THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs C Streener**

Respondent: **Barchester Healthcare Limited**

Heard at: **North Shields Hearing Centre** **On:** **13th March 2019**

Before: **Employment Judge AM Buchanan (sitting alone)**

Representation:

Claimant: **Mrs C Robson (Citizens Advice Bureau)**
Respondent: **Mr P Singh (Solicitor)**

JUDGMENT having been sent to the parties on 16 March 2019 and written reasons having been requested in accordance with Rule 62(3) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the following reasons are provided:

REASONS

Preliminary Matters

1. By a claim form filed on 23 October 2018 the claimant brings an application before me for unfair dismissal pursuant to sections 94/98 of the Employment Rights Act 1996 ("the 1996 Act"). The claim form was supported by an early conciliation certificate on which Day A was shown as 20 September 2018 and Day B 16 October 2018. There are no time issues in relation to this matter.

2. On 18 December 2018 the respondent filed a form of response in which it denied all liability.

Witnesses

3. In the course of the hearing I heard from three witnesses for the respondent namely:
3.1 The investigating officer Julie Deborah Bond ("JB"),
3.2 The dismissing officer Suzanne Denise Hudson ("SH") and
3.3 The appeal officer Mary Thomas McCondichie ("MC")

4. In addition I heard from the claimant herself. The claimant produced three statements from other witnesses who did not attend. I read the statements but they added nothing to my findings.

Documents

5. I had a bundle before me which extended to 186 pages. Any reference in these reasons to a page number is a reference to the corresponding page within that agreed trial bundle.

The Issues

6. The issues in this matter were identified at the outset of the hearing as follows:

6.1 Did the dismissing officer have a genuine belief in the misconduct of the claimant and so does the respondent prove the reason for the dismissal of the claimant on the balance of probabilities as being related to her conduct?

6.2 If so, were there reasonable grounds for that belief?

6.3 In particular did the respondent carry out as much investigation into the matter as was reasonable?

6.4 Did the respondent follow a reasonable procedure in moving to dismiss the claimant?

6.5 Did the decision to dismiss the claimant summarily fall within the band of a reasonable response?

6.6 If the decision to dismiss the claimant was unfair, did the claimant contribute to her dismissal by culpable or blameworthy conduct?

6.7 If the decision to dismiss the claimant was unfair, would the claimant have faced a fair dismissal and if so when? - namely the issue in **Polkey -v- A E Dayton Services Limited 1987 ICR 142.**

Findings of fact

7. Having listened to the evidence and the way in which that evidence was given and having considered the documents to which I was referred on the balance of probabilities I make the following findings of fact:

7.1 The claimant began work for the respondent company on 30 September 2005 and she became a deputy manager on 3 December 2012 (page 31). The claimant worked at the material time at the Woodhouse Care Home ("the Home") and it was events there on 11 June 2018 which are at the centre of this case. The claimant had been issued with a statement of the main terms of her employment (pages 31-36).

7.2 The respondent is a very large company and its administrative resources are very considerable. The respondent had issued to the claimant a staff handbook (pages 37-

120) which was commendably thorough. That handbook included examples of what would be considered as "*gross misconduct"* and that long list included *"abuse of residents or patients and failing to report abuse of residents or patients".*

7.3 On 11 June 2018 an anonymous complaint was made to the Northumberland County Council Safeguarding Department in respect of a resident at the Home and an allegation apparently was made that such resident was being treated inappropriately. No record of that complaint was put down into writing or at least, if it was, it was not shown to me and was not before the investigating or disciplinary officers in this case. The complaint was passed by the County Council to the respondent on 14 June 2018 and the regional manager, Claire Cargill ("CC") having received the complaint, attended the Home on 15 June 2018 and there saw the manager JB. When she began her investigation, CC understood the complaint related to the conduct of JB towards an (at that time) unidentified resident.

7.4 CC began an investigation and called for various records. During the course of that morning, she made JB aware that the allegation was in fact made against her. However, later during the course of that same morning, CC received a further telephone call from the County Council which clarified that the complaint was not made against JB but was in fact made against the claimant. No-one applied their mind to the question why or how that second call came to be received.

7.5 CC began an investigation on 15 June 2018 and by the time she received confirmation that the allegation was made against the claimant and not JB, she had interviewed three people. First, she interviewed a carer Melanie King ("MK") and the notes of that interview were at pages 130 and 131. MK recalled an incident in respect of a resident (to whom I will refer as "G") but did not in any way criticise the claimant's conduct. She was not able to recall anyone raising their voice and commented that if she had done so, she would have reported it. In common with all other statements taken by CC, the statement was not signed at the time it was taken but was only signed subsequently in readiness for this hearing before me.

7.6 CC also had a conversation with a carer Charlotte Irwin ("CI") by telephone (page 132) who was unwell and could not attend work that day. CI had no information of relevance to give and did not recall any issues with a resident taking a bath on that day.

7.7 CC spoke with Marlene Wardle ("MW") at 11.30am (page 134/135) that morning and she did recall hearing some sort of disagreement between the claimant and G and reported that the claimant had stated if G would not go in the bath, they had to shut the door because of the smell. MW was asked by CC if she had heard anyone say *"will have to stay in their own muck"* and she replied that that was "*maybe"* said by the claimant and then *"probably*" said by the claimant.

7.8 Having clarified that the allegations were made against the claimant rather than JB, CC left the Home and passed the responsibility for the investigation to JB and instructed that the claimant be suspended from work.

7.9 On 15 June 2018 a letter (page 135) was sent to the claimant suspending her from duty pending investigation into "*allegations of verbal abuse towards a resident".* The letter was in standard form and stated that consideration had been given as to whether suspension was necessary that it had been concluded that it was and the suspension would be subject to ongoing review. I do not accept that any consideration had been given either by CC or JB as to whether suspension was necessary.

7.10 JB then took up the investigation and interviewed other members of staff. On 22 June 2018 (pages 141-142) she saw Stephanie Wilson ("SW") who stated she had heard nothing of concern and would have reported it if she had.

7.11 On the same day JB re-interviewed MK (page 143). JB asked her to reflect on the statement she had given earlier and asked if it was correct. JB confirmed that it was and she had nothing to add. She commented that the situation was an awful one which clearly indicates the level of gossip about the matter which was ongoing in the Home at that time.

7.12 On 26 June 2018 JB interviewed Anita Donaldson ("AD") who was also a care worker (pages 144-145) who recalled an incident with G on 11 June 2018. She had notice an unpleasant smell coming from G's room and asked G if she had had an accident which G denied. AD stated she had looked into the bathroom and saw the room was covered in faeces. She had seen the claimant have a conversation with G about having a bath and she saw that G was refusing. AD stated that she had gone away and returned and found the claimant and G arguing. She had heard the claimant state that G could "*stay in her own shit".* She had then gone into the room and persuaded G to have a bath which she did. Later the claimant had seen G in the corridor and G had told the claimant that she had had a bath and the claimant had replied "*and so you should".*

7.13 On 27 June 2018 JB saw MW (page 146) and asked her to confirm her first statement was true and she confirmed that it was. She was asked again if she had heard anyone say "*you can stay in your own muck"* and on this occasion, she stated it was the claimant who had said that.

7.14 That was the extent of the investigation and on 27 June 2018 the claimant was seen by JB in what was a relatively short meeting (pages 147-148) lasting 20 minutes and in which the claimant effectively accepted that there had been a conversation between herself and G on 11 June 2018 about the necessity for G to have a bath because of her physical state on the morning in question. That conversation had taken place in G's room and G had refused to have a bath. The claimant accepted that she had told G she would have to close the door because of the smell and also to protect the dignity of G as she was covered in faeces. The claimant confirmed that another carer had persuaded G to have a bath and that when she had seen G later in the morning, G had told the claimant that she had had a bath and the claimant had replied to her that she was "*her own worst enemy".* The claimant denied using the words "*muck"* or "*shit"* as had been alleged.

7.15 As a result of those investigations a very brief report (pages 149-150) into the matter was prepared by JB who set out the various people who had been interviewed and she set out a recommendation in these terms:
"I also interviewed members of the team who were on duty…..Outcome from witness statements confirmed by two members of the team that they witnessed or overheard the conversation between Carol (the claimant) and the Resident (G) and clearly heard the terminology muck/shit as stated by the anonymous complainant. Carol is the deputy manager of Woodhorn Park and is expected within her job role to lead by example, raised voice and derogatory comments made directly to a resident is not acceptable and constitutes as abuse". JB recommended the matter proceeds to a disciplinary hearing.

7.16 That suggests that the anonymous complainant had referred to such words in the complaint but no record of that complaint was before me and it is entirely unclear how JB had come by that information.

7.17 That resulted in a general manager Suzanne Hudson writing to the claimant on 6 July 2018 a letter (pages 151-152) which simply told the claimant that she was summoned to disciplinary hearing and the purpose of the hearing was to consider the following allegations: *"allegations of verbal abuse towards a resident".* No further detail of that allegation was set out. There was no detail given of the date of the alleged incident or the resident involved or what constituted the alleged abuse. Various unsigned witness statements were forwarded to the claimant along with the investigation report and other documents listed in the letter. The claimant was advised that if the allegation was found to be proved *"it will be considered gross misconduct under the companies disciplinary and dismissal policy and your employment may be summarily terminated".* The claimant was told she could be accompanied that in the event she chose not to be.

7.18 The disciplinary hearing (minutes pages 153-157) took place on 13 July 2018 and at a relatively brief meeting (45 minutes) SH saw the claimant only. SH told the claimant for the first time what had been alleged by the anonymous complainant. The claimant effectively repeated what she had said earlier namely that she had had a conversation on 11 June 2018 with G and that there had been talk about shutting the door. The claimant made it clear she was referring to the door to the en-suite bathroom within G's room. The claimant made it clear that G was her aunt and had a history of self-neglect and that it was necessary to be firm with her to persuade her to have a bath. The claimant stated she was giving out the medication to the residents of the Home on the morning in question and she was administering a new medication regime and was concentrating hard on that task: the Home was short staffed as there was no "senior" on duty. The claimant accepted that she had told G that they could not have the corridor smelling as it was in an effort to persuade G to have a bath. The claimant pointed out that Marlene had changed her story after 12 days and as a result of the gossip in the Home. SH put to the claimant that Anita had heard her say "*Right you can stay in your own shit"* but the claimant denied that allegation. The claimant pointed out the differences in the accounts of the witnesses and posed the question why no member of staff had reported the matter straightaway if it was as bad as was then being made out. The claimant also pointed out that the manager JD had been in her office at the time. The claimant stated that G shouted when she talked normally. The claimant accepted she may have become muddled over the timings of the incident but not about the details of the incident. The claimant pointed out her "*impeccable work record".*

7.19 As a result of that investigation and interview, SH considered the matter and in a short letter of the 16 July 2019 (pages 158-159) wrote to the claimant setting out her decision in these terms:
" ....during the hearing you admitted that when staff had reported to you that the resident had smeared faeces in her own room and on herself you instructed Steph to shut the door. In addition you admitted that you told your staff that you couldn't get involved and also admitted that you couldn't deal with the resident at that time. During the hearing you admitted that on two occasions you firmly told the resident that she needed a bath and that until she did her door would be shut. These discussions took place in an area where they may have been overheard by other residents, staff and any visitors to the home. I am satisfied that the witness accounts in the main collaborate (sic) with your version on how you handled the situation however your conversation with the resident constitutes verbal abuse. I consider your actions to be gross misconduct and having considered all alternatives, I have decided to take the most severe sanction an employer can take against an employee and dismiss you…… As the care industry is heavily regulated and due to the fact that you were dismissed we have a statutory obligation to make referrals to DBS once this referral has been made you will be sent a letter with confirmation of the referral date".

7.20 The right of appeal was notified and the claimant duly exercised that right by letter of 20 July 2018 (pages 162-164) which set out various grounds of appeal. The claimant asserted the interpretation of her interview was not an accurate interpretation and in particular she denied ever having been rude or abusive towards G at any time. The evidence about G's challenging behaviour was not present at the disciplinary hearing and what she did on the day in question was to follow the guidelines set out in G's care plan. Information was not before the disciplinary hearing about other members of staff having to be firm yet courteous with G on many occasions. She had worked for the respondent for 13 years, six as deputy manager and had an excellent record. The family of G had not been advised that G had been subjected to what was considered to be verbal abuse and at no time had G been asked for her own version of the events. None of the witness statements had been signed or dated and the claimant asked for the details of the anonymous phone call and the contradictory witness statements to be reconsidered. The dismissing officer had not been made aware of G's history or that G was the aunt of the claimant.

7.21 The appeal ultimately came before MM on the 21 August 2018 when the various grounds of appeal were investigated. The appeal hearing was minuted (pages 167 – 170). The appeal was dismissed by letter dated 5 September 2018 (pages 173 – 174) when the appeal manager looked at the various grounds of appeal and dismissed each of them. The appeal was carried out on the papers and the appeal officer did not hear any evidence or interview any witnesses.

Submissions

Claimant

8. On behalf of the claimant Ms Robson made oral submissions which are briefly summarised:

8.1 The allegation faced by the claimant of verbal abuse was not clear. Neither the investigation report nor the letter bringing the claimant to a disciplinary hearing made plain the details of the allegation against the claimant.

8.2 Initially JB was thought to be the person complained about and yet she was not suspended. The decision to suspend the claimant was not considered but was an automatic decision and that characterises all that followed. It was not reasonable that the person initially suspected of misconduct should herself then become the investigating officer.

8.3 It is not clear that the allegation of verbal abuse was established because it is not clear what the allegation was. The claimant is still not clear what she was dismissed for. The evidence presented is not sufficient to justify a finding that there was verbal abuse. No consideration was given to the fact that G often raised her voice and that she was resistant to having a bath on the morning in question. The dismissing officer did not take account of the circumstances which faced the claimant on that day.

8.4 In failing to interview G, the respondent did not act reasonably. She could have been asked for her version of events. G did not lack capacity and she could have been asked for her evidence. A reasonable employer would at least have investigated whether she wished to be and could be interviewed about the matter.

8.5 It is clear that the dismissing officer moved automatically from a finding of verbal abuse to a decision to summarily dismiss the claimant without giving any thought or consideration to the very considerable mitigation advanced by the claimant. This included the claimant's clean disciplinary record and her long service. The dismissing officer accepted in evidence that she gave no consideration to those matters and those are not the actions of a reasonable employer.

8.6 There were flaws in the procedure adopted by the respondent. The interview notes were not agreed with the witnesses, the witness statements were not signed and there was no opportunity for the claimant to challenge the witnesses at the disciplinary hearing. In the context of producing statements which were not signed, it was important that the witnesses should have been present at the disciplinary hearing in order to enable the dismissing officer to reach her own view as to where the truth of the matter lay. In the event she simply accepted the evidence of the other witnesses whom she did not see against t the evidence of the claimant whom she did see.

8.7 The decision to impose the penalty of summary dismissal was not within the band of a reasonable response and evidenced a closed mind and predetermination of the outcome by the dismissing officer.

8.8 The claimant was not guilty of any contributory conduct and would not have faced dismissal if a fair procedure had been followed.

Respondent

9. For the respondent Mr Singh made brief submissions which are summarised:

9.1 The respondent has clearly established the reason for dismissal as being related to the conduct of the claimant. The personal relationship which the claimant had with G tainted her action and meant that she had behaved on the day in question in a way which amounted to verbal abuse of a resident. The claimant accepted closing the door of the resident's room and saying that the resident was her own worst enemy.

9.2 The witnesses for the respondent had all given clear and credible evidence and that was not the case in respect of the evidence given by the claimant.

9.3 The allegation put to the claimant was clear and sufficiently specific.

9.4 The dismissing officer concluded that the actions of the claimant had moved from being firm into the realm of abuse. In those circumstances the respondent adopts a policy of zero tolerance and therefore the penalty of summary dismissal fell within the band of a reasonable response. The claimant expressed no remorse in relation to her actions and the respondent could not allow her employment to continue. It is not appropriate to speak to a resident in the way that has been suggested in this case.

9.5 The claimant contributed very considerably to her dismissal and there should be a reduction of 90% in respect of contributory conduct. Furthermore, it if the respondent failed to follow a reasonable procedure, there is at least an 80% chance that dismissal would have followed had such a procedure been followed.

10. The Law of Ordinary Unfair Dismissal – Section 98 Employment Rights Act 1996 (the 1996 Act)

10.1 I have reminded myself of the provisions of section 98 of the 1996 Act which read:

> "*98(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 it is either a reason falling in subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) The reason falls within this subsection if it –*
>
> *(a) relates to the capability or qualifications of the employee for performing work of a kind which he was employed to do;*

(b) relates to the conduct of the employee …

(4) In any other case 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 reasons 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".

10.2 I have noted the decision in **British Home Stores Limited v Burchell [1978] IRLR379** and reminded myself that it is for the respondent to establish that it had a genuine belief in the misconduct of the claimant at the time of the dismissal. In answering this question, I note that the burden of proof lies with the respondent to establish that belief on the balance of probabilities. I remind myself that the other two limbs of the Burchell test, namely reasonable grounds on which to sustain that belief and the necessity for as much investigation into the matter as was reasonable in all the circumstances of the case at the stage at which the belief was formed, go to the question of reasonableness under section 98(4) of the 1996 Act and in relation to section 98(4) matters, the burden of proof is neutral. In considering the provisions of section 98(4), I must not substitute my own views for those of the respondent but must judge those matters by reference to the objective standards of the hypothetical reasonable employer. I have noted the words of Mummery LJ in **The Post Office-v-Foley and HSBC Bank plc –v- Madden 2000 EWCA Civ 3030:**

"In one sense it is true that, if the application of that approach leads the members of the tribunal to conclude that the dismissal was unfair, they are in effect substituting their judgment for that of the employer. But that process must always be conducted by reference to the objective standards of the hypothetical reasonable employer which are imported by the statutory references to "reasonably or unreasonably" and not by reference to their own subjective views of what they would in fact have done as an employer in the same circumstances. In other words, although the members of the tribunal can substitute their decision for that of the employer, that decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer, which they were not".

10.3 I have reminded myself of the decision in **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR23** where the Court of Appeal made it plain that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to any other procedural and substantive aspects of the decision to dismiss a person from his employment for misconduct reason.

10.4 I have reminded myself of the decision in **Ulsterbus Limited v Henderson [1989] IRLR251** where the Northern Ireland Court of Appeal said it was not incumbent on a reasonable employer to carry out a quasi-judicial investigation into an allegation of misconduct with a confrontation of witnesses and cross-examination of witnesses. Whilst some employers might consider that necessary or desirable an employer who fails to do so cannot be said to have acted unreasonably.

10.5 I was reminded of and have noted the decision of **A v B [2003] IRLR405** in which the Employment Appeal Tribunal reminded tribunals that in determining whether an employer has carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and the potential effect upon the employee.

I have noted the guidance of Elias J:

"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 of 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 inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him".

10.6 I was also reminded of and have noted the decision in **Salford Royal NHS Foundation Trust v Roldan [2010] EWCA Civ 522** and in particular the final paragraph of the judgment of Elias LJ which reads:

"The second point raised by this appeal concerns the approach of employers to allegations of misconduct where, as in this case, the evidence consists of diametrically conflicting accounts of an alleged incident with no, or very little, other evidence to provide corroboration one way or the other. Employers should remember that they must form a genuine belief on reasonable grounds that the misconduct has occurred. But they are not obliged to believe one employee and to disbelieve another. Sometimes the apparent conflict may not be as fundamental as it seems; it may be that each party is genuinely seeking to tell the truth but is perceiving events from his or her own vantage point. Even where that does not appear to be so, there will be cases where it is perfectly proper for the employers to say that they are not satisfied that they can resolve the conflict of evidence and accordingly do not find the case proved. That is not the same as saying that they disbelieve the complainant. For example, they may tend to believe that a complainant is giving an accurate account of an incident but at the same time it may be wholly out of character for an employee who has given years of good service to have acted in the way alleged. In my view, it would be perfectly proper in such a case for the employer to give the alleged wrongdoer the benefit of the doubt without feeling compelled to have to come down in favour of on one side or the other".

10.7 I have reminded myself of the words of Wood J in **Whitbread and Co PLC –v- Mills 1988 ICR 776** where he states:- *'It seems to us that in the context of industrial relations those appeal procedures form an important part of the process ensuring that a*

dismissal should seek to be fair. Secondly as Lord Bridge said in the West Midlands Co-operative Society Limited –v- Tipton 1986 ICR192 at page 202 'both the original and the appellate decision of the employer are necessary elements in the overall process of terminating contract of employment".

Wood J continued:- *'If it has (ie the acts or omissions of the initial hearing) then whether or not an appeal procedure has rectified the situation must depend upon the degree of unfairness of the initial hearing. If there is a rehearing de novo at first instance, the omission may be corrected but it seems to us that if there is to be a correction by the appeal then such an appeal must be of a comprehensive nature, in essence a rehearing and not a mere review".*

10.8 I have reminded myself of the decision of **Taylor v OCS Group Limited [2006] IRLR613** and particularly noted the words of Smith L.J. at paragraph 47:

"The error is avoided if ETs realise that their task is to apply the statutory test. In doing that they should consider the fairness of the whole of the disciplinary process. If they found that at an early stage, the process was defective and unfair in some way they will want to examine any subsequent proceedings with particular care. Their purpose in so doing will not be to determine whether it amounted to a re-hearing or a review but to determine whether due to the fairness or unfairness of the procedures adopted the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision maker the overall process was fair, notwithstanding any deficiencies at the early stage".

10.9 I have reminded myself of the decision of **South West Trains v McDonnell [2003] EAT/0052/03/RN** and in particular have noted the words of HHJ Burke at paragraph 36:

"Whilst not only unfair it is incumbent on an employer conducting an investigation followed by a disciplinary hearing both to seek out and take into account information which is exculpatory as well as information which points towards guilt, it does not follow that an investigation is unfair overall because individual components of an investigation might have been dealt with differently, or were arguably unfair. Whilst, of course, an individual component on the facts of a particular case may vitiate the whole process the question which the Tribunal hearing a claim for unfair dismissal has to ask itself is: in all the circumstances was the investigation as a whole fair?"

10.10 I was also referred to and have taken account of the decision in **Strouthos –v- London Underground Limited**. In that case the charge against the dismissed employee came under close scrutiny and Pill LJ commented that in criminal or disciplinary proceedings the charge against an employee should be precisely framed and that evidence should be confined to the particulars given in the charge. I have noted the guidance at paragraphs 38 and 41 of his judgment:
"However, it does appear to me to be basic to legal procedures, whether criminal or disciplinary, that a defendant or employee should be found guilty, if he is found guilty at all, only of a charge which is put to him. What has been considered in the cases is the general approach required in proceedings such as these. It is to be emphasised that it is wished to keep proceedings as informal as possible, but that does not, in my judgment, destroy the basic proposition that a defendant should only be found guilty of the offence with which he has been charged…….it does appear to me quite basic that care must

be taken with the framing of a disciplinary charge, and the circumstances in which it is permissible to go beyond that charge in a decision to take disciplinary action are very limited. There may, of course, be provision, as there is in other tribunals, both formal and informal, to permit amendment of a charge, provided the principles in the cases are respected. Where care has clearly been taken to frame a charge formally and put it formally to an employee, in my judgment, the normal result must be that it is only matters charged which can form the basis for a dismissal".

10.11 I remind myself also of the decision in **Ladbroke Racing v Arnott 1983 IRLR 154** where it was held that a rule which specifically states that certain breaches will result in dismissal cannot meet the requirements of section 98(4) in itself. The statutory test of fairness is superimposed on the employer's disciplinary rules which carry the penalty of dismissal. The standard of acting reasonably requires an employer to consider all the facts relevant to the nature and cause of the breach including the degree of its gravity. If therefore, an employer has a rule prohibiting a specific act for which the stated penalty is instant dismissal he does not satisfy the statutory test by imposing that penalty without regard to the facts or circumstances other than the breach itself. If that were a legitimate approach to the law, it would follow any breach of rules so framed could constitute gross misconduct warranting dismissal irrespective of the manner in which the breach occurred. In that case there was nothing to indicate that the manager who took the decision to dismiss gave any thought to the provisions of fairness. When considering sanction, previous good character and employment record is always a relevant mitigating factor.

10.12 I reminded myself of the provisions of Section 123(6) of the 1996 Act – *'Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the compensatory award by such proportionate as it considers just and equitable having regard to that finding'.* I note that for a reduction from the compensatory award on account of contributory conduct to be appropriate, then three factors must be satisfied namely that the relevant action must be culpable or blameworthy, that it must have actually caused or contributed to the dismissal and it must be just and equitable to reduce the award by the proportion specified. The Tribunal must concentrate on the action of the claimant before dismissal because post dismissal conduct is irrelevant. I have noted the provisions of Section 122(2) of the 1996 Act and the basis for making deductions from the basic award. I have noted the guidance of Brandon LJ in **Nelson –v- BBC (No 2) 1980 ICR 110**:

"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved".

10.13 I have reminded myself of the provisions of Section 123 of the 1996 Act in relation to the fact that compensation must be 'just and equitable' and have reminded myself of

the decision of **Polkey –v – A E Dayton Service Limited 1988 ICR142**. I note that the **Polkey** principle applies not only to cases where there is a clear procedural unfairness but what used to be called a substantive unfairness also. However, whilst a Tribunal may well be able to speculate as to what would have happened had a mere procedural lapse or omission taken place, it becomes more difficult and therefore less likely that the Tribunal can do so if what went wrong was more fundamental and went to the heart of the process followed by the respondent. I have noted the guidance given by Elias J in **Software 2000 Limited –v- Andrews 2007 ICR825/EAT.** I recognise that this guidance is outdated so far as reference to section 98A(2) is concerned but otherwise holds good. I note that a deduction can be made for both contributory conduct and **Polkey** but when assessing those contributions the fact that a contribution has already been made or will be made under one heading may well affect the amount of deduction to be applied under the other heading. I note that in cases involving allegations of misconduct a **Polkey** assessment is likely to be more difficult than in a redundancy dismissal case and that a misconduct case will likely involve a greater degree of speculation which might mean the exercise is just too speculative. I note that a deduction can be made for both contributory conduct and **Polkey** but when assessing those contributions, the fact that a **Polkey** deduction has already been made or will be made under one heading may well affect the amount of deduction to be applied for contributory fault. I have noted the decision in **Rao –v- Civil Aviation Authority 1994 ICR 485** and the guidance to the effect that a deduction from compensation pursuant to section 123(1|) of the 1996 Act (the **Polkey** deduction) should be first considered and then an assessment made in respect of contributory conduct. The extent of any **Polkey** type deduction may very well in many cases have a very significant bearing on what further deduction may fall to be made in respect of contributory fault.

10.14 I have reminded myself of the more recent guidance from Langstaff P in **Hill –v- Governing Body of Great Tey Primary School 2013 IRLR 274** and as to the correct approach to the Polkey issue.

*"A "**Polkey** deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer **would** have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand".*

10.15 In the employment context "gross misconduct" is used as convenient shorthand for conduct which amounts to a repudiatory breach of the contract of employment entitling the employer to terminate it without notice. In the unfair dismissal context, a finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Exactly what type of conduct amounts to

gross misconduct will depend on the facts of the individual case. Generally to be gross misconduct, the misconduct should so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment. Thus in the context of section 98(4) of the 1996 Act it is for the Tribunal to consider:

(a) was the employer acting within the band of a reasonable response in choosing to categorise the misconduct as gross misconduct and

(b) was the employer acting within the band of a reasonable response in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, the employee's length of service and disciplinary record are relevant as is his attitude towards his conduct.

Discussion and Conclusions

Reason for Dismissal

11.1 I have reminded myself of the legal provisions and authorities set out above and I turn to the first question for my consideration which is whether the respondent has proved the reason for the claimant's dismissal on the balance of probabilities. In this case the respondent asserts that the claimant was dismissed for a reason related to her conduct and thus a potentially fair reason within section 98(2) of the 1996 Act. I have considered the evidence of the dismissing officer. I have no hesitation in concluding that the reason SH moved to dismiss the claimant was because she genuinely believed that the claimant was guilty of having verbally abused G. I conclude that the respondent has established on the balance of probabilities that that was the reason for dismissal and that it related to the conduct of the claimant: this is certainly not a case where there is any evidence that the reason for dismissal is other than that asserted by the respondent. The reason for dismissal is established and I move on to consider the questions posed by section 98(4) of the 1996 Act.

The questions posed by section 98(4) of the 1996 Act

11.2 I have reminded myself again that in answering the questions posed by section 98(4) of the 1996 Act I must not substitute my view for what should have been done but instead I have to consider whether what the respondent did in terms of its investigation and its disciplinary process fell within the band of a reasonable response open to a reasonable employer.

11.3 I have considered the investigation carried out by the respondent. Was the investigation into this matter reasonable? I conclude that it was not. The investigation lacked rigour. It arose from an anonymous complaint. That anonymous complaint was not put down into writing and the full details of it were not made known to the claimant. At best the claimant was told of some details of it at the investigation and the disciplinary meetings.

11.4 The circumstances in relation to the complaint were unusual. The complaint related to an incident in the Home on 11 June 2018 and there must have been a very high likelihood that the complainant had witnessed or overheard the incident in order to

complain about it. Rather than complaining to the respondent direct, the complainant made an anonymous complaint to the County Council. That complaint evidently identified the home manager JB as the person being complained about. The Regional Manager then attended the Home to investigate the actions of JB and during the course of the morning, and whilst her investigation was ongoing, a further call was received from the County Council to the effect that CC was investigating the actions of the wrong person and that the person being complained about was the claimant and not JB. I did not hear from CC but I infer that no consideration was given by CC as to the circumstances in which that second call came to be made. It suggested that the complainant was present in the Home on 11 June 2018 and saw that the wrong person was being investigated and so made a further anonymous complaint to the County Council. Such circumstances could be said to suggest that the complainant had an axe to grind against the claimant and therefore that the motivation of the witnesses to the alleged incident merited very careful scrutiny. One obvious possibility of the identity of the maker of the second call was JB herself and yet the respondent, having received the second call, accepted its contents without question and then placed JB in charge of the investigation of which moments before she had herself been the subject. The Regional Manager left the scene and I infer that she did so glad to be free of the matter and glad to be able to place JB in charge of the investigation. Any reasonable employer faced with those very unusual circumstances would have carefully investigated the motivation of all the witnesses to the incident towards the claimant and would not have placed JB in charge of that investigation. The respondent did not at any time through any of its officers consider the question of the motivation of the witnesses whom it interviewed. Having had the Regional Manager embark on the investigation any reasonable employer would have had that same manager or another independent manager complete it.

11.5 When the investigation into the actions of JB by CC had begun, JB was not suspended or threatened with suspension yet as soon as the claimant became the subject of the investigation a decision was taken to suspend the claimant that same day. The proportionality of that decision was not assessed by the respondent and any reasonable employer would have carried out such an assessment before suspending the claimant. The suspension was actioned by JB. No reasonable employer would have placed JB in charge of the suspension of the claimant in the circumstances then prevailing.

11.6 The question of what was said on 11 June 2018 to G by the claimant was central to the issues in this case. No consideration was given by the respondent to interviewing G to see if she was able and/or willing to give her account of what had occurred on that day. In failing even to consider engaging with G on that point the respondent acted as no reasonable employer would have acted. It is clear that G was not mentally incapable of providing evidence and given that G was the other party to the conversation which led to the dismissal of the claimant, no reasonable employer would have failed at least to consider whether G was competent and willing to provide evidence of the conversation in question. If G had been approached and expressed herself unwilling or if it was considered that she was unable to provide any meaningful evidence, then the actions of the respondent could not have been impugned. However, in failing even to consider that matter the respondent acted as no reasonable employer would have acted. The allegations made against the claimant in this matter necessitated a referral to the DBS. The allegations were potentially career ending for the claimant in an

industry in which she had worked for 22 years. I remind myself of the decision in **A-v-B** (above) to the effect that the greater the gravity of the allegations made in terms of the effect on the claimant, the more rigorous an investigation needs to be if it is to be a reasonable one. I conclude that the investigation in this matter lacked rigour and failed to consider the question of motivation behind the allegations made in the anonymous complaint.

11.7 For those reasons, I conclude that the investigation by the respondent in this matter fell outside the band of a reasonable investigation of a reasonable employer.

11.8 I have turned to consider the procedure followed by the respondent in this matter.

11.9 The allegation against the claimant as contained in the letter bringing her to the disciplinary hearing was that she had verbally abused G. Thus, the details of what was said to G on 11 June 2018 by the claimant came into sharp focus. The allegation put to the claimant in the letter (page 151) bringing her to the disciplinary hearing was "*allegations of verbal abuse towards a resident".* The details of what the claimant had allegedly said and to whom and when and where were not specified. Any reasonable employer would have provided those basic details to the claimant in order that she was clear what allegations she had to meet. Whilst witness statements were provided to the claimant in that same letter, the details of the allegation against the claimant remained unclear. No reasonable employer would have framed the allegation against the claimant in that manner.

11.10 The witness statements provided both to the claimant and to the dismissing officer were not signed or dated by the witnesses. Statements placed before me had been signed many months after they had been taken and only in preparation for the hearing before me. Given the importance of what was recorded in those statements as to the conversations which took place on 11 June 2018, no reasonable employer would have provided unsigned and undated witness statements particularly so when no witnesses were to be called before the dismissing officer at the disciplinary hearing.

11.11 For those reasons the procedure followed by the respondent in this matter fell outside that of a reasonable employer particularly given the size and administrative resources of this respondent.

11.12 I have considered the decision to summarily dismiss the claimant and whether that decision fell within the band of a reasonable response.

11.13 The dismissing officer in this case accepted that she had not considered any mitigation advanced by the claimant. The process by which the dismissing officer reached her decision was that she decided the claimant had verbally abused G by saying that G had to stay in her own "*muck/shit"* and that G was her "own worst enemy". Having reached that decision, the dismissing officer saw the case as one of gross misconduct and proceeded immediately to impose the penalty of summary dismissal without giving any consideration to the considerable mitigation advanced by the claimant in this case. I refer to the decision in **Arnott** (above) and note that the statutory test of fairness is superimposed on the respondent's disciplinary rules even in respect of matters which are said to constitute gross misconduct. There was a complete failure by the dismissing officer in this case to consider any mitigating circumstances. The

mitigating circumstances in this case were that the claimant had worked for the respondent for over 12 years, that the claimant had an exemplary disciplinary record, that the claimant held a senior position in the Home, that on the day in question the home was short-staffed, that the claimant was interrupted by the event in which the conversation took place when carrying out an important duty of distributing medication and that the claimant was related to G and was effectively her next of kin. This last important factor was simply neither known to nor considered by the dismissing officer. In moving to dismiss the claimant without giving any consideration to mitigating factors, the respondent acted as no reasonable employer would have acted in this case.

11.14 I conclude that the dismissing officer determined that the claimant had spoken in an abusive way towards G after having read the witness statements placed before her and before she heard from the claimant. The dismissing officer did not approach the decision-making process with any objectivity or rigour but simply accepted the unsigned and undated statements of the other members of staff placed before her without testing that evidence in any way. I am reinforced in that conclusion when I note the dismissing officer simply failed to give any consideration to the mitigation advanced by the claimant in any way. I conclude that the dismissing officer read the file and determined there and then that the claimant was guilty of gross misconduct and was to be summarily dismissed. That process is not one which any reasonable employer would have followed.

11.15 Even considering the circumstances as the respondent saw them in this case namely that the claimant used abusive language towards G, I conclude that the decision to impose the penalty of summary dismissal fell outside the band of a reasonable response. Any reasonable employer would have considered the mitigation advanced by the claimant and would have taken account of the circumstances in which the conversation came to have occurred. Whilst no blame whatsoever could attach to G, who was a vulnerable resident of the respondent (as are all such residents), the circumstances prevailing on the morning of 11 June 2018 and the challenging and difficult behaviour being demonstrated by G would have been taken account of by any reasonable employer. That coupled with the relationship which existed between the claimant and G would have led any reasonable employer to mitigate the penalty of summary dismissal. That is not to say that the claimant was blameless in her actions on 11 June 2018 but I conclude judging the matter from the viewpoint of the hypothetical reasonable employer that no reasonable employer would have imposed the penalty of summary dismissal in the circumstances of this case and in the light of the mitigation available which simply was not taking into consideration.

11.16 In those circumstances the decision to dismiss the claimant was not one which any reasonable employer would have taken and the dismissal of the claimant was unfair.

11.17 I have considered the remaining issues namely whether the claimant would have faced a fair dismissal (the **Polkey** question) and whether the claimant contributed to her dismissal by culpable or blameworthy conduct.

11.18 I have decided that the decision to dismiss the claimant fell outside the band of a reasonable response and therefore conclude that a fair dismissal would not have followed even in the absence of an unreasonable procedure. Such is the extent of the

unreasonableness on the part of the respondent in this matter that to consider what the outcome might have been in the circumstances of this case would be pure speculation on my part and I have no evidence on which I can infer or conclude what the result would been had a fair procedure been followed.

Contributory conduct

11.19 I conclude that the claimant did contribute to her dismissal by culpable and blameworthy conduct on her part. The claimant was the deputy manager of the Home carrying out the difficult and important task of distribution of medication when the circumstances in relation to G were reported to her. I accept that the claimant engaged in a conversation with G at a time when she felt unable properly to deal with the matter because of her other duties and as a result she responded in a way in which she ought not to have responded. Rather than approaching G in a considerate and caring way, she approached the matter in a confrontational way. In doing so she was aware that G could evidence challenging behaviour which necessitated, at times, a firm response but I conclude in speaking to G on 11 June 2018 as she did the claimant was culpable. I conclude on the balance of probabilities that the claimant did say to G that if she was not prepared to have a bath then she would have to stay in her soiled state and that she was prepared to leave G in her own room rather than making proper efforts to persuade G immediately to have a bath and thereby to restore the dignity. In effect, the claimant took her eye off the ball and did not give the situation with G the attention and care that it merited. I take account of the fact that the situation with G was causing a very unpleasant atmosphere in the corridor and causing upset to other residents and staff but that was all the more reason to address the matter urgently and persuade G to bathe – no matter how challenging or difficult that may have been. I accept when the claimant referred to closing the door she was referring to the door of the bathroom in G's room and that she was trying to improve the atmosphere in the bedroom by that action. I do not accept that the claimant used either the word "*muck"* or "*shit"* in her conversation with G but I do accept that the conversation which took place was critical of G and evidenced a lack of patience and care. I accept that that occurred when the claimant was short-staffed and busy with important other duties. I conclude that the level of contributory conduct by the claimant in this matter is 40% and there will be that deduction from any remedy to which the claimant is entitled in this matter. I make it clear that there can never be an excuse on the part of a member of staff of a care home to show anything less than tolerance and patience towards a vulnerable resident even if that resident is also their effective next of kin. That said, I conclude that the circumstances of this case did not amount to conduct amounting to gross misconduct for the reasons I have set out above.

11.20 Accordingly the claimant is entitled to a remedy for unfair dismissal.

Findings of fact in respect of remedy.

12.1 The claimant was born on 7 March 1962. She began work for the respondent on 3 December 2012 but her continuous service with a previous employer counted as service with the respondent and her previous service began on 30 September 2005. At her dismissal the claimant had completed 12 years continuous service for the purposes of the calculation of the basic award. The appropriate multiplier was 1.5 weeks gross pay for each year of complete service namely 18.

12.2 At the time of her dismissal the claimant earned £371.67 per week gross and £316.37 per week net.

12.3 As a result of her dismissal, the respondent reported the claimant to the Disclsoure and Barring Service ("DBS"). The claimant was advised by letter dated 21 December 2018 that the DBS did not consider it appropriate to include the claimant on either the Children's or Adults' Barred List as a result of the circumstances of her dismissal. As a result of the referral to the DBS the claimant was hampered in her attempts to find alternative employment up to the end of 2018.

12.4 The claimant applied for a post as a Nursing Assistant with Northumbria Healthcare NHS Foundation Trust in December 2018 and for another such post in February 2019. In addition, applications have been made for posts in doctors' surgeries and as a health care assistant in Wansbeck and Cramlington hospitals and also for a post as an assistant in a chemist's shop. The claimant has not yet been successful in finding alternative employment. The claimant has worked as a care assistant for over 22 years and wishes, if possible, to remain within that sector. The claimant has received treatment from her GP since her dismissal for anxiety and depression but has not been unfit for work.

12.5 The claimant applied for and received Jobseeker's Allowance after her dismissal with effect from 24 July 2018 (page 183). This entitlement ceased on 29 January 2019

Conclusions in respect of remedy.

13.1 I conclude that the claimant has taken reasonable steps to find alternative employment since her dismissal. She has worked in the care sector for over 22 years and has no formal qualifications to work in any other sector. There has been no failure to mitigate. The outstanding referral to the DBS was bound to affect her employment prospects pending it being resolved.

13.2 I was given no meaningful information about the pension scheme offered by the respondent of which the claimant was a member or of the private health care provision from which she benefitted. As a result, I cannot assess any compensation in respect of such matters.

13.3 The outstanding referral to DBS and then the prospect of this litigation hampered the claimant's ability to find alternative employment. I calculate that with this litigation at an end and with the DBS reference resolved, the claimant will be able to find alternative employment at least at the level of remuneration paid to her by the respondent within 4 weeks of this hearing. I reach that conclusion because the claimant has a wealth of experience in the care sector and I apply my industrial knowledge to conclude that there are significant opportunities in that sector for an applicant of the claimant's experience.

13.4 I award £500 to the claimant for the loss of statutory rights. She had worked for over 12 years for the respondent and its predecessors and the loss of protection is significant.

13.5 The claimant received benefits covered by the Employment Tribunals (Recoupment of Benefit) Regulations 1994 up to 16 January 2019 and those regulations will apply to the compensatory award in this case. The prescribed element of the compensatory award totals £5011.31 and the prescribed period is 17 July 2018 until 16 January 2019. The amount of the award which is not subject to recoupment is £6591.90p.

13.6 The period from 16 July 2018 until 16 January 2019 is 26 weeks 2 days. The period from 16 January 2019 until 13 March 2019 is 8 weeks.

13.7 I conclude that it is appropriate to deduct 40% in respect of contributory conduct from both the basic and the compensatory awards made to the claimant in the judgment.

Compensation Summary

14. The calculation of compensation due to the claimant is as follows:

Basic Award

12 x 1.5 x £371.67 = £6690.06

Less 40% = £2676.02

Award = £4014.04 A

Compensatory Award

Prescribed element

16.7.2018 – 16.1.2019
26 weeks 2 days at £316.37 per week = £8352.17

Less 40% = £3340.86

Award = £5011.31 B

Non-prescribed element

16.1.2019 – 13.3.2019
8 weeks x £316.37 = £2530.96
Future Loss
4 weeks x £316.37 = £1265.48
Loss of statutory rights = £ 500.00
£4296.44
Less 40% £1718.57
£2577.86 C

SUMMARY

Basic Award (A)	£4014.04
Compensatory award prescribed element (B)	£5011.31
Compensatory award non-prescribed element (C)	£2577.86
Grand Total	£11603.21

EMPLOYMENT JUDGE BUCHANAN

REASONS SIGNED BY EMPLOYMENT JUDGE ON 7 June 2019