



EMPLOYMENT TRIBUNALS

Claimant: Miss C Spencer

Respondents: Mr and Mrs Seedheeyan and Mr Duymun
trading as Highgrove Rest Home

HELD AT: Manchester

ON: 28 February 2018
1 March 2018 and 9
March 2018 (in
chambers)

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: In person

Respondent: Ms A Smith, counsel

JUDGMENT

1. The complaint of unfair dismissal is not well founded.
2. The respondent was in breach of contract by dismissing the claimant without notice.
3. The complaint of unlawful deduction from wages is not well founded.
4. There will be a remedy hearing on 21 May 2018 to decide on damages for breach of contract unless the parties inform the tribunal before that date that they have agreed on damages and there is no need for a hearing.

REASONS

Claims and Issues

1. The claimant claimed unfair dismissal, breach of contract in respect of failure to give notice of termination and unlawful deduction from wages. Although the claimant had referred in her witness statement to constructive dismissal due to a hearing

impairment and discrimination and victimisation, the claimant confirmed that she was claiming unfair dismissal based on an actual dismissal and was not bringing any complaint of disability discrimination. The claimant had ticked the box on the claim form to indicate she was claiming arrears of pay but her particulars of claim and her witness statement gave no particulars relating to this complaint. The claimant clarified in answer to my questions that her complaint about unpaid wages related to two weeks pay which she alleged arose from a change in around 2003 from a system of fortnightly pay to monthly pay; the claimant said she had been told by the manager at the time, who no longer works for the respondent, that employees would be paid for these two weeks at the end of their employment. Initially, the respondent argued that the Tribunal should not consider this complaint since no particulars had been given prior to the hearing. However, after seeking instructions, on the second day of the hearing, Ms Smith informed me that the respondent no longer objected to the complaint being pursued but the respondent argued that there was no such payment due.

2. In relation to the complaint of unfair dismissal, the issues to be determined were:-

(1) Has the respondent shown a potentially fair reason for dismissal? The respondent relied on conduct. The Tribunal would consider whether the respondent had a genuine belief in the claimant's guilt.

(2) If the respondent has shown a potentially fair reason for dismissal, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissal in all the circumstances (including the size and administrative resources of the employer's undertaking)? The Tribunal would consider whether the respondent's belief in the claimant's guilt was based on reasonable grounds and formed after a reasonable investigation. It would consider whether both the procedure followed and the penalty of the dismissal fell within the band of reasonable responses.

(3) If the Tribunal found the dismissal to be unfair, in a case where such an assessment could be made, it would consider the chances that the claimant would have been fairly dismissed had a fair procedure been followed (the *Polkey* issue which could lead to a reduction in compensation).

(4) if the dismissal was unfair, the Tribunal would also consider whether compensation should be reduced on the basis that the claimant had contributed to the dismissal by culpable or blameworthy conduct.

3. In relation to the complaint of breach of contract in respect of failure to give notice, the Tribunal would consider whether the claimant was guilty of gross misconduct. If she was, the respondent was entitled to terminate her employment without notice. If the Tribunal was not satisfied the claimant was guilty of gross misconduct, the respondent was in breach of contract by not having given her notice of termination in accordance with her contract. The notice required by the contract in these circumstances was agreed to be the statutory minimum of twelve weeks, given the claimant's length of service.

Facts

4. The respondents are in partnership operating the Highgrove Rest Home. The partners separately own and operate other businesses but the Highgrove Rest Home is the only one they operate together. Mr Seedheeyan has a number of other companies operating in the care sector. Mr Duymun also has other businesses in the care sector. An employee of one of Mr Seedheeyan's other companies, Mr Haggan, carried out the investigation in the claimant's case. Stephen Holmes provided HR resources to the respondent and to other businesses operated by Mr Seedheeyan.

5. At the time the claimant was dismissed, the respondents employed eighteen to twenty people, of whom six or seven were in management roles. The registered manager of Highgrove Rest Home at the time was Emma Wilson.

6. The claimant began employment with the respondents as a carer on 25 May 2003. This was her first job and, to date, her only one. It is common ground that the claimant had a good record of employment until the disciplinary proceedings leading to her dismissal.

7. The claimant has a hearing impairment.

8. The claimant said she had no problems at work until issues arose with a manager, HH. I accept that the claimant understood that she had been promoted to Senior Carer at some point under the predecessor to HH and that she believed she was demoted by HH back to the position of Carer. The respondents dispute that she was ever promoted and then demoted. It is not necessary for me to make a finding as to whether, in fact, the claimant had been promoted and then demoted but I accept that the claimant believed that she had and that this was something she was aggrieved about.

9. On 26 September 2016, the claimant wrote to the Registered Manager, Emma Wilson, about various concerns. This included a complaint about what she described as unfair treatment. She wrote she did not know whether this treatment was because of her hearing, being part time or because HH disliked her. She wrote that this made other employees who she named, including Victoria Smith, who gave evidence to this Tribunal, think they could treat her the same. She complained that she was being made to do things that they did not like doing and that they were "slagging" her off to residents. She also referring to ongoing issues with hours.

10. From an email disclosed on the second day of the hearing, it appears that HH resigned as Deputy Manager of the Rest Home on 25 September 2016. Mr Duymun gave evidence that HH had been a good nurse and they were sorry to see her go. They subsequently re-employed her. On another document disclosed on the second day of the hearing, it appears this may have been in January 2017, since a DBS Enhanced Certificate was issued on 19 January 2017 for HH to work at the rest home. The claimant believed that HH may have been re-employed earlier, based partly on the fact that HH had attended a staff Christmas party; the respondents say this was not a party organised by the respondents but something arranged by staff themselves.

11. Emma Wilson replied to the claimant's letter of 26 September on 28 September 2016. She wrote that they had agreed to have a meeting on Friday 7 October 2016 to discuss the contents of that letter.

12. On 1 October 2016, the respondents allege that an incident occurred where the claimant left a resident unattended on a commode for approximately two hours. The claimant denies this incident. Victoria Smith, who was Floor Manager at the time, gave evidence to this Tribunal that she left a report of this incident, together with hand written statements from two employees, LG and SJ, on the desk of Mr Duymun for him to see on the morning of Monday 3 October 2016. An incident reporting form has been included in the bundle but there are no hand written statements which could have been prepared on 1 October from LG and SJ included in the bundle. A handwritten statement, apparently signed by SJ, was disclosed by the respondent during the course of the hearing and added to the bundle, but this is dated 6 October 2016 not 1 October 2016. A handwritten statement from LG was also disclosed during the hearing and added to the bundle; this is dated 18 November 2016 so appears to be something created during the course of Mr Haggan's investigation rather than a statement given to VS on 1 October 2016. If there were handwritten statements left on Mr Duymun's desk by Mrs Smith on 1 October 2016, I have heard no evidence as to what happened to these and no explanation as to why they have not been disclosed.

13. Mrs Smith's evidence is that an incident of this nature would normally be reported immediately to a more senior manager but there was no such manager contactable on 1 October 2016. Mrs Smith said Emma Wilson was on leave. Mrs Smith understood Mr Duymun to be away and Mr Seedheeyan to be unwell. Mrs Smith said she expected Mr Duymun to be in on the Monday (3 October) and to read what she had left for him.

14. Mr Duymun's evidence is that he did not return from a family holiday until mid October, at which point Emma Wilson raised the matter with him. Mr Duymun gave evidence that he thought Emma Wilson had been on leave until 13 October. However, since Emma Wilson's letter of 28 September 2016 arranged a meeting between her and the claimant to take place on 7 October, it appears Emma Wilson must have been due back from leave no later than 7 October 2016.

15. Mr Haggan and Mr Duymun both agreed that the normal procedure, where there was an incident of this nature, would be that reports would be made to the CQC, a Local Authority Safeguarding Officer and to the person responsible for the resident. None of these things were done in this case. Mr Duymun said this was a matter of regret but, by the time that he became aware of the alleged incident, the resident had left the rest home. In the dismissal letter dated 7 February 2017, Mr Duymun wrote that he had inspected the Residents' Register which showed that JH left the Highgrove Rest Home on 11 October 2016. It appears, therefore, that Emma Wilson would have returned from leave before the resident left. I have no evidence as to why Emma Wilson did not instigate the necessary reports to the CQC and others as soon as she learnt of the allegation and before the resident left.

16. Mrs Smith gave evidence that she had sent the claimant home after finding out about the alleged incident. This is recorded in the incident reporting form. The

claimant disputes that she was sent home. It is not necessary for me to make a finding as to whether or not the claimant was sent home that day and I do not do so.

17. It is common ground that the claimant worked normally on 2 October and on all her shifts until she was suspended on 2 November 2016. Mr Duymun told me that it was Emma Wilson's decision to suspend the claimant on this date, although his name was on the letter of suspension as proprietor of the home. He was unable to explain to me why Emma Wilson did not suspend the claimant earlier.

18. On 4 October 2016, Stephen Holmes, HR Advisor, wrote to the claimant regarding her letter to Emma Wilson of 26 September 2016. He informed the claimant that HH was no longer an employee of the rest home or employed in any capacity by the company. He wrote "I trust that this information will alleviate any concerns which you may have had with regard to your working relationship with Helen". He wrote that they were unaware of any gossip in the work place which may have featured the claimant. He advised her that, should she have any significant concerns regarding her working environment and important aspects of her work in the future, there were formal complaint and grievance procedures which could be invoked. He wrote "in light of the information contained within this letter, it will no longer be necessary for the planned meeting on Friday 7 October to go ahead. I trust that this is to your satisfaction. If you feel that there are issues which remain unresolved, please do not hesitate to contact Emma Wilson, Registered Manager at your earliest convenience". I note that this was an apparent change of view that a meeting was needed; HH had already resigned by the time Emma Wilson had written to the claimant arranging the meeting. The claimant did not write to Emma Wilson to say that there were unresolved issues that she wished to pursue.

19. Mr Duymun gave evidence that he was informed, around 14 or 15 October 2016, by Emma Wilson of the allegation about the commode incident. This is not consistent with the oral evidence to this tribunal of Mrs Smith, who said that Mr Duymun had called her on Monday 3 October and that she went in to speak to him. Mr Duymun gave evidence that Emma Wilson showed Mr Duymun the incident report form completed by Mrs Smith. Mr Duymun gave evidence that he was also informed about concerns raised by an employee SB about the claimant. He was aware of a hand written statement from SB but did not read this, being given a resume of it by Emma Smith. The allegations by SB related to matters other than the commode incident and were not later upheld at the disciplinary hearing. It is not necessary for me to make a finding as to exactly when Mr Duymun became aware of the allegations about the claimant.

20. Mr Duymun decided that there should be an investigation into the allegations. He asked the HR Advisor, Mr Holmes, to contact Mr Haggan, who was a senior manager of one of Mr Seedheeyan's companies, to carry out the investigation into the allegations. Mr Haggan was asked by Mr Holmes to carry out this investigation. Mr Haggan could not recall whether he was given anything in writing but he was told about the allegations and given a list of people to interview who had made allegations. It is not clear from the evidence when the investigation began. There are a number of handwritten statements which have been produced in evidence in this case. Mr Haggan thought these were all the result of his investigation. However, if Mr Duymun did not learn of the allegations until mid October, the

investigation can have started no earlier than mid October. A statement dated prior to mid October could not, therefore, have been made as a result of Mr Haggan's investigation. The majority of the statements are dated around 11 November 2016.

21. The only statements relating to the commode incident are statements made by Mrs Smith, LG and SJ. SJ's statement is dated 6 October 2016 and, therefore, preceded Mr Haggan's investigation. This does not appear to be a statement relied on at the disciplinary hearing, even if it was available to the investigation. The only statement of VS is the handwritten incident reporting form and a typed version of that. There is a handwritten statement from LG dated 18 November 2016 and then a typed version of this statement. The claimant thought she was given the typed version but not the handwritten version before the disciplinary hearing.

22. On 2 November 2016, Mr Duymun wrote to the claimant advising her that the company had received allegations of "serious untoward actions and behaviour" about her, although he did not give her the detail of the allegations. He wrote that they needed to carry out a full investigation into the allegations and the claimant was to be suspended from her duties at work with immediate effect. As previously noted, Mr Duymun's evidence was that the decision to suspend was taken by the Registered Home Manager, Emma Wilson. He said that, if he saw and signed the letter of suspension (and the copy in the bundle is unsigned), he did this as Proprietor of the home. He could not explain why the claimant had not been suspended at an earlier date if there were concerns about her continuing to carry out her duties during the investigation. Mrs Smith did not have power to suspend and told us there was no more senior manager she could contact on Saturday 1 October 2016. It appears, for the reasons given previously, that Emma Wilson must have been back at work by no later than 7 October 2016. I have had no explanation as to why the claimant was not suspended as soon as Emma Wilson became aware of the incident, if she considered suspension to be appropriate pending an investigation and possible disciplinary proceedings.

23. On 2 November 2016, Mr Holmes wrote to the claimant following a telephone conversation earlier that day. He confirmed the arrangements for an investigation meeting. This was scheduled for 14 November 2016 but later re-arranged for 22 November because the claimant's son was ill. It was then further re-arranged and finally took place, after the claimant had a period of sickness, on 10 January 2017. Mr Holmes wrote that, as the meeting was part of a fact finding exercise and not a formal hearing, the claimant could not be accompanied. However, in practice, the claimant was allowed to be accompanied by a friend Celine Costine at both the investigatory meeting and then the disciplinary hearing.

24. It appears that the claimant wrote to Mr Duymun on 4 November 2016 raising issues regarding Emma Wilson. Neither of the parties have provided me with a copy of that letter but it is referred to in a letter from Mr Holmes of 7 November. Mr Holmes informed the claimant that, as the issues in her letter were not connected with the current investigation process, they could not be the subject of a response from the company at the present time. He informed her that any issues of grievance could only be dealt with at the conclusion of the current investigation process and any other related action which may follow from that.

25. The investigatory meeting with Mr Haggan took place on 10 January 2017. As previously noted, the claimant was accompanied by a friend, Celine Costine. Mr Haggan was accompanied by a note taker who produced a hand written note which was read and signed by the claimant and Ms Costine at the end of the meeting to indicate their agreement to the note. The typed version of the note had been included originally in the bundle and the handwritten signed copy was disclosed and included in the bundle on the second day of the hearing.

26. In the parts of the meeting which related to the allegation about the commode incident, the claimant denied that she had done what was alleged. She said she would never leave anybody on a commode for two hours. She asked when the incident was alleged to have taken place. The claimant then said that the resident was not at the rest home on that date. The claimant said at one point "I feel they are just accusing me of anything to get me out of the door". She said that Emma would not acknowledge or speak to her. She said she was not getting her contracted hours despite writing a letter about this and alleged that she had been demoted from a senior position without any reason or explanation.

27. Following the investigation, Mr Haggan decided that there was a case to answer in respect of two of the original allegations, one of which related to the commode incident.

28. By a letter dated 23 January 2017 from Mr Haggan, the claimant was invited to a disciplinary hearing on 2 February to be conducted by Mr Duymun. The claimant was advised of her right to be accompanied by a trade union representative, a work colleague or a companion of her choice who had no connection with the company. Mr Haggan set out the allegations to be considered. The first allegation was not found proven at the disciplinary hearing so there is no need for me to record that allegation. The allegation which was subsequently upheld at the disciplinary hearing and led to the claimant's dismissal was set out as follows:

"That on 1 October 2016 you left a service user - JH - on the commode on his bedroom for a period of approximately 2 hours.

If proven, this would constitute a breach of the company's disciplinary rules under Gross Misconduct:

"Any act or omission, constituting serious negligence in a member of staff's performance of his/her duties"

29. Mr Haggan wrote that the full management statement of case would follow shortly in the post and would include all the evidence, including individual staff statements which management would rely on at the hearing on 2 February. The claimant confirmed at this hearing that she had received the management statement of case and the witness statements of Mrs Smith and LG prior to the disciplinary hearing.

30. In a second letter dated 25 January 2017, Mr Haggan advised the claimant that the allegation relating to the claimant's action on 1 October 2016 would, if proven, constitute gross misconduct and could result in her dismissal from the company. Mr

Haggan also informed the claimant that she could arrange for witnesses to attend the hearing, that management may call witnesses and the claimant or her companion would have the opportunity at the hearing to ask questions of the witnesses.

31. The disciplinary hearing took place on 2 February 2017 with Mr Duymun as the disciplinary officer. The claimant was accompanied by Celine Costine. A note taker was present and made a handwritten note of the hearing. The claimant and her representative were not asked to read and sign this note at the end of the meeting to agree its accuracy. The notes of the disciplinary hearing were not disclosed until the second day of the hearing and then included in the bundle. Mr Duymun gave evidence that he had not had access to these notes when reaching his decision but had relied on his memory of the evidence given. He had also not had access to the notes when preparing his witness statement. He understood that the notes had been given by the note taker to HR who had put them away and forgotten about them. Mr Duymun considered that the notes were generally an accurate record of the disciplinary hearing although there were some omissions. Mr Duymun said the notes did not record that he had asked the claimant why she had not requested assistance from a third member of staff on duty given that moving the resident had begun with two members of staff assisting him, including herself, and the claimant had replied that JH was not able to walk unassisted but one member of staff was sufficient to support him to transfer into his room and onto his commode. In relation to a part of the notes which recorded LG as saying she saw "Claudette heading back to [JH's] room with the commode so I thought it had been sorted", Mr Duymun did not understand this to mean LG was saying that the claimant was carrying the commode but that the commode was in JH's room. The claimant read this part of the notes as saying that she had been carrying the commode.

32. At the disciplinary hearing, Mr Haggan appeared to present the management case. Management called three witnesses to give evidence. Two of these witnesses were relevant to the commode allegation: Mrs Smith and LG. The statements of Mrs Smith and LG were read out. The claimant questioned why she had been allowed to work the following day after the allegation was made and denied that Mrs Smith had sent her home. She denied that she had laughed after Mrs Smith spoke to her. The claimant said that, if she had been abusing people, she would not have been able to work her shift the next day.

33. The claimant handed Mr Duymun some papers she wanted him to have a look at. There is a dispute as to the full contents of this folder. Mr Duymun only recalls seeing character references; the claimant says the folder also included the statement from her and arguments she wanted put. The claimant says that Mr Duymun refused to read this, saying it was not relevant. It is common ground that Mr Duymun did not take away the folder and, at most, in the hearing, he read some character references contained in the folder. Mr Duymun is recorded in the notes of the meeting as saying, after the claimant presented her paper work, that they needed to consider whether the allegations had happened, why they had happened and when.

34. Mrs Smith gave evidence at the disciplinary hearing. She confirmed her statement. She said she came in the home around 19.50, LG approached her, she

went into the room to find the service user still on the commode, his feet were blue with being cold and he was very distressed. Mrs Smith said she had asked the claimant how long he had been left on the commode and the claimant had said about two hours and found it funny. Mrs Smith said she then told the claimant to get her coat and go home at 20:15. The claimant questioned why, if Mrs Smith did not come in until 19:50, her statement said 7:30. The claimant said these things did not take place and she definitely would not have started laughing after being accused of laughing.

35. Mr Haggan and Mr Duymun are recorded as reminding the claimant that they were there to establish if the service user was left on the commode by her for two hours and saying that she could ask other questions. The claimant was asked if she had left the service user on the commode and she replied she had most definitely not. She also said he needed two carers to move and handle him. LG was then called as a witness. She agreed with her statement. LG confirmed that the claimant had taken JH to his room while she dealt with another resident. LG said that the claimant had passed her at 8 pm, saying she had forgotten about JH. LG was asked why, instead of going straight to JH to get him off the commode, she went to inform Mrs Smith about this. LG said she had seen the claimant heading back to JH so thought it had been sorted. The claimant questioned how JH could have been taken back to his room when he never came out of his room. The notes record LG saying that he rarely came out of his room but, on this occasion, he had been sat in the lounge. The claimant asked, if JH was in a wheelchair or on a zimmer, why would she walk past a toilet to take him to a commode and how was she carrying his commode if he was sat on it? The claimant said she did not put JH on the commode on her own. She said she never said that she had forgotten him. The claimant was asked what she was doing in between 6:15 and 8:15; she said she was washing up, doing suppers, medication. She said that JH had a buzzer within reach that he could have pressed. Mr Haggan asked if the claimant took JH off the commode; the claimant said no, as he takes two people. Mr Duymun said he would come to a conclusion within a few days and let the claimant know the outcome.

36. Mr Duymun decided that he would not uphold the first allegation. In relation to the commode incident, he decided that LG and Mrs Smith were telling the truth. He considered the evidence of the claimant to be contradictory and inconsistent. Mr Duymun took into account the claimant's previous good conduct but, considering the seriousness of the misconduct, felt there was no alternative but to summarily dismiss her from her employment.

37. Mr Duymun wrote to the claimant on 7 February 2017 setting out his conclusions. He recorded the evidence in relation to the commode incident as follows:

"At your meeting with the investigating manager, Alec Haggan on 10 January 2017, you informed him, when questioned, that you would never leave a resident on the commode for a long period of time. You then asked when was the date of this alleged incident, and when you were informed that it was on 1 October 2016, you responded by stating that the resident in question, JH, was not at the Highgrove on that date as he had left by then.

In the disciplinary hearing I was presented with evidence from witnesses that, firstly, [LG] and yourself, at 6pm, were both attending to the resident JH, who asked to be taken to his room to use the commode, and that you were both in the process of taking him to his room; however [LG] became involved with another resident - TK - who needed to be attended to as she was walking along the corridor completely naked. At this point you alone took the resident into his room and put him on the commode, and that you left him there unattended for a period of approximately two hours, as stated by yourself to [LG] after the incident, at approximately 8pm. You had taken the decision to proceed to take JH to his room on your own despite the fact that there was another member of staff on duty who you could have called for to help you with JH had you wished to be assisted. Staff on duty at the time of the incident were: [LG], yourself and [SJ]. V Smith came on duty that evening at 7.45 pm.

I heard that the resident was still on his commode some two hours after being placed there, and that his trousers were still at his ankles and his feet were blue and very cold, as stated by V Smith who took him off the commode and put him in his bed to keep him warm. V Smith then challenged you about the incident and requested that you get your coat and go home.

You challenged this evidence by saying that the resident does not leave his room and that he was not taken into his room by anyone as he would not have left his room in the first place, and that this incident never actually took place. Furthermore, you stated that you were never sent home by V Smith, even though the record states otherwise. However, both management side witnesses explained that he had been encouraged to spend more time out of his bedroom and that he had been responding well to this encouragement by spending more time in the main lounge. You then conceded that JH was in fact at the Highgrove on 1 October 2016".

39. Mr Duymun concluded

"I am therefore satisfied that JH was not in his room at the time when he requested assistance from staff. Additionally, I referred back to your original claim which was that JH was not at the Highgrove on the date of the alleged incident. Upon inspection of the Residents Register, it was clear that JH was in fact resident at the Highgrove on the date in question. A record shows that he left the Highgrove on 11 October 2016, ten days after the date of the incident.

In deciding whether you were the person who attended to the resident in question, JH, I heard compelling and corroborated evidence regarding the facts from the two witnesses, [LG] and V Smith. Further to this point, I was informed by both witnesses that, individually, they challenged you later regarding you leaving JH on the commode unattended for so long, and that you demonstrated a very casual response, indicating that you did not feel the matter was important.

I have decided that, on the balance of probability, you were the staff member who attended to the resident and left him unattended for an inordinately long period of time. I therefore uphold the complaint that you were guilty of an act of serious negligence in your job performance, and that this constitutes gross misconduct under the company's disciplinary rules".

40. Mr Duymun wrote further that, in deciding what sanction to apply, he had taken into account the claimant's long service with the company and her previous good conduct record. He wrote:

"However, it is my view that someone with such long service with the company, employed as a member of care staff, should know how unacceptable it is to demonstrate such serious negligence when attending to a vulnerable service user. Furthermore, I find your attitude when challenged by both staff members following the incident to be wholly unacceptable. Vulnerable residents are entitled to the very highest standards of care at all times, without exception. Your actions in this situation fell far short of the standards of care which both residents, and the company itself, are entitled to expect.

I therefore have no alternative but to dismiss you from your employment with the company".

41. Mr Duymun informed the claimant of her right to appeal against his decision in writing to Mr Seedheeyan.

42. The claimant wrote on 11 February 2017 appealing against her dismissal. She wrote that false and malicious allegations had been stated and appeared to be the basis of her termination. She wrote that she expected to receive her entitlement to be paid for one week for each year in service "along with two weeks in hand that I worked at the start of my employment".

43. Only part of the letter in response, dated 21 February 2017, was included in the bundle. I was not given any explanation for why only part of the letter was included. It is not apparent from that one page who the author of the letter was. The letter stated that a week's pay for every complete year of continuous service would only apply in a redundancy situation or related severance and that summary dismissal on grounds of misconduct meant that only monies outstanding in respect of e.g. untaken holidays may be due to her.

44. The claimant wrote to Mr Holmes on 23 February 2017, appealing again against her dismissal. She argued that the witness statements were void as each statement contradicted what the witness said in the meeting on 2 February. She wrote that the statements and times varied from their written statement to the statements they verbally gave in the meeting on 2 February. She referred to a letter she had written asking why her manager would not speak to her and said she had received no explanation for this. She also referred to her letter about HH and the letter she received back saying that HH no longer worked for them so there was nothing they could do. The claimant asserted that HH was still employed at the rest home, either cash in hand or via their books. She wrote "this again is proof that more lies have

been spoken and written". In a handwritten addition to her typed letter, she wrote that she would like the CCTV footage; if JH was in the lounge it would be on the camera. The claimant said at this hearing that the CCTV footage had never been provided.

45. The claimant wrote to Mr Seedheeyan on 28 February 2017. She asserted that her case had not been looked at properly, that the witnesses did not say the same thing. She noted that Mrs Smith had said the resident was in his room but LG said he was in the lounge., She wrote that Mrs Smith's statement said 7:30 and she said she came in at 8pm. The claimant also wrote "when pay went from two weeks to monthly we got two weeks pay for one month and got told we would get it back when left employment with your company".

46. Mr Seedheeyan wrote to the claimant on 7 March thanking her for her letters of 23 and 28 February and informing her that the appeal hearing was to take place on 23 March. He advised her of her right to be accompanied. He did not make any reference to the claimant's assertion that there was pay owing to her.

47. It is common ground that the claimant did not attend the scheduled appeal hearing. I accept that the claimant tried to inform the respondent that she would not be able to attend the hearing, by leaving a message for Mr Haggan, although she gave no explanation as to why she would not be able to attend. Mr Haggan was not the person due to hear the appeal.

48. During the course of the hearing, the claimant disclosed messages on her tablet between her and Catherine Scott, with whom the claimant says she left messages for Mr Haggan that she could not attend the appeal hearing. Ms Scott worked at Cleveden lodge, a home Mr Haggan was registered manager for, and one of Mr Seedheeyan's businesses. Ms Scott produced a witness statement but did not attend to give evidence at this hearing. The text messages were written in the context of the claimant asking Ms Scott to write a statement, so were written some time after the relevant events. Included in one of Ms Scott's messages was an account that she had said to Mr Haggan that the claimant had been a good staff member and he had said that the claimant was a trouble maker and was a "gonna". Ms Scott wrote that she had challenged Mr Haggan, saying that he was taking other people's word for it and he should be professional and "not take the side of emma and all "her staff" who obviously have it in for claudette coz theyre all new". Ms Scott wrote that Mr Haggan then started backpeddling and said "don't worry we're doing everything by the book". Mr Haggan said in evidence he only got one message about rearranging a meeting. He could not recall whether this was before or after the appeal hearing. He said he had said it was "out of my hands" because he had only done the investigation. I do not find it necessary to make a finding on whether Mr Haggan said what Ms Scott's messages record him as saying. Even if he did say that, Mr Haggan's beliefs about the claimant's guilt or otherwise at that time are not relevant to what I have to decide.

49. Whatever messages Mr Haggan received, it does not appear that he passed these on to Mr Seedheeyan. It seems unlikely that Mr Seedheeyan would not have referred in his letter to the claimant to any attempt to postpone the hearing had he received a message that she could not attend.

50. Mr Seedheeyan wrote to the claimant on 27 March 2017. He wrote that the hearing had been scheduled to take place at 2pm on 23 March

"However you did not attend the hearing, and I am aware that you have not made any contact with the company to give notification of your intention not to attend, or provide an explanation in respect of your non-attendance.

I now consider the matter to be closed, and there is no further right of appeal".

51. Mr Seedheeyan did not give evidence to this tribunal. However, it appears from this letter that he did not consider the merits of the appeal on the basis of the papers but closed the matter because the claimant did not attend the hearing.

52. The claimant did not write to Mr Seedheeyan following that letter to say that she had, in fact, left a message that she was unable to attend.

53. The claimant then presented her claim to the Tribunal after notification to the ACAS under the early conciliation procedure.

54. The claimant did not give any details of the claim about arrears of pay in her claim form or evidence about it in her witness statement. In oral evidence, she said there were two weeks she was not paid when the respondent switched to monthly pay. She said they got two weeks' pay and worked a month and, if they needed to borrow, the respondent would lend it but they had to pay it back when they got paid. She said they were told they would get the two weeks' pay back when they left.

55. Mr Duymun gave evidence that, when the change was made from fortnightly to monthly pay, everyone's pay was up to date. He said that they offered help initially to people who could not wait a month for their pay until they got used to being paid on a monthly basis. An email from the financial administrator, Christine Harris, confirmed that the claimant was not owed or entitled to any further pay.

Further findings of facts relevant to wrongful dismissal

56. I separate these findings from the findings above since they are relevant to the complaint of wrongful dismissal, but not unfair dismissal. For unfair dismissal, as explained later in these reasons, I do not consider whether the claimant did what is alleged, but whether the person taking the decision to dismiss genuinely believed that she did and whether that belief was formed on reasonable grounds, after a reasonable investigation. For wrongful dismissal, however, I must consider whether, on a balance of probabilities, on the evidence available to me, the respondent has satisfied me that the claimant was guilty of gross misconduct. This means I must look at the evidence as to whether the claimant did leave a resident unattended on his commode for about 2 hours on 1 October 2016.

57. This section deals with the evidence available to me and the findings of fact I make which are relevant to the question of whether the claimant did leave a resident unattended on his commode for about 2 hours on 1 October 2016.

58. The only witnesses at this tribunal who could give direct evidence about the events of 1 October 2016 were the claimant and Victoria Smith. I did not hear evidence from LG, who had provided a statement for the investigation and appeared as a witness at the disciplinary hearing.

59. The evidence of Mrs Smith was that, shortly after arriving at work on 1 October 2016, she was approached by LG who told her that the claimant had left the resident, JH, on the commode for about 2.5 hours and had told LG she had forgotten him. Mrs Smith said she went to JH's room, found him still on the commode, took him off and helped him to bed. She said she then spoke to C who thought it was funny. Mrs Smith said she wrote the incident report that day and left it on the desk for Mr Duymun to read on Monday 1 October 2016. She said she got written statements from LG and another carer, SJ, and left these with the incident report and an accident report. She said that, although the normal practice would be to report such an incident immediately to someone more senior, there was no one available. Mrs Smith said she expected Mr Duymun to be in on Monday 1 October 2016. In answer to a question from me, she said Mr Duymun had contacted her on the Monday and she had gone in to speak with him. This is not consistent with the evidence of Mr Duymun who said he was away until 14 or 15 October 2016 and that he was informed of the allegations by Emma Wilson on his return.

60. No handwritten statements from LG and SJ have been produced in evidence and no explanation given for their absence. The earliest statement from LG is dated 18 November 2016.

61. The incident reporting form is signed by Mrs Smith but the section "seen by manager" has been left blank.

62. No report was made to the CQC, the Local Authority Safeguarding Officer or the person responsible for JH. Mr Duymun said he regretted this and said that this was because, by the time the matter came to his attention, JH had left the home. From what Mr Duymun wrote in his letter of 7 February 2017, JH left the home on 11 October 2016. Whether or not Mr Duymun saw the report on 3 October 2016, as Mrs Smith said he did, and even if he did not become aware of the incident until 14 or 15 October 2016, as Mr Duymun says was the case, it seems to me highly unlikely that the report, if it was produced on 1 October 2016, was not seen by a manager more senior to Mrs Smith on or soon after Monday 3 October 2016. At the very latest, it appears Emma Wilson would have been back at work by 7 October 2016, since this was the date she had arranged to have a meeting with the claimant. If the incident reporting form had been seen in the week commencing 3 October 2016, there appears to be no explanation for why the reports were not made to the CQC and others whilst JH was still at the home. The failure to make such reports may cast some doubt on the authenticity of the incident reporting form as an accurate and contemporaneous document.

63. It is also surprising that the claimant was not suspended earlier than 2 November 2016 if such a serious allegation had been made on 1 October 2016. Mr Duymun's evidence has not been able to satisfactorily explain this. The fact that the claimant was not suspended closer to the incident in question also casts some doubt on the

authenticity of the incident reporting form as an accurate and contemporaneous document.

64. There are some inconsistencies in the times given by Mrs Smith as to events. She put 7.30 p.m. on the incident report. In answer to questions at the tribunal hearing, she first said she started her shift at 8 p.m., then she altered this, saying she must have gone in at 7.30 p.m. She said she had completed the incident form about an hour after it had happened. When asked the relevance of the time of 7.30 p.m. on the form, she said this was when it had happened. However, 7.30 does not seem to relate to either the alleged start or end of the period of time JH was allegedly left on the commode or to the time LG allegedly told her about the incident. LG's written statement said that the claimant had told LG at 8 p.m. that she had left JH on the commode and forgotten and that LG then went to tell Mrs Smith. Mrs Smith gave evidence that LG told her about 5 minutes after she had arrived for her shift.

65. The claimant has maintained throughout the investigation and disciplinary process and this tribunal hearing that the allegation is false. Mr Duymun gave evidence that the claimant, in the disciplinary hearing, alleged that the witnesses had fabricated their stories. The claimant did not put to Mrs Smith in this tribunal hearing or at the disciplinary hearing any reason why Mrs Smith should have falsely created the incident reporting form although I note that she was trying to get Mr Duymun to read a folder which she says included her arguments. Since he did not read this, other than some character references, I do not know whether she was attempting to suggest by these means some motive. In these tribunal proceedings, the claimant was not represented. I do not feel able to draw the same conclusions from the claimant not putting to the witness some other reason for her actions as I might do if the claimant had been legally represented. I note that, in her letter to Emma Smith of 26 September 2016, the claimant's complaints included unfair treatment by HH and others, including specifically "Vicky" i.e. Mrs Smith. There does appear, therefore, to be a possibility of pre-existing ill feeling by Mrs Smith towards the claimant before the letter of 26 September 2016, for some unexplained reason, or after the letter, if Mrs Smith had become aware that the claimant had complained about her amongst others. I do not have sufficient evidence to make a finding that this was the case, but, together with other matters, it serves to cast doubt on whether the incident reporting form should be accepted as an authentic contemporaneous document and as to whether I should prefer the evidence of Mrs Smith to that of the claimant.

66. I have been shown the handwritten statement of LG dated 18 November 2016 but LG has not attended this hearing so I have not had the benefit of oral evidence from her, in particular not being able to hear what she would say in response to points put to her.

67. The written statement of LG alleges that the claimant told her at about 8 p.m. that she had forgotten JH and left him on the commode. According to the evidence of Mrs Smith, the claimant did not then go and assist JH but Mrs Smith went to JH's room to find him still on the commode with the claimant not in the room. It seems unlikely that the claimant, if she had left JH and forgotten, would tell LG but not then either go immediately to JH or, if, for some reason she could not do so, ask LG to do so. Failing to do either of these things would display a callousness which appears

inconsistent with what LG reports; that the claimant had simply forgotten JH (which is not intended to suggest in any way that such negligence, if it did occur, is not a very serious matter).

68. The claimant denies the incident ever occurred and has been consistent in her denial throughout the investigation and disciplinary process and in bringing these tribunal proceedings. It is common ground that she had a clean disciplinary record before this matter and she had worked for the respondent since 2003. There is no suggestion that the claimant had ever been involved in conduct of this nature before 1 October 2016.

69. The respondent pointed to an inconsistency in the claimant's evidence during the investigatory and disciplinary process: she initially said JH was no longer at the home when the incident was alleged to take place but then conceded that he was. It is unsurprising to me that the claimant may have made a mistake about dates. She was not told about the specific allegation until the investigation meeting on 10 January 2017, more than 3 months after the alleged incident. The claimant was presumably relying on her own memory that JH had left the home by then. Mr Duymun later was able to check the Residents' record, which would not have been available to the claimant in the investigation meeting. Mr Duymun recorded that JH had left the home on 11 October i.e. 10 days after the alleged incident. The claimant did not need to be mistaken by much to think that the resident had left by 1 October.

70. In relation to the central allegation, there is little the claimant could do, if the allegation was false, other than to deny it, as she has. I note the dispute as to whether JH was out of his room on the day in question and that the claimant requested, in her annotation to her appeal letter of 23 February 2017, the CCTV footage since, if JH was in the lounge, the claimant asserted it would be on camera. If this had been produced and shown JH was not in the lounge, this would have cast doubt on the credibility of LG as a witness. I have been shown no response to this request. The claimant says there was none and the footage has never been disclosed. I have been given no explanation why the footage has not been disclosed.

71. The burden is on the respondent to prove the facts they rely on to show that the claimant left JH unattended on his commode for around 2 hours on 1 October 2016. I have conflicting evidence from the claimant and Mrs Smith. For reasons I have explained above, there are matters which cast some doubt on the reliability of the evidence of Mrs Smith and the authenticity as a contemporaneous document of the incident report form. LG did not appear to give evidence in this tribunal and I feel able to give little weight to her written statement produced as part of the investigation. There is also some inconsistency as to times of events between her statement and the evidence of Mrs Smith and the issue of inherent improbability that the claimant would behave as LG alleged in saying she had forgotten JH then doing nothing about it. Given that I do not feel able to prefer the evidence of the respondent to that of the claimant, the respondent has not satisfied me, on a balance of probabilities that the claimant left JH unattended on the commode on 1 October 2016 for about 2 hours.

Submissions

72. The claimant gave brief oral submissions. She spoke about her job becoming difficult when HH became a manager and how HH had commented on her deafness. She referred to the letter she had written with concerns about HH and the response that the issues were no longer concerns. She spoke about poor treatment by staff and that she felt discriminated against because of her deafness. She said she had been a good employee and carer and had references to back this up. After the respondent's submissions, she added that the whole process had been unfair. From day one, they had wanted her out. They had made their minds up. This was clear from the text messages about Alec [Mr Haggan].

73. Ms Smith, for the respondent, submitted, in summary, in relation to the complaint of unfair dismissal that Mr Duymun had a reasonable belief that the claimant had done what was alleged in relation to the commode incident and he had reasonable grounds for that belief, following a reasonable investigation. Ms Smith submitted that this was a relatively small employer. Despite this, they had carried out a full investigation. The claimant had been allowed to be accompanied by a friend to meetings and had been able to put her case. There had been the incident form and consistent witness statements from Mrs Smith and LG. There was consistent evidence from Mrs Smith and LG as to whether the claimant had left the service user on the commode. The claimant had given inconsistent accounts. She said first the service user was not there. She said she had not done it. She made no suggestions as to why Mrs Smith and LG should make up the allegation. The claimant was provided with a right of appeal but this did not go ahead because the claimant did not inform the respondent that she could not attend. The claimant said at the tribunal hearing, for the first time, that Mr Duymun did not listen. She says she presented a pack to him, but this takes her no further. Character references did not go to whether the commode incident occurred as alleged. This was a serious incident. Dismissal was within the band of reasonable responses, despite the claimant's long service and previous good conduct. There were no procedural errors. If there were procedural flaws, they did not make the dismissal unfair, given the size of the respondent and the lengths they went to to allow the claimant to put her points across.

74. In relation to wrongful dismissal, Ms Smith submitted that the claimant had left the service user on the commode for more than 2 hours. When this was raised with her, she laughed. Mrs Smith was consistent in her statement and the incident reporting form was contemporaneous. No reason had been suggested as to why her account would not be true. The claimant's evidence was inconsistent. All she could say was that the incident did not happen. The claimant has every reason not to be entirely truthful with herself about what happened. If it occurred, it was gross misconduct and the respondent was not in breach of contract by dismissing without notice.

75. In relation to the complaint about arrears of pay, the matter had been sprung on the respondent on the first day of the hearing since, although she had ticked the box, the claimant had provided no detail. Despite that, the respondent had looked into the matter. There was the evidence of Mr Duymun and an email from the payroll administrator. Support had been offered when pay changed from fortnightly to

monthly. It was likely the claimant was confused. It was entirely unlikely that all members of staff would be told to work for 2 weeks and only been paid on termination. This was so unlikely, Ms Smith submitted the tribunal should find it did not happen.

The Law

76. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. The fairness or unfairness of the dismissal is determined by application of Section 98 of the 1996 Act. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Conduct is one of these potentially fair reasons for dismissal.

77. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses. The burden of proof is neutral in deciding on reasonableness.

78. In relation to a conduct dismissal, the Tribunal is guided by the authority of *British Home Stores v Burchell* [1979] IRLR 379. When considering whether the respondent has shown a potentially fair reason for dismissal, the Tribunal must decide whether the respondent had a genuine belief in the claimant's guilt. In considering the fairness or otherwise of the dismissal, the tribunal must consider the other parts of the *Burchell* test: was this belief based on reasonable grounds and formed after a reasonable investigation?

79. An employee is entitled to be given notice of termination unless they are in fundamental breach of their contract, in which case the employer can terminate without notice. If an employee is not in fundamental breach of contract, the notice period they are entitled to is as agreed in their contract, provided this is not less than statutory minimum notice which, for someone with 12 or more years' service, is 12 weeks' notice.

80. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a

right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

Conclusions

Unfair dismissal

81. The decision to dismiss was made by Mr Duymun. I have to consider the reason he dismissed the claimant and whether the dismissal was reasonable in all the circumstances.

82. On the basis of the evidence before me, I conclude that Mr Duymun's reasons for dismissing the claimant were as set out in the letter dated 7 February 2017. I conclude that Mr Duymun dismissed the claimant because he decided, on a balance of probabilities, that the claimant had left a resident of the home, JH, on a commode, unattended, for approximately 2 hours. He found other allegations unproven and these played no part in his decision to dismiss. I conclude that Mr Duymun had a genuine belief that the claimant was guilty of this misconduct. The respondent has, therefore, satisfied me that they had a potentially fair reason for dismissal, being misconduct.

83. Mr Duymun had available to him the evidence of Mrs Smith and LG in relation to the commode incident. He had the incident report form completed by Mrs Smith, her statement, which was a typed up version of that report, and a written statement from LG. He also heard the oral evidence of Mrs Smith and LG at the disciplinary hearing. LG's written statement was evidence that, from LG's own observation, the claimant had taken JH to his room to assist him onto the commode at about 6.15 p.m. and that, at 8 p.m., the claimant had said to LG that she had left JH on the commode and had forgotten. LG also wrote that she had spoken to the claimant in the kitchen, not long after 8 p.m., about leaving JH on the commode and the claimant had given her the impression that she had just forgotten. LG confirmed her statement at the disciplinary hearing. Mrs Smith's incident form and statement wrote that she had been informed by a member of staff that a resident had been left on the commode in his room for two and a half hours. Mrs Smith wrote that she went to check the resident, spoke to him and helped him back into bed and settled him down. She wrote that she spoke to the claimant, the member of staff who had done this (LG having identified this as the claimant), who thought it was funny. Mrs Smith confirmed her statement at the disciplinary hearing. She said at the hearing that LG had approached her, Mrs Smith had gone into the service user's room to find him still on the commode, his feet blue with being cold and he was distressed. She said she had asked the claimant how long the service user had been left on the commode and the claimant had said about 2 hours and found it funny.

84. Mr Duymun also had the evidence of the claimant at the disciplinary hearing and a record of what she had said at the investigatory meeting on 10 January 2017. The claimant consistently denied the allegation, saying she would never leave a resident unattended on a commode that long. She also said two carers were needed to move JH. The claimant did not suggest in the hearing why Mrs Smith and LG might not be telling the truth.

85. Mr Duymun was faced with evidence from two witnesses, Mrs Smith and LG, that the claimant had left JH on the commode, unattended, for approximately two hours. Their evidence was consistent as to the main points. The claimant denied the allegations. Mr Duymun preferred the evidence of Mrs Smith and LG to that of the claimant, finding, on a balance of probabilities, that the claimant had left the resident, JH, unattended on a commode for approximately two hours. This conclusion was one that was open to him, within the band of reasonable responses, to make on the evidence available to him.

86. I conclude that the investigation was reasonable in all the circumstances. The claimant was given an opportunity to respond to the allegations at an investigatory meeting on 10 January 2017 and at the disciplinary hearing on 2 February 2017. She was informed of the allegations orally at the investigatory meeting and in writing prior to the disciplinary hearing. She was given copies of the statements relating to the commode allegation and management statement of case prior to the disciplinary hearing. The claimant had an opportunity to question witnesses. The respondent went beyond the statutory right to be accompanied, which only applies to trade union representatives or work colleagues, in allowing the claimant to be accompanied to the disciplinary hearing, and extended this to the investigatory meeting. The claimant was given a right of appeal, although a failure of communication contributed to no appeal hearing going ahead.

87. The alleged offence was clearly a serious one. From the evidence of LG, it appeared that the neglect of the service user was due to forgetfulness, rather than by intent. Mr Duymun found the claimant guilty of an act of serious negligence. The claimant did not admit the act and, Mr Duymun concluded, on the basis of the evidence of Mrs Smith, made light of it at the time. In these circumstances, it was clearly within the band of reasonable responses for Mr Duymun to decide that dismissal was the appropriate penalty, despite the claimant's previous long service and good record.

88. I conclude, for these reasons, that the complaint of unfair dismissal is not well founded.

Wrongful dismissal

89. The test I have to apply for the complaint of wrongful dismissal is different to that for unfair dismissal. For the complaint of wrongful dismissal, I have to decide on the basis of the evidence available to me whether, on a balance of probabilities, the respondent has satisfied me that the claimant was guilty of gross misconduct. If she was, the respondent was not in breach of contract by dismissing her without notice. If she was not, she was entitled to notice and the respondent was in breach of contract by dismissing her without notice.

90. For the reasons I set out in the section "Further findings of facts relevant to wrongful dismissal" (paragraphs 56-71 of these reasons), I found that the respondent has not satisfied me that, on a balance of probabilities, the claimant left JH unattended on his commode for around 2 hours. I conclude, therefore, that the respondent has not satisfied me that the claimant was guilty of gross misconduct.

The respondent was, therefore, in breach of contract by dismissing the claimant without notice. The claimant was entitled to be given 12 weeks' notice of dismissal.

91. At the remedy hearing, I will determine damages for this breach of contract unless the parties notify the tribunal that they have settled on remedy.

Unlawful deduction from wages

92. The claimant did not give any details of this claim in her claim form or evidence about it in her witness statement. In oral evidence, she said there were two weeks she was not paid when the respondent switched to monthly pay. She said they got two weeks' pay and worked a month and, if they needed to borrow, the respondent would lend it but they had to pay it back when they got paid. She said they were told they would get the two weeks' pay back when they left. The claimant had no documentary evidence to support this claim.

93. I accept that the claimant genuinely understood it to be the case that, when the change was made, there were two weeks unpaid which was to be paid on termination of employment. It is possible that the claimant misunderstood the position. It is possible that she is right in her understanding, although this would be a very unusual thing to have happened. The burden is on the claimant to satisfy me, on a balance of probabilities, that she is due two weeks' pay. On the evidence available, the claimant has not been able to satisfy that burden. I conclude that the complaint of unlawful deduction from wages is not well founded.

Employment Judge Slater

Date: 16 March 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
23 March 2018

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FOR THE TRIBUNAL OFFICE