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Judgment: approved by the Court for handing down | *Delivered:* **10/04/2014**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ANDREA HEADLEY

-v-

SOUTHERN CROSS HEALTH CARE AND OTHERS

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LJ (delivering judgment of the Court)

[1] This is an appeal of the decision of an Industrial Tribunal on 11 October 2013 unanimously dismissing claims made by the appellant against her former employer following her dismissal for gross misconduct on 15 June 2012. The appellant is a personal litigant and it was agreed before the Tribunal that the third named respondent, Four Seasons No. 8 Limited, was the correct and only respondent following TUPE transfers.

[2] The background is that the appellant was employed as a nurse by the respondent from 31 January 2005 until she was dismissed for gross misconduct on 15 June 2012. The two charges that led to her dismissal were (a) an incident involving the administration of insulin to a dementia patient which ultimately led to that patient being hospitalised to check if he had received an overdose, and (b) a sick form submitted to the appellant's employer which represented that she was sick on 8 March 2012, when in fact she had worked the previous nightshift at another home for another agency.

[3] In relation to the first incident the Tribunal's decision stated that the incident charged related to the appellant's poor organisational skills when handing over the responsibility for the drug administration round to a junior nurse. This led to a mismanagement of insulin administration. The resident was transferred to hospital with a suspected overdose. It was common case that the junior nurse had administered insulin to the patient. The appellant was insistent that she had previously given insulin to the patient despite the fact that the later hospital assessment did not bear this out. The Tribunal was of the view that the appellant

persisted in putting forward this account at the hearing even though it was at odds with documentary evidence from the hospital. The Tribunal determined that the appellant was the senior nurse in charge and the documentation completed by her was at best wrongly completed and at worst completed after the event in order to cover her lack of proper record keeping in relation to drug administration.

[4] The employer undertook an investigatory process in May 2011 and later began a disciplinary process. In the meantime the appellant sent her employer a grievance document in June 2011 and she was informed of the grievance outcome by letter of 4 July 2011. As regards the disciplinary process the respondent concluded that the appellant had failed to give the insulin dose to the resident and had then falsified the relevant document to cover the deficiencies in her record keeping. It was concluded that this amounted to gross misconduct as it called into question the integrity of the appellant's position and that she had failed to meet the standards required of a registered nurse. On 8 September 2011 she was dismissed. However on 11 October 2011 she successfully appealed that decision and was reinstated in her employment receiving instead a final warning.

[5] The second incident arose when the appellant cancelled the shift for the respondent which was to have taken place on 8 March 2012 claiming that she was sick. She provided a document representing that she was sick from 7 to 10 March 2012 inclusive. It transpired that she had worked in another home for an agency on the nightshift of 7/8 March 2012. She agreed that the sick leave document was inaccurate in key respects, but claimed that this was a mistake on her part. The employer following investigation and on the basis of the evidence at the disciplinary hearing formed the view that the appellant had deliberately withheld information from the Home Manager relating to the real reason for her inability to work on the morning shift on 8 March 2012, which was that she had worked the previous night shift in a different home. The conclusion reached was that the appellant falsified her statement of sickness and the decision was that that of itself amounted to gross misconduct as it adversely affected their ability to trust her. This led to her dismissal on 15 June 2012.

[6] The appellant alleged that racial comments were made by Mrs Kelly, the Home Manager, and Mrs O'Connell, the General Manager, on 9 December 2010, 16 December 2010 and 2 April 2011. She also alleged that derogatory comments were made from that time on an on-going basis and that in February 2011 Mrs Kelly tried to force her to sign a form demoting her from her position as sister to a lesser position. There were also on-going issues about staffing levels to provide care at the respondent's establishment. The Tribunal were referred to RQIA reports which recorded that RQIA had concerns about staffing levels and the care given to residents. It was the appellant's case that she complained on an on-going basis to the RQIA in particular and to other outside bodies and individuals in relation to the standard of care given to patients and staffing levels. In her evidence the appellant said she raised issues with RQIA at the end of March 2012. She also complained

about the treatment meted out to her in the first disciplinary process. She then allegedly made disclosures to the RQIA, the Royal College of Nursing, Mr Storey MLA, the Health Minister and the Department of Health. The appellant's record of complaints made by residents about rough handling led to disciplinary proceedings against two other members of staff in April and May 2012.

[7] The appellant submitted two claim forms. Her initial claim in October 2011 of having been unfairly dismissed was withdrawn given that she was then re-instated and that led to the withdrawal of the redundancy payment and other related claims. Claims of sex discrimination in relation to part-time working which had formed part of the second claim were also withdrawn before the hearing. There were three aspects to the claim considered during the hearing. First, that her dismissal was unfair on ordinary principles in that it was on the grounds that she made protected disclosures and on the basis of racial discrimination. In addition the appellant claimed that the dismissal was an act of victimisation because she had lodged the first claim to the Tribunal. Secondly, there was a claim of race discrimination based on the 2012 dismissal, adverse treatment in relation to the first disciplinary process and alleged derogatory comments from 2010 onwards. Thirdly there were related claims for deduction from wages and breach of contract.

[8] The Tribunal drew an adverse view of the appellant's reliability as a witness. It considered that while she appeared genuinely to believe in the truth of what she put forward, even when independent evidence from documents or her own witnesses did not support her contentions, she was at times extremely confused and unable to explain key matters. She was unable to prove certain primary facts in the absence of any corroborating evidence. She gave different accounts to the Tribunal of the reasons for the failure of her witnesses to attend on the first day of the hearing and had no explanation for the contradictory versions of events. It transpired that none of the witnesses had been spoken to that morning as she had claimed or told of the dates of hearing. Two witnesses had been and remained ready and willing to give evidence and a third could not give evidence because of health difficulties. She also gave contradictory accounts regarding the location of an original copy of documents which she said were extracts from contemporaneous records she kept in personal notebooks.

[9] The Tribunal considers that Mr Graur's evidence was convincing but did not support the appellant's case. His evidence undermined the appellant's allegation that the RQIA did their unannounced inspection as a result of her complaint to them. Rather his evidence was that it was he and another member of staff who had phoned RQIA with concerns about resident care and that RQIA came in that same day to inspect the home. The Tribunal found that the conclusions reached during the disciplinary processes were open to the disciplining manager on the information before him. The actions of the employer in relation to the investigation, disciplinary process and penalty given the gravity of the allegations and of the first incident in particular were within the band of reasonable responses.

[10] The respondent had also complied with the statutory disciplinary procedure. The Tribunal used the steps in Kuzel v Roche Products Limited and dismissed the appellant's claim that she had been dismissed because she made protected disclosures. First the Tribunal was not satisfied that there was a real issue as to whether the reason put forward by the respondent for the dismissal was not the true reason. The appellant was a senior nurse in charge of drug administration. Correct record keeping and clear instructions from her were essential given that an overdose could result in hospitalisation of a patient and the patient going into a coma. The patient was unable to have a reliable account of his medication intake due to his dementia. Secondly, the Tribunal found that the employer proved the reason for dismissal which was gross misconduct. The Tribunal concluded that the appellant had not discharged the initial burden of proving facts from which the Tribunal could conclude that an act of race discrimination had occurred. It was clear from the documents that there were serious issues which were investigated and found to be substantiated in 2011 in relation to the claimant's practice and record keeping. The evidence did not reveal any taint of race discrimination in relation to the dismissal in 2011.

[11] The Tribunal further concluded that the appellant had not discharged the burden of proving that the alleged derogatory comments had been made or that there had been an attempt to force her to sign a form demoting herself from her position of sister. The reason for so finding related to their serious doubts about the reliability of the appellant's evidence generally in the absence of corroborating evidence. The Tribunal did not accept that a dismissal in 2012 was an act of victimisation following the lodgement of the first claim to the Tribunal in October 2011 or the raising of the grievance in June 2011. They considered that the respondent had ample reason for dismissing the appellant. The Tribunal did not find the 2012 dismissal tainted by race discrimination.

[12] The Tribunal found that there was no evidence to support the appellant's claim that she complained to the named bodies or individuals. All of the bodies contacted by the respondent's solicitors confirmed that they could find no details of such complaints. There was no evidence that the RQIA inspections were prompted by information from the appellant. Further the chronology did not bear out the claim that disclosures made by the appellant had a material influence on the second disciplinary process and outcome. She said she raised the issues at the end of March 2012 but the issues to do with the sickness document arose in early March 2012. Similarly the disciplinary process against the appellant had already begun before she complained about the incidents on 19 April 2012 involving other members of staff.

[13] In her skeleton argument the appellant alleged that the Tribunal were biased against her and disputed findings of fact made by the Tribunal. These include that the Tribunal failed to find that she was harassed at work, that the Tribunal wrongly concluded that even though the RQIA had said it received anonymous complaints she had not made these complaints and that the Tribunal wrongly concluded that

she had not made complaints to various bodies and individuals. The appellant stated that as regards the incident she prepared statements for the investigation but they went missing and the respondent admitted that they had destroyed them. She also stated that as regards the second incident for which she was disciplined her sick form had been written up incorrectly and that her GP had diagnosed her as on 8 March 2012 as suffering from anxiety and depression.

[14] We have carefully examined the oral and written submissions lodged by the appellant. The appellant must demonstrate an error of law on the part of the Tribunal in order to succeed in her appeal. Her complaints related largely to disputed issues of fact. There was ample material available to the Tribunal which justified it in rejecting the appellant's reliability as a witness for the reasons given by it. The test for bias is whether the fair-minded and informed observer having considered the facts would conclude that there was a real possibility that the Tribunal was biased. In light of the material available to the Tribunal we do not consider that the appellant could possibly have satisfied that test. The appellant has not satisfied us that there was any error of law. The appeal is dismissed.