to the fact that the claimant was seriously unwell and that her sister had authority to deal with the issues on her behalf. Mrs Mackenzie responded to the letter by phoning the respondent to say that her sister was on the verge of a nervous breakdown and had a four month fit note and could not attend another meeting during this time. Mrs Lennon then phoned the claimant, and notwithstanding the letter of 15 June giving permission to deal with Mrs Mackenzie, asked the claimant whether or not she was attending this meeting. The claimant said she was unwell and had given authority to her sister to act on her behalf. She found it stressful to keep receiving contact from the respondent despite the severity of her illness, and at around this time was prescribed antidepressant medication as a result.

37. On 17 June, the day the claimant received the invitation to the appeal meeting, Mrs Mackenzie sent a text message to Mrs Lennon asking to discuss the meeting, but received no response. She sent another letter on the claimant's behalf that day saying she was too unwell to attend any appeal meeting. Despite this, on 19 and 26 June the respondent sent further invitations to appeal meetings on 23 and 30 June. In the case of all three letters, the day and date identified in the letter did not tally. In any event, the claimant had not requested a meeting. A further letter saying that she was too ill to attend was hand delivered to Mr Hukkeri on 1 July to this effect.

38. By this time Mr Hukkeri had already attended Roseworth Lodge to deal with the appeal. He discussed the issues with Mrs Panjadka and Mrs Lennon in making

his decision. He did not make or retain any notes of that process, nor of the discussions he said in evidence that he had had at various times with the members of staff who had provided witness statements. The respondent did not obtain or produce any further evidence from Ms Diaz, to clarify what was said on 25 May and ask her about the claimant's version of events.

39. On 2 July the respondent wrote to the claimant with a decision on the appeal. Mr Hukkeri used the terminology of a decision appealing against dismissal, terminology which had been used consistently in the correspondence from 1 June, and at no point did he contact the claimant to ask her why she considered her employment to have been terminated. All the respondent's managers who gave evidence to the Tribunal denied knowledge of or involvement in the letter dated 26 May purporting to terminate the claimant's employment, and the text message to the same effect dated 29 May. Although denying that these documents had been created by Mrs Panjadka, none of the respondent's witnesses could offer any explanation for their existence, nor for the fact that the letter and the text message were expressed in the same terms as each other and used language which accurately reflected the respondent's concerns. Furthermore, they confirmed in evidence that no steps had been taken to investigate the sending of such communications in the respondent's name.

40. The appeal decision letter noted that the claimant had missed three appeal meetings, and that in her absence a decision had been made, as follows:

> "That your actions on 25th May 2020, where you left work without permission of Nurse in charge thus putting residents at risk constitutes gross misconduct. I am issuing you final written warning, any similar issues would result into instant dismissal. … I uphold your appeal against termination of employment and reinstate your employment at Roseworth Lodge."

41. The letter stated that the warning would be placed in the claimant's records for 12 months and invited her to contact the manager to discuss her return to work. It made no reference whatsoever to the claimant's ill health or fit note.

42. On 6 July, in response to this decision, the claimant wrote a resignation letter which was delivered to the respondent on 9 July. She reminded the respondent but she was still too unwell to attend work meetings and had a sick note until 25 September 2020. She reiterated that she had not left work without the permission of the nurse in charge, but because she became ill with stress after working with residents with Covid-19 and without proper support from management. The claimant referred to the final written warning being issued for gross misconduct but reiterated that she had not committed any misconduct. She had informed the nurse in charge and was was unwell and had to leave work on 25 May. She again complained about the lack of any investigation or disciplinary process before she was dismissed by the letter of 26 May. She concluded:

> "The company have breached the implied term of trust and confidence by accusing me of gross misconduct before they made any investigation and by changing that decision to a final written warning for the same offence . I could not return to work for the company because of this breach of trust and confidence. I resign without notice and claim constructive dismissal."

43. The respondent did not reply to this letter or make any effort to contact the claimant with a view to clarifying the position, or persuading her to change her mind or otherwise encourage her back to work.

44. The claimant's health deteriorated after her employment ended and following a serious breakdown she was hospitalised between 26 October and 8 December 2020. She was further hospitalised between 8 and 14 January 2021, though after that was discharged from the care of the hospital. The claimant, as at the date of this hearing, remained unfit to seek work though her health has improved somewhat.

Conclusions

45. In her submissions to the Tribunal Mrs Lennon denied that the respondent had constructively dismissed the claimant, and said that even if its actions were flawed, the respondent had done its best to manage the situation in the difficult circumstances of managing the impact of the pandemic. In other words, any failings on its part were unintentional. For the claimant Mr Mann submitted that the facts of the case, culminating in the decision to reinstate the claimant with a final written warning for something she had not done, amounted to a repudiatory breach of the employment contract. The claimant was therefore entitled to resign and treat herself as constructively dismissed.

46. Applying the facts of this case to the legal framework summarised above, I am satisfied that the respondent did breach the implied term of trust and confidence through its handling of the events of 25 May 2020, culminating in the appeal outcome. Whether that conduct was deliberate or unintentional does not assist the respondent because the legal test is whether it conducted itself in a manner calculated *or likely* to destroy or seriously damage the relationship of confidence and trust. The employer's conduct may not have that effect if it had reasonable and proper cause to act as it did, but this cannot be said in the present case.

47. I have had regard to the principles set out in the case of Burchell v BHS in my assessment of the respondent's approach to the claimant's leaving work on 25 May, as on its face the respondent may have had grounds to treat this as a disciplinary matter. An employer who dismisses an employee for misconduct may act fairly if it:

a. Genuinely believes in the employee's guilt;

b. Has evidence to support that belief; and

c. Has conducted a reasonable investigation into the allegations.

48. Fairness in misconduct dismissal cases also requires consideration of well-established principles of conducting fair procedures in line with the ACAS Code of Practice. These include, broadly, allowing an accused employee to know the case against them and giving them access to the evidence; in some cases interviewing them also at the investigation stage; providing an opportunity to respond and challenge the case at a disciplinary hearing; and offering a right of appeal against the outcome. It is important to be clear, however, that failings in the above areas generally go to the question of reasonableness, and conduct which is merely unreasonable does not in itself amount to a breach of the the implied duty of trust and confidence. To the extent that I have considered the standards expected of a

reasonable employer, this has formed only a part of the overall assessment of the facts of this case.

49. The background here is that the respondent was operating in extremely demanding circumstances, running care homes for the elderly amid a global pandemic which made both its residents and staff vulnerable. The claimant was understandably very anxious about working in this environment and made the respondent aware of this, albeit informally. She had worked successfully for the respondent since around 2002, even if not continuously, and was considered a good worker who was especially good with dementia patients. On 25 May 2020, the claimant's mental health was such that her tolerance for being spoken to in an abusive manner by her colleague was lowered, and the altercation upset her greatly. The claimant felt too unwell to continue working and she immediately made the nurse in charge aware of this, as acknowledged in Ms Diaz's statement. Ms Diaz tried to encourage the claimant to stay, but gave no such instruction. The claimant phoned her manager, Mrs Panjadka, later that morning and made her aware of the fact that she was seeing her GP the next day. A fit note for stress was issued for an unusually extended period of 4 months. Even though the respondent did not see this until 29 May, from then it was aware of the seriousness of the claimant's poor mental health.

50. For reasons which were not clear to the Tribunal, the respondent's immediate reaction to the claimant leaving work on 25 May was to assume the worst. It decided immediately that the claimant was guilty of walking off the job without good reason, which if true could amount to gross misconduct justifying her dismissal. Before any investigation was carried out, and without any semblance of a disciplinary procedure taking place, the respondent chose to dismiss the claimant by its letter from Mrs Panjadka of 26 May. I am in no doubt that this letter was sent either by Mrs Panjadka or with her knowledge and approval, despite the respondent's witnesses attempts to persuade me otherwise. Their evidence on this letter and the related text message dated 29 May was wholly unconvincing. Had a member of staff produced and sent such a letter without authority, the respondent would have been extremely concerned on discovering this and would have investigated the circumstances. It did not.

51. It may be that the letter was not initially posted, as the claimant did not see it until she was given a copy after the 1 June meeting ended. On 27 May Mrs Lennon phoned the claimant and told her it was serious to walk off the job and could lead to dismissal. At that very early stage the claimant said she *had* informed the nurse in charge that she was leaving. During the Tribunal hearing the respondent took issue with the claimant's reasons for leaving, saying that it was not for ill health but because she had had an argument with a colleague. At no time did the respondent consider that the two explanations might be connected, and that it was possible for both to be true. Whether or not the claimant adequately explained this to Ms Diaz, it must have been obvious to the respondent that the claimant felt unwell, and the seriousness of her ill health was confirmed by 29 May on receipt of the fit note.

52. The text message sent on 29 May corroborates the claimant's account of events, referring as it does to the fit note, which the respondent was not willing to accept because the claimant's contract had already been terminated. This is consistent with the content of the respondent's letter of 26 May. The text, which I am also satisfied was sent by Mrs Panjadka, not only undermines the evidence of the

respondent's witnesses but also contradicts their assertions that they were not aware of the fit note at the time of attending the meeting on 1 June. By this time, it appears that the respondent had taken advice and decided as a result to distance itself from the purported dismissal, instead taking steps to try and put the case back on track. It arranged to pay the claimant sick pay and did not give effect to the previous intention to dismiss. It asked three members of staff to provide statements which they wrote themselves on around 30 May, but excluded the claimant's nephew from this step. Instead, the respondent simply assumed that he had not heard or seen anything, apparently because he was in the EMI unit on the floor above the residential unit where the argument had taken place. It is telling that the statements appear to be geared around the argument itself and not the conduct of which the claimant was accused, namely leaving the building without informing the nurse in charge and thereby leaving vulnerable residents at risk.

53. As part of this arrangement to protect its position, the respondent invited the claimant to a fact-finding meeting without giving any consideration to the seriousness of her ill health. At no time was this acknowledged or taken into account in the respondent's handling of the case. Although the respondent did allow Mrs Mackenzie to accompany her sister at the meeting, and was correct to ensure that its factual questions were answered only by the claimant, at no time did it address its mind to alternative ways of obtaining the claimant's input into the investigation. Having asked other members of staff to write their own statements, there was every reason to allow the claimant the same opportunity. Instead, the claimant felt pressurised at the meeting and it achieved nothing. In any event, Mrs Lennon was aware from her telephone call with the claimant on27 May that she was defending herself on the basis of having in fact informed the nurse in charge that she was leaving work.

54. By the time of the 1 June meeting the claimant was aware of the respondent's intention to treat her contract as terminated with immediate effect. This was clear from the text message of 29 May and the letter of 26 May which was belatedly provided after the meeting. The claimant submitted her appeal against dismissal that same day, and it was handled by Mr Hukkeri as such. He did not query why the claimant saw herself as dismissed, because he knew that these steps had been taken. Indeed, in his decision letter he explicitly concluded that the claimant should be reinstated in her employment. His three invitations to an appeal meeting also ignored the claimant's 4 month fit note and repeated pleas that she was too unwell to attend. The respondent's concern again seemed to be limited to protecting itself by ticking a few procedural boxes. The welfare of the claimant and the impact on her was not considered.

55. Looking at the procedural steps taken, there is no doubt that the respondent's actions were utterly unreasonable. No proper investigation was carried out, no attempts were made to obtain the claimant's account in such a way as to allow for her poor health, yet from the outset and throughout the respondent treated the claimant as guilty of gross misconduct. But more fundamentally, the cumulative impact of the respondent's actions demonstrated to the claimant and to this Tribunal that it had no care or concern for the claimant's situation. It knew from the beginning that the claimant said she had reported her absence to Ms Diaz. This assertion was repeated in writing in the grounds of appeal but again ignored. The respondent may have had questions about the detail of that conversation, but even on Ms Diaz's own account, the claimant did let her know she was leaving. Nevertheless, no steps were taken to clarify this with Ms Diaz. Instead, all of the respondent's managers clung to

their insistence that the claimant had left work without permission and had left residents at risk. This latter allegation was manifestly not true. In fact, the respondent's witnesses confirmed in their evidence that residents were not put at risk because the nurse in charge had provided the necessary cover.

56. Why the respondent was so determined to treat the claimant as guilty of gross misconduct without any supporting evidence – and indeed in the face of evidence to the contrary – is not clear. Perhaps it was genuine but mistaken in its belief. However, looking at the totality of the case it is clear that the respondent's actions were, intentionally or not, so serious as to breach the implied duty of trust and confidence. The conclusion on the claimant's guilt was predetermined from the outset, no meaningful attempt was made to investigate with the input of the claimant or her nephew, conversations took place between managers and staff members which were not noted, no evidence was shared with the claimant at any time, and the limitations on her ability to participate in the process were ignored. These examples, coupled with the lack of any disciplinary process before deciding first to dismiss and later to substitute a final written warning, were fundamental in nature and went to the root of the employment relationship. Not only were principles of fairness not followed, but the respondent's actions together amounted to a clear breach of the implied duty of trust and confidence entitling the claimant to resign.

57. It will be apparent from my findings of fact and these conclusions that where there were differences in the evidence of the claimant and the respondent's witnesses, I preferred the claimant's evidence as the more reliable. I have already drawn attention to some of the concerns and contradictions in the respondent's evidence, but its credibility as a whole was seriously damaged by a number of things, not least the decision to deny its own letter and text message; the contradictory evidence from the managers about whether they had discussed the case with each other and meetings with staff; and the contradictions in their evidence about the existence or otherwise of Mrs Lennon's notes of the 1 June meeting.

Authorised by Employment Judge Langridge

Date 14 April 2021