THE INDUSTRIAL TRIBUNALS

CASE REF: 7749/19

CLAIMANT: **Brian Jenkins**

RESPONDENT: **Larchwood Care (NI) Limited**

JUDGMENT

The unanimous judgment of the tribunal is that all claims are dismissed.

CONSTITUTION OF TRIBUNAL

Vice President: **Mr N Kelly**

Members: **Mr Roger McKnight**
Mr Alan White

APPEARANCES:

The claimant appeared in person, assisted on the first day by a family member and on the second day by his son.

The respondent was represented by Ms Lara Smith, Barrister-at-Law, instructed by O'Reilly Stewart Solicitors acting as agents for Markel LLP Solicitors.

BACKGROUND

1. The claimant had been employed by the respondent as the catering manager in a residential care home for approximately 16 years until he was summarily dismissed.

2. The respondent is a limited company which operates several care homes including the care home in which the claimant had been employed.

3. The claimant had been the representative for the GMB trade union in that care home until his dismissal.

4. The claimant was summarily dismissed on 5 February 2019 for misconduct and that dismissal was upheld on appeal.

5. The claimant lodged a claim in the Industrial Tribunal on 16 April 2019 which alleged unfair dismissal, disability discrimination, age discrimination and trade union activity detriment.

6. The claim of age discrimination was withdrawn and the claim of disability discrimination was not pursued.

7. The claimant was represented by a solicitor at a Case Management Discussion on 20 August 2019. At that Case Management Discussion the tribunal directed that the claimant's solicitor was to confirm to the tribunal whether the claimant's case included a claim for dismissal on the grounds of trade union membership or trade union activities.

8. The hearing was further case managed on 10 February 2020. The claimant was no longer legally represented. It was recorded that this was a claim of alleged unfair dismissal and alleged trade union activity/membership detriment. The full hearing was listed for 24, 25 and 26 March 2020.

9. Following the lockdown as a result of the pandemic, the full hearing was postponed and was relisted for a Case Management Preliminary Hearing on 12 August 2020. At that Preliminary Hearing, the respondent prepared a draft list of issues which related to alleged unfair dismissal, alleged trade union detriment and alleged failure to pay notice pay as a result of the summary dismissal. The claimant was directed to indicate whether he had any objection or wished to make any amendment within seven days. The claimant did not do so.

10. The full hearing was listed for 26-28 October 2020 but concluded on 27 October 2020.

    The claimant had difficulties with sight and with hearing. He was assisted throughout the hearing; particularly with reading documents.

11. At the commencement of the hearing the claimant was asked to confirm that his only claims before the tribunal were a claim of alleged unfair dismissal (including any loss of notice pay) and alleged trade union activity detriment. The claimant confirmed that those were the only two issues before the tribunal. The case proceeded on that basis.

12. The witness statement procedure was used in this case. Each witness swore or affirmed to tell the truth, adopted their witness statement as their evidence and moved immediately into cross-examination and, where appropriate, brief re-examination.

13. The claimant gave evidence on his own behalf and did not call any other witness.

14. Three witnesses gave evidence on behalf of the respondent. They were firstly, Mr Christopher Walsh who had conducted the investigation. Secondly, Ms Siobhan McMullan who had conducted the disciplinary hearing. Thirdly, Ms Nuala Green who had conducted the appeal hearing.

15. The case was conducted over two days on 26 and 27 October 2020. At the conclusion of the evidence, the parties gave oral submissions.

16. At the conclusion of the oral submissions, the tribunal considered the evidence and the arguments and reached its decision. This document records that decision.

RELEVANT LAW

Unfair Dismissal

17. The statutory test to be applied by a tribunal, when considering the fairness of a dismissal, appears simple. However it has provoked a lengthy series of appellate decisions.

18. Article 130 of the Employment Rights (Northern Ireland) Order 1996 provides:-

> *"130(1) In determining for the purposes of this Part 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 is either a reason falling within paragraph (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 paragraph if it –*
>
> *(b) relates to the conduct of the employee,*
>
> *(4) where the employer has fulfilled the requirements of paragraph (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."*

19. The Court of Appeal in ***Rogan v South Eastern Health & Social Care Trust [2009] NICA 47*** approved the earlier decision of Court in ***Dobbin v Citybus Ltd [2008] NICA 42*** where the Court held:-

> *"(49) The correct approach to [equivalent GB legislation] was settled in two principal cases – **British Home Stores v Burchell [1980] ICR 303** and **Iceland Frozen Foods Ltd v Jones [1983] ICR 17** and explained and refined, principally in the judgements of Mummery LJ, in two further cases **Foley v Post Office** and **HSBC Bank PLC (formerly Midland Bank) v Madden reported at [2000] ICR 1283** (two appeals heard together) and **J Sainsbury v Hitt [2003] ICR 111**.*

(50) *In **Iceland Frozen Foods**, Browne-Wilkinson J offered the following guidance:-*

"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by [equivalent GB legislation] is as follows:-

(1) the starting point should always be the words of [equivalent GB legislation] themselves;

(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another;

(5) the function of an industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair. "

(51) *To that may be added the remarks of Arnold J in **British Home Stores** where in the context of a misconduct case he stated:-*

> *"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, it must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as*

much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the Tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the Tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure", as it is now said more normally in a criminal context, or, to use the more old fashioned term such as to put the matter beyond reasonable doubt. The test, and the test all the way through is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."

20. In ***Bowater v North West London Hospitals NHS Trust [2011] EWCA Civ 63***, the Court of Appeal (GB) considered a decision of the Employment Appeal Tribunal which had set aside a decision of an employment Tribunal. The Employment Tribunal had determined that a remark made by a nurse in an Accident & Emergency Department was not a sufficient basis for a fair dismissal. Lord Justice Longmore stated at Paragraph 18 of the decision that:-

> *"I agree with Stanley Burnton LJ that dismissal of the appellant for her lewd comment was outside the range of reasonable responses open to a reasonable employer in the circumstances of the case. The EAT decided that the ET had substituted its own judgment for that of the judgment to which the employer had come. But the employer cannot be the final arbiter of its own conduct in dismissing an employee. It is for the ET to make its judgment always bearing in mind that the test is whether dismissal is within the range of reasonable options open to a reasonable employer."*

He continued at Paragraph 19:-

> *"It is important that, in cases of this kind, the EAT pays proper respect to the decision of the ET. It is the ET to whom Parliament has entrusted the responsibility of making what are, no doubt, sometimes, difficult and borderline decisions in relation to the fairness of dismissal."*

21. In ***Fuller v London Borough at Brent [2011] EWCA Civ 267***, the Court of Appeal (GB) again considered a decision of the Employment Appeal Tribunal which had set aside the decision of an employment tribunal on the basis that the employment tribunal had substituted its view for the decision of an objective reasonable employer. Lord Justice Mummery stated at Paragraph 7 of the decision that:-

> *"In brief, the council's case on appeal is that the ET erred in law. It did not apply to the circumstances existing at the time of Mrs Fuller's dismissal the objective standard encapsulated in the concept of the 'range or band of*

reasonable responses'. That favourite form of words is not statutory or mandatory. Its appearance in most ET judgments in unfair dismissal is a reassurance of objectivity. "

At Paragraph 38 of the decision, he continued:-

"On a proper self-direction of law I accept that a reasonable ET could properly conclude that the council's dismissal was outside the band or range of reasonable responses and that it was unfair. If, as I hold, the ET applied the objective test, it did not err in law and there was no ground on which the EAT was entitled to set it aside or to dismiss Mrs Fuller's claim. "

22. In ***Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721***, the Court of Appeal (GB) again considered a decision of an Employment Appeal Tribunal which had set aside the decision of an employment tribunal on the ground that that tribunal had substituted their judgment of what was a fair dismissal for that of a reasonable employer. At Paragraph 13 of the judgment, Lord Justice Elias stated:-

*"Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances. In **A v B [2003] IRLR 405**, the EAT (Elias J presiding) held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite"*

*"In **A v B** the EAT said this:- Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course even in the most serious cases it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the enquiry should focus no less on any potential evidence that may exculpate or least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."*

23. The Court of Appeal in Northern Ireland further examined the approach that a tribunal should adopt in claims of unfair dismissal in the case of ***Connolly v Western Health & Social Care Trust [2017] NICA 61***.

In that case, a nurse, who was on duty in a hospital ward and who was experiencing the symptoms of an asthma attack, used a Ventolin inhaler from the locked ward stock. She had intended to replace it with another inhaler which would have been supplied to her on her own prescription. She had not sought prior permission to use the hospital's inhaler; she had not approached any doctor in the hospital for assistance; she had not attended the Accident & Emergency Department for assistance. She did not disclose the use of the inhaler until her next day on duty two days later. It was not in dispute that there had been misconduct on the part of the claimant in using a prescription only medicine which was part of hospital stock. The issue in all of this was whether the misconduct had been sufficiently serious to ground summary dismissal for gross misconduct.

24. The WHSCT had been concerned that the claimant had intended to replace the inhaler from her own supply. That would have broken the chain of supply within the hospital and in the employer's view would have presented a serious risk to the health of patients. The employer was also concerned that the claimant had sought, in response to the disciplinary proceedings, to stress that Ventolin had not been a controlled drug (although it had been a prescription only drug). The employer felt the claimant still believed that her conduct was permissible in certain circumstances and that therefore the behaviour could recur. The claimant was summarily dismissed for gross misconduct.

25. This case was the subject of two separate appeals to the Court of Appeal. However, the later appeal is the one relevant to the present case. It was a split decision. The minority decision, reached by Gillen LJ, found that the tribunal decision had been a decision which it had been entitled to reach, in that it had held that there had been a fair dismissal for gross misconduct. The hospital rules had made it clear that '*misappropriation*' of drugs was a potential offence. The claimant had not notified any other member of staff of her use of the inhaler before using it or for the rest of that shift. She had attended work for her next shift some two days later and had only then informed her manager that she had used the Ventolin inhaler from ward stock.

26. In essence, Gillen LJ determined that the decision to summarily dismiss the claimant in all the circumstances of the case had been a decision which a reasonable employer could reasonably have reached, even if may not have been the decision that the tribunal or the court would have reached, had it been determining the issue at first instance.

27. After citing the usual authorities, Gillen LJ approved the following statement in the tribunal's findings:-

> *"It (the tribunal) may not re-hear and re-determine the disciplinary decision originally made by the employer; it cannot substitute its own decision for the decision reached by that employer. In the case of a misconduct dismissal, such as the present case, the tribunal must first determine the reason for the dismissal: that is, whether in this case the dismissal was on the basis of conduct and must determine whether the employer believed that the claimant had been guilty of that misconduct. The tribunal must then consider whether the employer had conducted a reasonable investigation into the alleged misconduct and whether the employer had then acquired reasonable grounds for its belief in guilt. The question is not whether the tribunal will have reached the same decision from the same evidence or even on different evidence. The tribunal must then consider finally whether the decision to dismiss was proportionate in all the circumstances of the case."*

28. Gillen LJ then noted that the tribunal had determined that the employer had been concerned by the use of the prescription only inhaler from the ward stock which had been kept under lock and key, the claimant's intention to replace that inhaler with an inhaler from her own supply and that she knew the use of such medication was wrong. The tribunal had determined that the employer had held a genuine belief in gross misconduct which had been reached on reasonable grounds following a reasonable investigation and that it was not for the tribunal to substitute its own

opinion or penalty for that of the employer in the circumstances of this case. Gillen LJ determined that:-

> *"49. I consider that there is no basis upon which this court could consider that this conclusion was plainly wrong or that it could not have been reached by any other reasonable tribunal. Taking a prescription drug from under lock and key for the appellant's own use is clearly an extremely serious matter which no hospital can or should tolerate. Not only was the appellant well aware that this was prohibited behaviour but it could easily have been avoided by seeking assistance from A and E or the duty doctor.*
>
> *50. It was not unreasonable to conclude that this was aggravated by her failure to report the matter until two days later. Moreover it was perfectly reasonable for the Panel, made up of employees of the Trust well versed in Trust procedures and policies, to take the view that intent to personally replace it infringed the pharmacy supply chain. Frankly it scarcely requires an expert to inform the court that decisions to replace prescribed medications in principle should not be taken at this level irrespective of how simple an exercise in replacement in individual instances may appear to be."*

29. Gillen LJ concluded:-

> *"57. Whilst this may not necessarily have been the conclusion that this court would have reached had it been hearing the matter at first instance, I find no basis for substituting our view for that of the Panel and the Industrial Tribunal hearing this matter. I therefore dismiss this ground of appeal."*

30. The majority of the Court of Appeal in ***Connolly***, Deeny LJ and Weir LJ, reached a different conclusion. Firstly, they concluded that the decision of the respondent to dismiss the claimant, in all the circumstances of the case, was not a decision which a reasonable employer could reasonably have reached. Secondly, it determined that the decision of the industrial tribunal was '*plainly wrong*'. That second decision is based on the facts of the ***Connolly*** decision and on the view taken by the majority of the Court of Appeal in relation to the wording of the tribunal decision in that case. The first decision, and the approach taken by the majority to the objective standard of reasonableness, is of primary importance to the present decision.

31. Deeny LJ stated that:-

> *"Reaching a conclusion as to whether the dismissal is fair or unfair 'in accordance with equity and the substantial merits of the case' as required by Article 130(4)(b) would appear to involve a mixed question of law and fact."*

32. Deeny LJ then cited the well-known paragraph in ***Iceland Frozen Foods Ltd v Jones*** (above) which sets out the '*reasonable responses*' test. He went on to quote further from that decision to include the following:-

*"Although the statement of principle in **Vickers Ltd v Smith [1977] IRLR 11** is entirely accurate in law, for the reasons given in **N C Watling & Company Ltd v Richardson [1978] ICR 1049**, we think industrial tribunals would do well not to direct themselves by reference to it. The statement in **Vickers Ltd v Smith** is capable of being misunderstood so as to require such a high degree of unreasonableness to be shown that nothing short of a perverse decision to dismiss can be held to be unfair within the section. This is how the industrial tribunal in the present case seems to have read **Vickers v Smith**. That is not the law. The question in each case is whether the industrial tribunal considers the employer's conduct to fall within the band of reasonable responses and industrial tribunals would be well advised to follow the formulation of the principle in **N C Watling & Company Ltd v Richardson [1978] ICR 1049** or **Rolls Royce Ltd v Walpole [1980] IRLR 343**."*

33. Deeny LJ then pointed out that gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee:-

"So the conduct must be a deliberate and wilful contradiction of the contractual terms."

34. Deeny LJ stated that:-

"The facts as found are that she [the claimant] took five puffs of this inhaler when undergoing an asthmatic attack, without permission. The tribunal accepted the Appeal Panel's view that this was aggravated by her failure to report the matter until two days later.

*It seems to me that, even taking into account the delay, for which an explanation was given and was not rejected as a finding of fact, that cannot constitute 'deliberate and wilful conduct' justifying summary dismissal. Her terms of employment do not seem to have expressly prohibited such a use. The Code of Conduct is ambiguous at best on the topic. If she had asked the Ward Sister for permission before she used the inhaler and the Sister had refused her permission and she had nevertheless gone ahead and had used it one might have had the sort of act of disobedience contemplated by the Court of Appeal in **Laws v London Chronicle Limited**. That would have been a deliberate flouting of essential contractual conditions, ie following the instructions of her clinical superiors. But that is not what happened here. Furthermore, I agree with the statements in Harvey … that dismissals for a single first offence must require the offence to be particularly serious. Given the whole list of matters which the employer included under the hearing of Gross Misconduct it is impossible, in my view, to regard the nurse's actions as 'particularly serious'."*

35. Deeny LJ stated:-

"For this court to approbate the tribunal's decision upholding as within a reasonable range of responses the summary dismissal of an employee from her chosen profession on these facts without any prior warning as a 'repudiation of the fundamental terms of the contract' would be to turn language on its head. Employment law is a particular branch of the law of

contract. With statutory interventions it has, of course, developed a character of its own. But any dismissed employee opting to go into a court of law and claim damages for breach of contract at common law against an employer who had summarily dismissed them for using a Ventolin inhaler while suffering from an asthmatic attack and delaying two days in reporting that, particularly when it was their 'first offence', could be tolerably confident of success before a judge, in my view."

36. Deeny LJ held further that:-

> *"The interpretation of what, in this jurisdiction, is Article 130(4)(a) of the 1996 Order has been fixed by a series of appellate courts over the years, ie that whether an employer acted reasonably or unreasonably is to be addressed as whether an employer acted within a band of available decisions for a reasonable employer even if not the decision the tribunal would have made. That test, expressed in various ways, is too long established to be altered by this court, and in any event has persuasive arguments in favour of it. But it is necessary for tribunals to read it alongside the statutory provision of equal status in Article 130(4)(b), ie that that decision 'shall be determined in accordance with equity and the substantial merits of the case'. … ."*

37. The statutory test of unfairness in Article 130 of the 1996 Order (and in its predecessor) is in simple terms, and should be straightforward. It is difficult to see why it has generated such an extended discussion in case law over the last 40 years. The words of Article 130 comprise the only statutory test of unfairness. The formulation of the '*band of reasonable responses*' test, variously worded in different decisions, cannot be a substitution for the proper application of the statutory test. It may best be regarded as a double-check to be applied to ensure that, in applying the statutory test, the tribunal has avoided substituting its own views, on what it would have done in the relevant circumstances, for the decision of the employer. In other words it is, as the Court of Appeal (GB) stated in ***Fuller*** (above), a '*reassurance of objectivity*'.

    It is therefore important to remember that the '*reasonable responses*' test, although long-established as pointed out by the Court of Appeal in ***Connolly*** (above), appears nowhere in the statute. This is a statutory tribunal whose function is to apply the statute. Non-statutory wording or non-statutory paraphrasing of the statutory test can only be of assistance where it is remembered that it cannot substitute for the statutory test which sets out the remit and the function of the tribunal. In ***Iceland*** (above), it was stressed that the starting point should be the words of the legislation. In ***Connolly*** (above) the Court of Appeal (Northern Ireland) emphasised the importance of applying the statutory test as a whole.

38. There is no difference between the formulation of the legal principles expressed in the majority judgment and in the minority judgment in the case of ***Connolly***. The detailed formulation of those principles set out by Gillen LJ at Paragraph 28(i) – (xvi) of the decision covers, in full, the procedure which should be adopted by an industrial tribunal in assessing the fairness or unfairness of a misconduct dismissal. It is not disputed or challenged in any way in the majority judgement.

39. In ***Reilly v Sandwell Metropolitan Borough Council [2018] UK SC16***, the Supreme Court looked at a case of alleged unfair dismissal. The facts of that particular case are not of assistance to the present matter. However it is notable that Lady Hale, the President of the Supreme Court stated;

> *"the case might have presented an opportunity for this court to consider two points of law of general public importance which have not been raised at this level before."*

The first point is not of relevance to the present matter. However, Lady Hale described the second point in the following way;

> *"nor have we heard any argument on whether the approach to be taken by a tribunal to an employer's decisions, both as to the facts under section 98(1) to (3) as the Employment Rights Act 1996 first led down by the Employment Appeal Tribunal in* ***British Homes Stores Limited v Burchell [1978] ICR 303*** *and definitively endorsed by the Court of Appeal in* ***Foley v Post Office [2000] ICR 1283,*** *is correct."*

She went on to state;

> *"Even in relation to the first part of the inquiry, as to the reason for the dismissal, the* ***Burchell*** *approach can lead to dismissals which were in fact fair being treated as unfair and dismissals which were in fact unfair being treated as fair. Once again, it is not difficult to think of arguments on either side of this question but we have not heard them."*

40. Lady Hale went to state;

> *"34. There may be good reasons why no one has challenged the* ***Burchell*** *test before us. First, it has been applied by Employment Tribunals, in the thousands of cases which have come before them, for forty years now. It remains binding upon them and on the Employment Appeal Tribunal and Court of Appeal. Destabilising the position without a very good reason would be irresponsible. Second, Parliament has had the opportunity to clarify the approach which is intended, should it consider that* ***Burchell*** *is wrong, and it has not done so. Third, those who are experienced in the field, whether acting for employees or employers, may consider the approach is correct and does not lead to injustice in practice.*
>
> *35. It follows that the law remains as it has been for the last 40 years and I express no view about whether that is correct."*

41. Therefore, while the Supreme Court recognised the long standing of the ***Burchell*** test, and pointed out the significant difficulties inherent in challenging that non statutory test at this stage, it did, rather pointedly, indicate that they were not expressing any view about whether the non-statutory test is correct and that they had not heard any argument in relation to that point. At the least, the Supreme Court questioned whether the "reasonable responses" test should be challenged at the final appellate level.

That said, as matters stand, the statutory test, underpinned by the *'reasonable responses'* test as discussed in the above authorities, is the approach which this tribunal must adopt in relation to the claim of unfair dismissal.

Trade Union Activity Detriment

42. Article 73 of the Employment Rights (NI) Order 1996 provides;

> *"(i) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of –*
>
> *(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so –"*

43. Article 74 of the 1996 Order provides;

> *"(1) A worker – may present a complaint to an Industrial Tribunal on the ground that he has been subject to a detriment by his employer in contravention of Article 73."*

44. Article 75 of the 1996 Order provides;

> *"(1) On a complaint under Article 74 it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act".*

RELEVANT FINDINGS OF FACT

45. The claimant had been employed at all relevant times as a catering manager in a care home operated by the respondent. The claimant had been in charge of the kitchen and therefore in charge of the preparation of food for residents including the preparation of food for those residents who were on restricted or special diets.

46. On 24 March 2018, the RQIA, the statutory body charged with the inspection and regulation of care homes, carried out an unannounced inspection of the care home. At that time, the inspector made particular observations to the care home manager and those observations were included in a report published later on 14 August 2019. In particular, the RQIA identified what it described as *"weaknesses"* in relation to the provision of nutritional care to patients.

47. Special or restricted diets were assessed by Speech and Language Therapy specialists. These were known as SALT recommendations. The RQIA stated that the records maintained by care staff *"did not accurately reference the patients assessed risk of choking".* The RQIA further determined that;

> *"Observation of the dining/kitchen environment and discussion with kitchen staff further highlighted that signage used to indicate patients assessed dietary needs inaccurately described patients received SALT recommendations."*

48. A Quality Improvement Plan was set out for the home by the RQIA. It included the following;

> *"All speech therapy care plans have been updated to reflect the current assessed needs of all residents within the home as of 2 and 3 October 2018. A folder has been placed in both dining rooms for all staff to advise as to the recommended guidelines for each resident. There is a folder for catering staff that has been updated to reflect current guidelines on 4 October 2018. All pre-existing boards that were used to display this information are no longer in use for this purpose."*

49. In April and June 2018 a patient *"EG"* had three choking incidents. That patient was admitted to hospital and subsequently died. Those incidents are not directly related to the disciplinary process which led to the claimant's dismissal in the present case. Nevertheless, the tribunal determines that they are relevant in that they set the background and context in which the respondent then proceeded to address the provision of nutritional care to patients and in particular the nutritional care to another patient *"PM"*.

50. Following the incidents concerning *"EG"*, the Northern Health and Social Care Trust conducted an investigation and reported to the respondent on 10 October 2018. The Trust noted that there appeared to be some confusion amongst staff in the home about food texture. It stated that the Senior Social Worker said *"this had identified a training need."* The then home manager had *"acknowledged this as she said they didn't realise the extent of the training need until this event."* The Trust attached an *"action plan"* to that letter. That action plan identified seven residents who required particular SALT plans. It included the resident "*PM*". It required individual meals prepared in the kitchen to be marked with the resident's name and recommended training for the catering staff in the home.

    The tribunal concludes that that following the incidents with "*EG*" the RQIA report, and following the report from the Northern Trust together with the action plan prepared by the Northern Trust, the respondent had been made aware of the urgent need to ensure that SALT guidelines were followed in relation to seven particular patients, including the patient identified as "*PM*". The tribunal is also satisfied that the need and importance of relevant training for kitchen staff, which would have included above all the catering manager, had been made plain to the respondent. The need for such training had also properly been accepted by the respondent.

51. Training was provided to the staff of the care home, including to the catering staff in a variety of ways. Some training was conducted on a face to face basis. Other training comprised of supervision notes which were handed to individual members of staff so that those individual members of staff would read, understand and sign those supervision notes. The tribunal concludes that this was an entirely proper way of conducting training from time to time. There is no requirement that such training can only be conducted on a face to face basis by a formal trainer in a formal setting. It was appropriate to disseminate information to staff members by supervision notes, with a requirement for each staff member to acknowledge having read and understood those supervision notes

52. The claimant, who had been a GMB representative at that time, refused to sign such supervision notes and further advised his colleagues not to sign those

supervision notes. The claimant stated that he did this because he believed these supervision notes formed part of the disciplinary procedure. There was and is no basis for any such belief. When directly questioned by the tribunal about the basis for that belief, the claimant was unable to properly explain that belief. The tribunal concludes that the claimant, in refusing to sign these supervision notes, and in advising his colleagues not to sign those supervision notes, did not, and could not, have believed that they formed any part of the disciplinary process. He had been repeatedly advised by management that this had not been the case and there had been no evidence whatsoever to support any such belief.

53. The tribunal's unanimous conclusion is that it is surprised that immediate disciplinary action had not been taken against the claimant once he refused, and once he had instructed his colleagues, to sign the supervision notes. Those supervision notes were a vital part of ensuring that the correct diet was provided to each of the residents. Against the background of the *"EG"* incidents the RQIA investigation, and the Northern Trust report, the need for appropriate training and the need to evidence that training could not have been more serious.

54. On 28 September 2018, Mr Christopher Walsh, the operations managers for the respondent company carried out an investigation meeting with the claimant. In the course of that investigation meeting, the claimant confirmed to Mr Walsh that he understood the SALT guidelines and that he knew the importance of serving the correct meals in accordance with those guidelines to patients. Mr Walsh confirmed to the claimant that the supervision notes did not form part of the disciplinary process and that they were part of the necessary training to ensure that those guidelines were followed. Nevertheless the claimant insisted that he would not sign those supervision notes and that he had instructed his colleagues, in his role as GMB representative, not to sign those supervision notes.

55. The claimant confirmed to Mr Walsh that he had received SALT training on 6 September 2018 and that he would follow that training.

56. A further staff meeting was held with the catering staff, including the claimant, and the home manager on 10 October 2018. The staff were informed that the previous procedure of using wipe boards to indicate the correct diet had been discontinued and that the new procedure was that the relevant SALT recommendations were to be held in a black folder to be kept beside the microwave in the kitchen. The staff were also informed that they had to attend a briefing at 11.00 am every morning to be kept informed of any changes. The tribunal unanimously concludes that this had been made absolutely plain to the claimant and to other members of the kitchen staff in the course of this meeting. There could have been no misunderstanding of either the need to maintain the correct SALT guidelines in the black folder or of the need to attend the daily briefing at 11.00 am.

57. The minutes of the staff meeting record;

> *"All kitchen staff are to attend the safety brief daily at 11.00 am to ascertain if there had been any changes to the SALT guidelines – if this does not take place for any reason, it is imperative that you inform the home manager."*

58. In the course of that meeting on 10 October 2018 the catering staff, including the claimant, were also advised that all meals leaving the kitchen would be labelled with

the name of the patient and would indicate the texture of the food in accordance with the SALT guidelines.

A copy of the minutes of that meeting were placed in the kitchen and would have been available to all staff who had in any event attended that meeting.

59. On 20 October 2018, an incident occurred with a patient identified as "*PM*". On the following day, on 21 October 2018, three members of staff; Registered Nurse Mary Braithwaite, care assistant Laura Magee and care assistant Laura McCrum, reported that the claimant had sent an incorrect meal upstairs for "*PM*". That incorrect meal had been lasagne and chips. It had been a normal meal and had not been in accordance with the SALT recommendations for *"PM".* It posed a risk of choking.

60. Registered Nurse Mary Braithwaite provided a detailed two page hand written statement to the home manager. That statement recorded;

> *"At lunchtime on Saturday, Shannon came to me to say resident (PM) got normal meal instead of modified diet as per SALT. When I asked who gave it, she said Emily [the claimant's wife who was a care assistant in the care home]. When I asked Emily re this she said Brian [the claimant] said it was ok as she had signed a form. Shannon said this was no longer the case as she has to have what SALT had recommended."*

61. The statement further recorded that "*PM*" refused to change the meal. She had *"tolerated"* the lasagne but had not eaten the chips. The statement went to say;

> *"I was informed by staff later when some items were being requested from kitchen by shouting down that Brian (the claimant) was heard shouting up to tell Emily to answer her F--- phone.*

The statement went to on say;

> *"At teatime I went into the dining room to check meals were ok. I observed Emily put her phone in her pocket and say "he is not talking to me like that!" and was visibly upset."*

62. Laura Magee, a care assistant, provided a witness statement to the home manager which stated;

> *"On Saturday 20 October, I was not present in the upstairs dining room for the beginning of the phone call. However once I had returned, Emily was ending a phone call and seemed to be quite frustrated. I did not hear Brian shout anything to Emily, nor did I hear the conversation between the two of them at that present time."*

63. Laura McCrum, another care assistant, provided a witness statement to the home manager stating;

> *"On 20 October, I was working with Emily, Laura, Shannon and Mary. At lunchtime, lasagne and soup was served. On serving meals we realised two meals were missing. One fork-mashable and one pre-mashed. Dave*

the kitchen assistant came up and we asked for this as we had several failed attempts to try and communicate down the lift. After a minute, Brian shouted up the lift "tell Emily to answer her fucking phone". I told Emily Brian was ringing her and went to feed Edith at the other end of the room. Emily got her phone out and rang Brian who said the puree was sent for the pre-mashed and the normal [meal] was [PM's]. I can't remember who was stood beside Emily at the time but she said to them that [PM] was allowed the normal [meal]. We both told Emily this was no longer the case and Pauline wasn't allowed the texture she wanted. Emily then tried to lift the meal from [PM] who then kicked off."

64. The claimant went on annual leave on 21 October 2018 and returned from annual leave on 12 November 2018.

65. On Friday 10 November, a carer, Ms McLeod, provided a witness statement to management which referred to the manner in which a supervision note, part of the training regime for kitchen staff, had been treated by the claimant. It stated;

> *"Downstairs, there was supervisions printed for the staff to read and sign when received. Brian (the claimant) was told there was a supervision for him and could he sign for it by the nurse in charge. Brian took the supervision and placed it in the bin in the nurse's station which was emptied by the domestic staff."*

66. On 23 November 2018, the home manager entered the kitchen to check the folder which was supposed to contain the SALT recommended diet guidelines for each of the relevant patients including "*PM*". That folder contained an outdated diet for "*PM*" which had been issued on 13 April 2018. It did not contain the updated guidelines for "*PM*" which had been issued on 15 October 2018 and which had been given to the claimant. After a search had been conducted of the kitchen, the updated guidelines had been found amongst menus on top of the microwave. The tribunal is satisfied that the updated guidelines should have been entered into the black folder kept specifically for that purpose and that that should have been done by the claimant as catering manager. The tribunal is also satisfied that the updated guidelines, could not, where they had been left, have been easily located or used by other member of staff. That would have included any member of staff who had been in charge of the kitchen when the claimant had been off on his regular days off duty or when the claimant had been off on annual leave.

67. An investigation meeting was held on 11 December 2018 to consider the management of modified diets within the care home and to consider the claimant's engagement with management within the care home. The claimant was represented in the course of that investigation meeting by Mr Alan Perry a GMB representative.

68. In the course of his cross-examination before this tribunal, the claimant sought to challenge the accuracy of the minutes recorded of that meeting. The handwritten notes which formed the basis for those typed minutes were provided to the tribunal.

69. The tribunal is satisfied that Mr Perry did not at any stage seek to challenge the accuracy of those notes other than to allege that a particular question he had asked in the investigation meeting had not been recorded. In any event, the tribunal is

content that those notes are accurate. The claimant, in response to the queries put to him by Mr Walsh had described the process as a *"witch hunt"*. He stated;

> *"This is micro management. This is silly – all over someone's diet. On Sunday D's were given sausage rolls. This is just silly."*

70. The claimant had been asked what he done with the copy of the supervision note which Ms McLeod alleged he had placed in the bin, he replied;

> *"I do not know. How can anyone work under these conditions"*
>
> *"It was ridiculous. It was five pages, how could anyone remember that."*

The claimant was again asked what he done with the supervision note and then stated that;

> *"It is in the house, if I could find it."*

It is difficult to reconcile those two responses.

71. In relation to the alleged incident on 20 October 2018, the claimant stated;

> *"No I did not give "PM" her meal described to you"*

He stated that he had cut the lasagne into small squares.

However the claimant was asked at a later point in the investigation meeting whether he had given "*PM*" chips and lasagne. His reply at that stage was different. He stated;

> *"Cannot recall. It was so long ago. It needs to be reported the day after. I am expected to remember two to three months down the line."*

It is again difficult to reconcile those responses.

72. When the claimant was asked about the fact that the updated SALT guidelines for PM had not been placed in the correct folder and had been left amongst other papers on top of the microwave, he stated that *"I know where this is going. This is crazy."*

Mr Walsh pointed out to the claimant that this had meant that other staff would not have had access to the updated SALT guidelines should they had to refer to the updated guidelines in preparing meals. The claimant again stated that this was a "*witch hunt*" and was all about one resident who is very fond of and he said again that it was "*nonsense*".

73. The claimant again stated he could not remember what meal "*PM*" had got as it was too long ago. He stated that he could have had *"a hundred and one reasons"* for not putting the updated SALT recommendations for "*PM*" in the correct folder.

74. Following the investigation, Mr Walsh recommended that disciplinary action should be taken in relation to the following matters;

(i) neglect of appropriate care;

(ii) abusive behaviour;

(iii) gross insubordination;

(iv) failure to comply with lawful and/or reasonable instructions.

75. That recommendation was communicated to the claimant by letter dated 11 January 2019. The claimant was invited to attend a disciplinary meeting to answer the following charges;

> *"- neglected to provide appropriate care to a resident at _____ care home, by failing to follow SALT guidelines in relation to her dietary restrictions;*
>
> *- engaged in abusive behaviour towards another employee at _____ care home;*
>
> *- displayed gross insubordination in response to efforts by the home manager and her agents, to ensure your awareness of your obligations in relation to the welfare of residents at the home;*
>
> *- failed to carry out reasonable instructions."*

The claimant was provided with the investigation report, minutes of the investigation meeting, relevant correspondence and the relevant statements. The claimant was advised that the disciplinary action might result in dismissal or summary dismissal.

76. In the course of the disciplinary meeting on 24 January 2019, the claimant was again represented by Mr Alan Perry, the regional organiser of the GMB. The disciplinary hearing was conducted by Ms Siobhan McMullan the head of Human Resources of the respondent organisation who was assisted by Mr Burke who was the HR support officer and a notetaker Ms Suzanne Small.

77. While the claimant raised a concern to this tribunal about a particular question which he stated he had asked in the earlier investigation meeting and which he stated had not been recorded in the minutes, neither the claimant nor Mr Perry had previously sought to dispute the accuracy of those minutes at the disciplinary meeting. In particular neither the claimant nor Mr Perry had sought to argue that he had not given contradictory answers in relation to whether or not he knew whether he had given a normal meal to "*PM*". Neither the claimant nor Mr Perry sought to argue that the claimant had not stated that the matter had been "*a witch hunt*" and *"silly"*.

78. In relation to the training issue, the claimant again asserted that the issuing of supervision notes which had to be signed and acknowledged by members of staff had been part of the disciplinary procedure and that that had been why he instructed his colleagues not to sign those notes. The claimant was again assured that the notes did not form part of the disciplinary procedure and that they were *"a form of learning"*. The claimant did not accept that explanation and continued to

insist that they were a form of disciplinary sanction. Mr Perry sought to argue that an individual has the right to disagree with a manager and that individual therefore had a right not to sign a supervision note.

Ms McMullan reminded the claimant that he had told her and the home manager at an earlier meeting that he was *"sick of improvement plans."*

79. The claimant accepted that a nurse was responsible for notifying SALT changes to the kitchen staff ie to the claimant and that the kitchen staff were responsible for updating the folder with the recommendations. The claimant also accepted that he had taken the SALT updated recommendations for "*PM*" and that he had put them into the pile on the top of the microwave and had forgotten about them.

80. In relation to the allegation that the claimant had thrown supervision notes into the bin, the claimant denied that allegation. He produced what he alleged to be the supervision documentation which had been given to him and to his wife Mrs Emily Jenkins. That documentation was returned by Ms McMullan to the claimant. That documentation was not produced by the claimant to the present tribunal. Ms McMullan asked the claimant in the course of the disciplinary hearing whether he had retrieved the supervision documentation out of the bin. The claimant denied that he had done so.

81. Ms McMullan then asked the claimant about the daily safety briefings which were directed to occur each day at 11.00 am. Ms McMullan asked the claimant if he attended those daily safety briefing. The claimant stated that he was a *"very busy man"*. He stated that he could not answer that question because of the length of time that he passed and he *"finds them of no use to him".* Ms McMullan reminded him that the safety of residents was paramount and that a safety briefing would normally be a short briefing. The claimant then said that he had gone to meetings, looked in the door and asked if there was anything for him at that day. If not, the claimant said he just went back to the kitchen. That reply was not consistent with his earlier reply that he could not remember whether he attended those briefings or not. The claimant then repeated that he did not go to all of the safety briefings, that he was a busy person and he added that he *"is a busy person and does not refuse to go but does not attend them".*

82. In relation to the incident on 20 October 2018, the claimant denied that the wrong meal had been given to "*PM*". He alleged that the statements received from staff had not been corroborated or questioned. He asked who had asked for the statements.

He stated *"the correct meal went up marked for PM but that doesn't mean she got it".*

83. The assertion that he had sent the correct meal labelled for PM upstairs was made on 24 January 2019, some weeks after the investigating meeting on 11 November 2018 when he had vacillated between saying that he had cut the lasagne into small squares and saying he could not recall if PM had been given chips and lasagne.

84. The claimant stated to Ms McMullan that;

"I am not happy. You are trying to smear my name. You are making a mountain out of a molehill."

85. On 5 February 2019, the claimant was advised by letter that the respondent had discontinued the charge that the claimant had *"engaged in abusive behaviour towards another employee at ____ care home.* That charge had related to the claimant's behaviour towards his wife who had worked as a care assistant in the home. The respondent took the view that since it would be inappropriate to ask the claimant's wife for a statement, the disciplinary charge would not proceed. The other matters were considered.

86. In relation to the charge that the claimant *"neglected to provide appropriate care to a resident at _____ care home by failing to follow SALT guidelines in relation to her dietary restrictions"*, the respondent upheld the charge. Ms McMullan stated that it was evident that on 20 October 2018 the claimant had provided a meal for "*PM*" and that the meal had been in breach of her dietary restrictions.

The tribunal concludes that the respondent had been entitled to reach that conclusion, given the clear evidence of Registered Nurse Mary Braithewaite and care assistant Laura McCrum, and given the claimants contradictory evidence to Mr Walsh.

87. In relation to the charge that the claimant had *"displayed gross insubordination in response to efforts by the home manager and her agents to ensure that your awareness of your obligations in relation to the welfare of residents at the home",* the respondent upheld the charge. Ms McMullan recorded that the claimant had refused to sign supervision notes and had failed to attend the majority of daily safety briefings. When questioned he had stated that he was a *"very busy man"* and she concluded that that had been an unacceptable reason for failing to engage in the system.

The claimant had also failed to comply with the guidelines by setting up a system to maintain safe records.

Again, given the responses of the claimant to Mr Walsh and to Ms McMullin there had been ample evidence to support that conclusion. There was no specific conclusion that the claimant had put the supervision note in the bin as alleged by Ms McLeod.

88. In response to the allegation that the claimant had *"failed to carry out reasonable instructions"* the respondent upheld the charge. Ms McMullan concluded that the claimant had failed to engage in the management process and had been disruptive.

89. Ms McMullan recorded that the claimant had been guilty of gross misconduct and he was summarily dismissed with effect from the date of the letter. The claimant was advised of his right of appeal.

90. The claimant appealed that decision to summarily dismiss him. That appeal was by letter dated 8 February 2019. Essentially, the claimant alleged that he had not put "*PM*" at risk. He blamed *"the staff upstairs"* who gave the wrong meal to the resident. The claimant denied that he had resisted the support of his manager and denied that he had thrown any document in the bin. He alleged that he had

attended training and that he attended the majority of safety briefings. He stated that he believed he had been dismissed because he had not signed supervision notes as he believed that the signing of such notes was part of a disciplinary process. He alleged that a full and thorough investigation had not been carried out because none of the witnesses had been further interviewed. He argued that the dismissal decision had been too harsh.

91. The appeal hearing was held on 1 March 2019 and was conducted by the managing director of the respondent company Ms Nuala Green. The claimant was represented by Mr Alan Perry of the GMB.

92. It was apparent from the evidence of Ms Green, the evidence of the claimant and the notes of the appeal hearing, that the claimant did not accept any responsibility for the incident on 20 October 2018. He again sought to place the entire blame for the incident on the nursing staff and accepted no responsibility for it whatsoever.

93. In relation to training, the claimant denied throwing the supervision note in the bin. He stated that it had not always been possible to attend the daily team briefings. He stated that *"I usually pop my head round the door to see what was happening".* In relation to not signing supervision notes he stated that *"I was just asked to sign sheets left in plastic poly pockets. That's not supervision."* He again sought to argue that the supervision notes were in some way a disciplinary action. He alleged that there had not been a full investigation and that the people who had provided witness statements had not been further questioned. He argued that the decision to dismiss him had been too harsh.

94. The claimant was further asked about a series of social media posts which had followed his dismissal in which the claimant had criticised the respondent organisation and further criticised the GMB. Those social media posts alleged that the GMB had left him *"stranded"* and *"hanged out to dry"*. Mr Perry consulted with his client and then apologised on behalf of the claimant for those posts, stating that the claimant had not been *"in the right frame of mind"* and that no harm been meant by the social media posts. Ms Green stressed that this was a separate issue and that it did not affect the appeal outcome.

95. By letter dated 19 March 2019, the claimant was advised that his appeal had been dismissed.

96. In relation to the incident on 20 October 2018, Ms Green concluded that the resident (PM) had been given lasagne and chips in contravention of the SALT dietary guidelines. The updated dietary guidelines for "*PM*" had been left on top of the microwave amongst other papers and not placed in the correct folder maintained for that purpose. The claimant had failed to properly attend the daily team briefings. The claimant had failed to sign and return supervision notes. There had been ample evidence to support those conclusions. A full and thorough investigation had been carried out and the sanction of summary dismissal had been appropriate. Ms Green further indicated that the claimant had failed to acknowledge the serious implications and dangers of non-compliance with the dietary regime of residents. She also recorded that the claimant had failed to admit to any shortcomings on his part which might have placed the resident at risk and that the claimant did not recognise his responsibility for ensuring proper procedures and safeguards to prevent residents being placed at risk of harm. Since the

claimant had failed to admit any responsibility for the often poor performance of the kitchen under his management, he had not provided any reassurance of improvements in the execution of his duties or in his attitude towards the protection of resident safety and welfare.

DECISION

Credibility

97. The tribunal has serious concerns about the credibility of the claimant in this matter. As an example, the claimant alleged in sworn evidence that in or around the time of the investigation meeting;

> *"At this time I took a panic attack at home due to the stress of the bullying I was receiving from the HR manager. I spent three nights in Antrim Hospital."*

However the claimant had completed a self-certification for statutory sick pay in respect of the alleged sick absence. Part of that self-certification requires the individual to give details of his sickness. The only note compiled by the claimant on that self-certification form was;

> *"COPD related".*

There was no reference in that self-certification to a panic attack; no reference to a hospital stay and no reference to any harassment by the respondent. When challenged in cross-examination, the claimant sought to allege that he had told Mr Walsh about the alleged panic attack. However there was no evidence of any such conversation and it had not been put to Mr Walsh in cross-examination. In any event, the tribunal concludes that it is highly improbable, if such an incident had occurred, that the claimant would not have provided accurate details on his self-certification form and equally highly improbable that his union representative would not have brought the matter up in some detail in the course of the investigation process, the disciplinary process and indeed the appeal process. The alleged hospital stay with a panic attack had been some two months before the investigation meeting. The tribunal therefore concludes that this had been a deliberate misrepresentation of the facts put forward by the claimant in an attempt to add colour and weight to his allegations to this tribunal.

98. Throughout his evidence and throughout his cross-examination, the claimant maintained the position that he had been entirely blameless in this matter and that each and every individual who had given evidence about him had been lying. At the tribunal hearing, he did not seek to call as a witness his wife or indeed his trade union representative. Furthermore, when he stated in cross-examination that various parts of the records of the investigation meeting and the disciplinary meeting and the appeal meeting had been falsified, he could not explain why neither he nor his trade union representative at that time had sought to challenge those records formally. Other than in relation to four alleged questions in the investigation meeting. Again the unanimous decision of the tribunal is that the claimant sought to make these allegations solely to add colour and weight to his allegations.

99. In contrast, the evidence given on behalf of the respondent was clear, consistent and credible.

Unfair Dismissal

100. The first issue for the tribunal to determine is the reason for the dismissal. The onus in that respect is on the respondent. The unanimous decision of the tribunal is that the dismissal had been on the basis of the claimant's conduct and for no other reason.

101. The tribunal is satisfied that the respondent had followed the statutory disciplinary and dismissal procedure. There had been no procedural unfairness. The claimant had been given every opportunity to respond to the disciplinary charges and had been represented throughout by Mr Perry. He had been afforded in proper appeal.

102. The tribunal is further unanimously satisfied that the decision to dismiss the claimant had been a decision which a reasonable employer could reasonably have reached in the circumstances and on the evidence before it. Contrary to the claimant's repeated assertions, it is not a requirement that a clear and specific witness statement should be supported by a further interrogation of the witness. A reasonable employer is entitled to rely on witness statements furnished to that employer by members of staff. The employer had reached the conclusion, and it had been more than entitled to reach that conclusion, that the claimant had throughout displayed a regrettable attitude towards the need to ensure that training was provided to kitchen staff and to the claimant and that SALT dietary guidelines should be strictly followed in relation to residents. The tribunal also concludes that the respondent had reached the conclusion and had been more than entitled to reach the conclusion that the claimant had provided a normal meal, for some reason known only to himself, to "*PM*" on 20 October 2018. The respondent had been entitled to conclude that the clear statement of Registered Nurse Braithwaite and care assistant Laura McCrum made that case. There had been no reason for either Registered Nurse Braithwaite or care assistant Laura McCrum to lie about this matter. It had been clear from their statements that the normal meal had been sent up for "*PM*" and that, when queried, the claimant had told his wife who had been working as a care assistant, to proceed with that normal meal.

103. In short, the decision to summarily dismiss the claimant in all the circumstances had been reasonable. The role of the claimant as catering manager and the obvious importance of observing SALT guidelines for vulnerable patients, meant that, even though this was a first offence, summary dismissal was an option open to a reasonable employer in all the circumstances of this case. The claimant's failure to co-operate with the provision of training and his actions in providing a normal meal to *"PM"* were so serious, particularly given his role as catering manager, that a summary dismissal had been reasonable, even when regarded as a first offence. This had been *"deliberate and wilful conduct"* as discussed in ***Connolly*** above.

104. In relation to the allegation of trade union detriment, there was absolutely no evidence that the decision to discipline and then to dismiss the claimant had been reached on any grounds other than on the ground of conduct. There had been no discussion of or consideration of the claimant's trade union status or activites in that process. The unanimous decision of the tribunal is that the respondent has

discharged the statutory burden of proof under Article 75 of the 1996 Order and has shown that the only reason for the disciplinary action and for the dismissal had been the claimant's conduct.

105. The claimant sought to allege that other, unspecified, incidents before the disciplinary process amounted to trade union detriment. No such evidence was presented to the tribunal.

106. The claim of trade union detriment is therefore dismissed.

Vice President:

Date and place of hearing: 26 and 27 October 2020, Belfast.

This judgment was entered in the register and issued to the parties on: