EMPLOYMENT TRIBUNALS

Claimant: Mrs Marie Shillito

Respondent: The Disabilities Trust (A Registered Charity and a Company Limited by Guarantee)

Heard at: Nottingham **On:** 18th,19th and 20th November 2019

Before: Employment Judge Rachel Broughton (sitting alone)

Representatives

Claimant: Ms G Nicholls - Counsel
Respondent: Mr B Frew - Counsel

RESERVED JUDGMENT

- The Judgement of the Tribunal is that the Claimant's claim of unfair dismissal is well founded and succeeds.

- The Claimant contributed to her dismissal by her conduct and a reduction of 75% is to be applied to the basic and compensatory award.

REASONS

Background to the Claim

1. By way of a claim form presented on 30 July 2018, the Claimant issued proceedings against the Respondent for unfair dismissal under section 98 Employment Rights Act 1996.

2. Following a disciplinary process which commenced in October 2019 in relation to allegations, which the Respondent treated as allegations of misconduct, the Respondent issued the Claimant with a final written warning and sought to demote her into the role of Assistant Manager. The Claimant was not willing to accept the demotion on the grounds that the Respondent had no contractual right to demote her and submitted an appeal. On appeal the Respondent upheld the disciplinary sanctions following which the Respondent dismissed the Claimant effective from 19 March 2019.

3. The Respondent's case is that it dismissed the Claimant for *some other substantial reason* in accordance with section 98 (1)(b) Employment Rights Act 1996. The Claimant appealed that decision. The appeal was not upheld.

4. The termination date of 19 March 2019 is the agreed date of termination as between the parties.

The Hearing

5. On the morning of the first day of the hearing, Counsel for the Respondent was asked to confirm what reason the Respondent was relying upon for the decision to dismiss on the 19 March 2019. Counsel for the Respondent informed the Tribunal that the reason relied upon by the Respondent was 'gross misconduct'. This was promptly challenged by Counsel for the Claimant because what was pleaded by the Respondent in its ET3 was 'Some Other Substantial Reason'(SOSR). Following the Claimant challenging the reason now being given, the Respondent confirmed that its final position was that it was indeed relying upon SOSR however, the background factual nexus involved findings of misconduct.

Issues

6. The following list of issues were agreed;

   a. *Did the Respondent have a fair reason for dismissal?*

   b. *Did the Respondent follow a fair and reasonable procedure in dismissing the claimant?*

   c. *The Claimant contends that the following substantive and procedural matters are in issue:*

      In terms of the investigation

      i. *Inviting the Claimant to an informal telephone meeting on 24 October 2019 (later changed to 29th of October) in order to discuss the investigation*

      ii. *interviewing witnesses following the Claimant's telephone meeting] with the investigating officer and producing the investigation report without speaking with the Claimant further following those interviews*

      iii. *Expansion of the allegations against the Claimant, including the concerns about the management of a controlled drug despite not asking the Claimant about this during the course of the investigation meeting*

      In terms of the disciplinary hearing:

      iv. *Meeting and interviewing Lucy Evans on 19 December 2018 after the disciplinary meeting on 12 December 2018 with the Claimant, without reverting back to or meeting with the Claimant further.*

      v. *Meeting and interviewing Helen Gilpin and Roxanne Rowland after the disciplinary meeting with the Claimant on 12 December 2018, without reverting back to or meeting with the Claimant further.*

      vi. *Attempting to demote the Claimant.*

      vii. *Failure to initially confirm the duration of the final written warning in the initial communication to the Claimant.*

      viii. *Manifestly excessive sanction imposed namely a final written warning and demotion.*

ix. Failing to consider whether the Claimant could for example be put on an employment improvement plan as opposed to demotion.

In terms of the appeal hearing in relation to the demotion and final written warning;

x. Failing to properly consider the imposition of the disciplinary sanctions.

xi. Failing to consider whether the Claimant could for example be put on employee improvement plan as opposed to demotion.

In terms of the decision to dismiss for SOSR;

xii. Failing to provide any meeting notes or notes of discussions in relation to the decision to dismiss on 19 March 2019.

xiii. Failure to consider whether the Claimant could for example be put on employee improvement plan as opposed to demotion

In terms of the appeal hearing in relation to the SOSR dismissal;

xiv. Failing to notify the Claimant of the date of the meeting on 1 April 2019.

xv. Failing to send any written communications or questions to the claimant either before or after the meeting.

xvi. Failure to confirm to the Claimant who was to hear the appeal against SOSR dismissal therefore preventing the Claimant from objecting to panel members.

xvii. Inclusion of Victoria Pilkington as panel member given that there was a direct factual dispute between her and the Claimant about what was said during an assurance call

d. Did the Respondent have a contractual right to demote the Claimant?

Remedy;

e. In the event that the Claimant's claim succeeds in part or in full what losses the Claimant suffered as a consequence of the dismissal? Are they attributable to the Respondent, is it just and equitable, [another] Claimant taken reasonable steps to mitigate her losses?

f. Contributory fault.

7. The Respondent wanted to include in the issues, whether there should be a reduction in any award for future loss to reflect the chance that the Claimant would have been dismissed fairly in any event: **Polkey v AE Dayton Services Limited 1987 IRLR 50 9HL.** Counsel for the Claimant objected on the basis that this was not pleaded however did not pursue that argument in her submissions.

8. A Polkey reduction is something which the tribunal is required to consider where there is evidence to support a finding that the employee may have been dismissed if the employer had acted fairly.

9. Counsel for the Respondent also wanted to add into the agreed list of issues the guidance as set out in the case of **British Home Stores Limited v Burchell 1980 ICR 303 EAT** which was objected to by Counsel for the Claimant given that the reason relied upon was not conduct. The relevance of the Burchell test was a matter left for submissions.

10. Throughout the hearing and in submissions, the parties presented evidence and arguments in respect of alleged substantive and procedural failings in the internal proceedings including the findings in relation to the conduct allegations.

The Evidence

11. During the hearing I heard oral evidence from the following witnesses for the Respondent; Ms San Randhawa, employed by the Respondent as an internal investigating officer, Ms Kerri Tunstall employed by the Respondent as Regional Manager for the North-West Region, Ms Claire Ward employed by the Respondent as an Assistant Director of Operations and Ms Anna Bygrave, employed by the Respondent as Director Operations.

12. For the Claimant I heard oral evidence from the Claimant and the following witnesses; Ms Catherine McClure and Ms Karen Slaney. Ms Slaney had worked for the Respondent from May 2015 until February 2019. Ms Slaney had produced a witness statement and was not cross examined by the Respondent. Ms McClure had worked for the Respondent from October or November 2012 until she was made redundant, the date when her employment ended are a matter of dispute.

13. In addition to the witness evidence I also had regard to the documents in the bundle which include 829 pages, the skeleton arguments and oral submissions of both Counsel and my record of proceedings.

The Legal Principles

14. Before reaching my conclusions in relation to the issues before me, I have had regard to the law which I am required to apply when considering the matters for consideration;

The Reason for Dismissal – section 98 (1) and (2) ERA

15. It is up to the employer to show the reason for dismissal and that it was a potentially fair one namely that it falls within the scope of section 98 (1) and (2) of the Employment Rights Act1996 (ERA) and was capable of justifying the dismissal of the employee. A 'reason for dismissal' has been described as: 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA

16. At the stage of establishing the reason, the burden of proof is on the employer and what is not required at this stage, is for the employer to prove that the reason justified the dismissal. Whether the reason justified the dismissal or not is a matter for the tribunal to assess when considering the question of reasonableness. It is however sufficient that the employer genuinely believed the reason given and did so on reasonable grounds.

Principal Reason – Multiple Reasons.

17. An employer may have more than one reason for dismissal, section 98 (1)(a) ERA requires an employer to show the reason or if more than one the principal reason.

18. A tribunal must assess fairness based on those reasons in their totality i.e. the composite reason, where multiple reasons are advanced. It is not what would have been reasonable and fair for an employer to have thought, but what the employer did think and whether, having regard to the totality of its reasons, dismissal was reasonable.

19. Where an employee is alleging different grounds for dismissal and each ground independently justified dismissal, it will be sufficient for at least one of the grounds to be established subject to a finding by the tribunal that that reason was the principal reason for dismissal and would justify dismissal of itself.

Reasonableness - section 98 (4) ERA

20. Once an employer has shown a potentially fair reason for dismissal within the meaning of section 98 (1) ERA, the Tribunal must go on to decide whether the dismissal for that reason was fair or unfair which involves deciding whether the employer acted reasonably or unreasonably dismissing for the reason given in accordance with section 98 (4) ERA which provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer);

    a) *Depends on whether in the circumstances (including the size and administrative rescores 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.*

21. What a tribunal must decide is not what it would have done but whether the employer acted reasonably.

22. Mr Justice Browne- Wilkinson in his judgement in **Iceland Frozen Foods Ltd V Jones ICR 17 EAT** set out the law in terms of the approach a tribunal must adopt as follows;

a. *The starting out should always be the words of section 98 (4) themselves*

b. *In applying the section, a Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the member of the Tribunal) consider the dismissal to be fair*

c. *In judging the reasonableness of the employers conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of three employers*

d. *In many (though not all) cases there is a band of reasonable responses to the employees conduct which in which the employer acting reasonably may take one view, another quite reasonably take another.*

e. *The function of the Tribunal, as an industrial jury, is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which the reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, it is falls outside the band it is unfair*

23. In terms of procedural fairness, the House of Lords in **Polkey v AE Dayton Services Ltd 1988 ICR 142 HL** firmly established that procedural fairness is highly relevant to the reasonableness test under section 98 (4). If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced.

Some Other Substantial Reason

24. Section 98 (1)(b) ERA provides a potentially fair reason of some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held (SOSR). As long as it is not a section 98(2) reason, any reason for dismissal, can be pleaded as long as it is a substantial reason and not trivial.

25. Once the reason has been established, it is up to the tribunal to decide whether the employer acted reasonably under section 98 (4) in dismissing for that reason; whether the decision to dismiss fell within the range of responses that a reasonable employer might adopt. This may involve consideration of whether the employee was consulted and given a hearing and whether the employer searched for other employment.

26. The Respondent in this case asserts that while the conduct of the employee due to mitigating factors, did not warrant summary dismissal, they considered that she could not return to her role as Service Manager, that to do so would put service users at risk. The Respondent does not allege that ultimately it dismissed because of her misconduct, it had decided that her misconduct did not warrant dismissal, but that it ultimately dismissed because of the risk to service users, it had lost trust and confidence in her ability to work at a level which meant she had ultimate oversight locally for the welfare of the service users and the quality of the service. It offered a less responsible role which she was not prepared to accept.

27. In **Governing Body of Tubbenden Primary School v Sylvester 20102 ICR D29 EAT**, the Appeal Tribunal rejected the argument that when considering a SOSR dismissal for loss of confidence, an employment tribunal was not entitled to have regard to the circumstances leading up to that loss. In this case a Deputy Head Teacher was friendly with a fellow teacher suspended for possessing indecent images of children. An internal appeal panel found that her actions had not brought the school into disrepute or pose safeguarding risk to child but the head teacher had lost confidence in her such that her employment was untenable. The tribunal found her dismissal unfair including because there had been no warning. The school appealed on the basis that the tribunal was not entitled to have regard to the absence of a warning or the causes of the loss of confidence but should be restricted to the fact of that loss of confidence. This was rejected, section 98 (4) entitled the tribunal to take a broader view. The context was analogous to a dismissal for misconduct where a warning would be highly relevant to any consideration of fairness.

28. **In Leach v Office of Communications 2012 ICR CA,** the EAT emphasised the importance of identifying *why* the employer considered it impossible to continue to employ the employee, a case concerned with reputational damage.

29. **Ezsias v North Glamorgan NHS Trust 2011 IRLR, 550** the EAT commented that while tribunals should be on the look out to check whether when an employer is using SOSR as a pretext to conceal a real reason for dismissal eg conduct, it referred to the difference between dismissing the employee for his conduct in causing the breakdown and dismissing him for the fact that those relationships had

broken down. The tribunal is entitled to find that the reason was the breakdown in the relationship and that the employee's responsibly for it, was incidental to the reason or dismissal and therefore the failure to follow the contractual disciplinary procedure did not render the dismissal unfair because that procedure did not apply to SOSR.

Alternative Employment

30. The question of what steps an employer has taken to find redeployment for the employee is normally only considered relevant to the issue of reasonableness where it involves incapacity or redundancy i.e. no fault on the part of the employee however in **P V Notts County Council 1992 ICR 706 CA**: the Court of Appeal stated that in an appropriate case and where the size and administrative resources of the employer's undertaking permit, it may be unfair to dismiss an employee without first considering whether he or she could be deployed in an alternative job notwithstanding that it is clear that the employee could not be allowed to continue in his or her original job.

Conduct

31. Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal. According to the EAT in **British Home Stores v Burchell 1980 ICR 303** the employer must show;

21.1 It believed the employee guilty of misconduct
21.2 It had in mind reasonable grounds upon which to sustain that belief
21.3 At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances.

Acas Code

32. The reasonableness of an employee's dismissal will normally be assessed by reference to the Acas Code of Practice on Disciplinary and Grievance Procedures.

33. In **Lund v St Edmund's School, Canterbury 2013 ICR D26 EAT** the EAT concluded that the Code applied to a dismissal which was not based on the employee's conduct per se but on the effect of his conduct, which amounted to SOSR. The EAT held that the Code applies not only in circumstances where disciplinary proceedings are invoked against an employee but in circumstances where they should have been, as it is not the outcome of the process which determines whether the Code applies but its initiation. However, the EAT in **Phoenix House Ltd v Stockman and anor 2017 ICR 84 EAT** held that the Code does not apply to such dismissals on the basis that Parliament laid down a sanction for a failure to comply (ie uplift in compensation) and without clear words, an employer would be at risk of being unfairly punished. This does not mean however that certain elements of the Code should not be considered to determine fairness where relevant.

34. The Acas Code provides that at paragraph 27:

"*The appeal should be dealt with impartially and, wherever possible by a manager who has not previously been involved in the case".*

Contributory Fault

35. In Nelson v BBC (No.2) 1980 ICR 110, CA, the Court of Appeal said that three

factors must be satisfied if the tribunal is to find contributory conduct:

- the relevant action must be culpable or blameworthy
- it must have actually caused or contributed to the dismissal
- it must be just and equitable to reduce the award by the proportion specified.

36. With regards to the basic award, the relevant statutory provision is section 122 (2) ERA; "*where the tribunal considers that **any conduct** of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*"

37. The equivalent provision in respect of the compensatory award is section 123 (6) ERA; "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 amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

38. Section 122 (2) gives tribunals a wide discretion whether or not to reduce the basic award on the ground of *any* kind of conduct on the employee's part that occurred prior to the dismissal. To justify a reduction to the compensatory award the conduct must be shown to have caused or contributed to the employee's dismissal.

Polkey

39. The question of whether procedural irregularities rendering a dismissal unfair, really made any difference to the outcome is to be taken into account when assessing compensation: **In Polkey V Dayton Services Ltd 1988 ICR 142 HL**.

Witnesses

40. By way of general observation, I found the Claimant and the witnesses who gave evidence on behalf of both parties, to be generally reliable witnesses when giving their oral evidence other than Ms Bygrave and Ms Ward for reasons I address further below.

Findings of Fact

41. The Respondent is a national charity providing support to individuals with complex needs including; acquired brain injury, complex physical needs and learning disabilities. The Respondent provides both community based and residential support in purpose built centres.

42. The premises and the care provided by the Respondent is regulated by the Care Quality Commission (CQC) who monitor, inspect and regulate health and social care services. The Respondent's residential centres are managed by a Service Manager who is also a Registered Manager. The services provided at the Respondent's centres are a regulated activity under the Health and Social Care Act 2008 and those who manage the centres are required to meet certain standards to be considered fit to do so including that they have the necessary competence for the role. The role of a Registered Manager is an activity regulated by the CQC.

43. It is not in dispute that the Claimant's work history is as follows; the Claimant originally worked as a volunteer for the Respondent at one of its centre's catering for those with complex physical needs; Victoria House in Yorkshire. Her

employment commenced with the Respondent on 16 December 1995. The Claimant's undisputed evidence is that she was promoted into various job roles until in December 2013 she was approached by her then line manager Catherine McClure, and asked whether she was prepared to assist another residential centre, Gregory Court (GC) in Nottingham as the Interim Service Manager. The service had received a negative result from the Care Quality Commission following an inspection. The Claimant took over as the Service Manager at Gregory Court from April 2014 on a permanent basis and at some point later when her registration was accepted, as the Registered Manager*.* The role of a Registered Manager is a regulated role and carries with it significant responsibility, overseeing day to day the care of vulnerable individuals. The title of Service Manager is the internal job description. The Claimant was both Service Manager and a CQC Registered Manager.

Registered Manager and Service Manager – Gregory Court

44. GC is located in Nottingham, it is a 10-bed residential unit for adults with either physical or mental disabilities, these are people with complex and high dependency needs.

45. Following a relatively short period of time, a matter of some months, following the Claimant's appointment, GC received an improved rating of 'Good' from the CQC. It is not in dispute that a further inspection in early 2016 delivered another rating of 'Good' under the Claimant's management.

46. I shall now set out the contractual terms relating to the Claimant's employment as Service Manager;

Contract of Employment

47. The Claimant's most recent contract of employment dated June 2018 includes the following relevant provisions, I have highlighted key words or phrases;

<u>Duties: clause 4</u>

The Disabilities Trust requires highest standards from you in performance at work and your general conduct and in particular you must;

- *Be diligent, honest and ethical in the performance of your duties and during working hours devote the whole of your time, attention and abilities to them;*
- *Render your services in a professional and competent manner in willing cooperation with others and at all times conform to the reasonable directions of management;*

As part of your role, you may be required to;

- *Travel both inside and outside the United Kingdom;*
- *Transfer to another place of work [within England and the UK] upon reasonable prior notice and in accordance with relevant policies and procedures."*

General: clause 11

iv. All social care workers, are required to comply with the standards of professional conduct and practice as set out in the ***Code of Healthcare Support Workers and Adult Social Care Workers in England****…"*

*ix. The Disabilities Trust reserves the right, after consultation with you, to change the post **appropriate to the level of the post you occupy**, your place of work, job duties or working arrangements to ensure that service requirements are met.*

x. Where changes to the terms of your contract occur by agreement with you, or otherwise in accordance with any terms of your contract providing for such changes to be made, you will be informed of these in writing in accordance with statutory requirements and in a manner deemed practicable by The Disabilities Trust.

Disciplinary Procedure: clause 21

*The Disabilities Trust's disciplinary procedure is set out on the Hub **but does not form part of the terms and conditions of employment**. If you are dissatisfied with any disciplinary action, which relates directly to you, you have the right to appeal to the relevant director, stating your grounds for appealing the decision*

48. Within the body of the first main paragraph of the contract of employment it also provides as follows;

*The Disabilities Trust operates certain additional policies and procedures **other than those policies expressly incorporated into this contract of employment**. These can be located electronically via The Hub or from your place of work. These are reviewed at regular intervals and subject to change to comply with legislative and operational requirements. It is important that you familiarise yourself with these documents throughout your employment to ensure that you keep up-to-date with any amendments and in signing this contract **you are stating that you agree to comply with them.***

Disciplinary Policy

49. There are a number of disciplinary documents within the bundle dating from 2011 to a version dated December 2018 (hereafter referred to the disciplinary policy) which postdate the date of the suspension and the alleged offences however, the Claimant accepted in cross examination that the contract of employment provides that that the Respondent may update and change its policies and it was not in dispute between the parties that the December 2018 was the most recent and the relevant policy.

50. The Respondent's disciplinary policy to which I was referred albeit not this particular provision within it, states that the Respondent will (page 131);

"Provide them [employee] with all relevant information that the Trust intends to rely upon as evidence, not less than 3 working days in advance of the hearing."

51. The disciplinary policy also sets out at page 6 examples of what the Respondent considers potential acts of gross misconduct which includes (amongst other examples);
    - *Behaviour that **compromises Service User trust, care or safety and/or** statutory or regulatory requirements.*
    - ***Serious negligence (even a single error where the actual/potential consequences are extremely serious) which causes or could have caused** unacceptable, loss, damage or injury*

52. The policy also sets out at page 7 the disciplinary sanctions that may be applied which includes the following;

Final written warning

*Where a more serious disciplinary offence has been committed or repeated misconduct occurs (including when a 'live' written warning is in place) the Trust may issue a final written warning. This will remain on the employee's personnel file for **18 months**. This level of warning may also be imposed in circumstances where an offence amounting to gross misconduct has taken place but the Trust decides, as an alternative to summary dismissal after taking into account all the appropriate circumstances and any mitigation, that a lesser penalty is appropriate.*

Temporary transfer

The Trust may impose a temporary transfer to a job of a lower status in order to provide additional support whilst any recommendations made at the hearing are being facilitated. Recommendations will be reviewed during facilitation by the line manager supporting the employee. Upon completion when the Trust feels it is appropriate to do so, the employee will be returned to their substantive post.

Demotion or Permanent Transfer

The Trust reserves the right, as an alternative to dismissal, to effect a demotion and/or transfer to an alternative role or place of work. This will be a permanent basis and with a corresponding salary. As this is a disciplinary sanction, the employee does not have to be consulted regarding the demotion and/or transfer or any reduced salary. Where at all possible any transfer to an alternative place of work will be reasonable given travelling requirement. Whilst a final written warning is 'live' further acts of misconduct may lead to the employee's dismissal.

53. The appeal process is dealt with at page 5 of the policy. The Appeal Chair it states, will;

    - *Consider any **new evidence** the employee brings to the appeal, including the reasons why this was not presented at the original disciplinary hearing.*
    - *Consider whether a **fair process was followed** in accordance with the Trust's Disciplinary Policy and Procedure; and,*
    - ***Consider whether the sanction imposed was appropriate** to the proven misconduct.*

54. In terms of the Claimants understanding of the disciplinary policy, she confirmed under cross examination that she had herself dismissed staff and applied the policy.

55. It is common between the parties that the disciplinary process is not a contractual policy and that there is no contractual right to demote as a disciplinary sanction.

56. A Registered Manager is answerable to the CQC and the Claimant accepted under cross examination that the Respondent needed to have "*utter trust*" in her as a Registered Manager

57. The Claimant accepted that The Skills for Care Code of Conduct for Healthcare Support Workers and Adult Social Care Workers in England (the "Code") and specifically Appendix 39 applied to her employment. Appendix 39 provides as

follows;

"a. Point 1: Be accountable by making sure you can answer for your actions or omissions. As a health care support worker or adult social care worker in England, you must:
a.1.3 be able to justify and be accountable for your actions or your omissions -what you failed to do
b.1.4 always ask your supervisor or employee for guidance if you do not feel able or adequately prepared to carry out any aspect of your work, or if you are unsure how to effectively deliver task
c.1.5 ***tell your supervisor or employer about any issues that might affect your ability to do your job competently and safely****. If you do not feel competent to carry out an activity, you must report this.*
d.1.9 ***report any actions or omissions by yourself or colleagues that you feel may compromise the safety or care of people who use health and care services*** *and, if necessary use whistleblowing procedures to report any suspected wrongdoing.*

b. Point2; promote and uphold the privacy, dignity, rights, health and well-being of people who use health and care services and their carers at all times. As a health care support worker or adult social care worker in England you must:
a. 2.1 always act in the best interest of people who use health and care services
b. 2.8 be alert to any changes that could affect a person needs a progress report your observations in line with your employees agreed ways of working.
c.2.9: ***always make sure that your actions or omissions do not harm an individual's health or well-being. You must never abuse, neglect, harm or exploit those who use health and care services, their carers or your colleagues.***
c. Point3: work in collaboration with your colleagues to ensure the delivery of high quality, safe and compassionate healthcare, care and support. As a health care support worker or adult social care work in England you must:
a. 3.1 understand and value your contribution of the vital part you play in your team.
b.3.5; honour your work commitments, agreements and arrangements and be reliable, dependable and trustworthy.
c.3.6: actively encourage the delivery of high quality health care, care and support.

d.Point4; communicate in an open and effective way to promote the health, safety and well-being of people who use health and care services and their carers. As a health care support worker or adult social care worker in England you must:
a.4.4: ***maintain clear and accurate records of the healthcare, care and support you provide. Immediately report to say senior member of staff any changes or concerns you have about a person's condition."***

58. The Claimant accepted under cross examination that a breach of the above Code would potentially amount to gross misconduct.

Maternity leave 23 June 2017 – 6 April 2018

59. The Claimant commenced a period of maternity leave from 23 June 2017.

60. It is not in dispute that prior to starting her maternity leave the service at GC had achieved a 'Good' CQC rating and that the Claimant had performed her role well. Brief reference was made during the hearing to the death of a service user at GC however, the Claimant was not the subject of any allegations around her personal performance in connection with that unfortunate event and/or subject to any disciplinary proceedings. Despite this at paragraph 9 of the grounds of resistance the Respondent alleged that the Claimant did not have an unblemished record. I

shall return to this when setting out the findings in respect of the disciplinary process.

61. The Claimant had been working without an Assistant Manager at GC since 2015. After announcing her pregnancy on 4 April 2017, it was agreed that an Assistant Manager would be recruited. The Claimant was assisted in the recruitment process by her Line Manager and Divisional Manager, Ms Lisa Lovatt.

62. MB was recruited as the Assistant Manager. MB was an internal recruit, and at the time she was recruited she was employed at another service which catered for different needs. In the event, MB was taken on not as the Assistant Manager but Interim Service Manager to run GC during the Claimant's absence however, MB was not able to take up the post until two weeks before the Claimant started her maternity leave, leaving little time for an effective handover. The lack of effective handovers emerged as a pattern in these proceedings.

63. MB transferred to GC at the beginning of June 2017 however it is common between the parties that MB did not perform well in this role. The Claimant refers to the absence of an Assistant for MB to support her and her lack of experience of the type of complex needs catered for at GC as reasons why she may have struggled to perform in this position. Whatever the reasons, it is accepted between the parties that there were issues with her performance.

64. The Claimant's undisputed evidence is that she had regular contact with the business Administrator Karen Slaney during her absence who kept her informed about what was happening at GC. Ms Slaney attended the hearing and gave evidence which was supportive of the Claimant's account of what she was being told. Counsel for the Respondent did not cross examine Ms Slaney. Ms Slaney's undisputed evidence, is that she worked at GC and reported to the Claimant, that MB did not (in her opinion) have the required experience to take on the Interim Service Manager role and things were not dealt with during her stewardship including supervisions, folders, care packages, daily hand overs etc. Ms Slaney also refers to some staff leaving because of how GC was being run during this period.

65. The Claimant had concerns during this period based on the reports she was receiving from Ms Slaney. There were text message in the bundle from the Claimant to Ms Lovatt asking Ms Lovatt to make contact with her, clearly expressing concern about GC and asking for information.

66. Ms Lovatt was not called as a witness by the Respondent however, Ms Lovatt did give evidence during the disciplinary investigation and copies of the interview notes are in the bundle. The authenticity and reliability of those notes, in terms of reflecting accurately what evidence Ms Lovatt gave, is not in dispute. During Ms Lovatt's interview on 13 November 2018 (page 533 - 537) she confirmed that there had been what she described as "*serious concerns*" with MB. MB's secondment was brought to an end and she was replaced by JD. Ms Lovatt refers to having been busy herself during this period, having taken over the additional responsibilities of another Divisional Manager who was absent. Ms Lovatt admitted to prioritising another centre (EKC) because of "*big concerns*" with the running of that service. None of this is disputed.

67. Ms Lovatt in her interview accepted that before the Claimant returned from maternity leave, JD raised concerns with her about the service at GC but that she was receiving verbal assurances from him that he was resolving the issues and "*had no reason not to believe JD that everything had been done when he was telling me.*" She admitted to not going into GC to assure herself.

JD as Interim Service Manager – 12 December 2017 – 13 April 2018

68. MB was demoted to Assistant Manager and JD took on the role of Interim Service Manager from 12 December 2017, working full time until 13 April 2018.

69. MB was then absent on sick leave from end of 2017. It is not in dispute that while JD was in charge of GC, there were no steps being taken to manage her ongoing sickness absence.

70. The Claimant used her keep in touch days during maternity leave (KIT days) to complete training and familiarise herself with some of the new systems which had been introduced. I note from the text message from the Claimant to Ms Lovatt that the Claimant was trying to arrange to go into GC and use her KIT days from 3 January 2018.The Claimant was not however the Registered Manager whilst absent on maternity leave. It is not in dispute that JD had at some point taken over as Registered Manager.

March 2018 - Pressure Sore

71. What is at the heart of the disciplinary proceedings and the subsequent decision that the Claimant could not continue as the Service Manager at GC, were issues surrounding a service user who developed a grade 3 pressure sore. It is not in dispute that a grade 3 pressure serious is an incredibly serious medical condition which requires careful and immediate management. The severity of a grade 3 pressure sore is such that it is accepted that it can ultimately, if not appropriately treated, be fatal.

72. District Nurses visit GC and provide care to the service users. The staff at GC are responsible for ensuring the day to day care, management of fluids and administration of medicines etc. A grade 3 pressure sore is a safeguarding issue and must be reported promptly to Safeguarding and to the CQC and details of it put on the Datix system (a computer based incident reporting and risk management software system introduced into GC during the Claimant's absence on maternity leave).

73. It is not in dispute that it is incredibly important to keep someone suffering with a pressure sore hydrated, hydration helps the healing process. There is a recommended amount of fluid for each patient that they must have each day.

74. The evidence of JD during the disciplinary investigation in his interview 25 October 2018 (page 494 – 496), was that in or around March 2018 (while the Claimant was on maternity leave but using KIT days to go into GC) the District Nurse visiting GC made him aware that a service user had developed a pressure sore on the heal of her foot, the service user we shall refer to as AP. JD admits in his interview that he was not familiar with pressure sores and the nurse did not mention what grade it was. The Tribunal did not hear evidence about whether JD had received adequate training and whether it was contended that he should have understood the significance of a grade 3 pressure sore or why there had been such paucity of communication as between the District Nurse and JD which left AP in what must have been a precarious position.

75. JD could not recall when interviewed whether he had mentioned the pressure sore to the Claimant but on checking his handover notes which he had emailed to the Claimant on 11 April 2018, the record of the meeting with him records him confirming that there was nothing documented. It is not in dispute that JD did not

report the pressure sore and in the interview with Ms Carruthers, a Quality Assurance Advisor (QA) her evidence was that JD had said that he had "*got distracted and forgot*". The evidence of the Claimant is that she was not aware of the pressure sore until May. The Claimant did not return from maternity leave until 18 April 2018.

Return from Maternity Leave - 18th April 2018

76. The Claimant returned from her maternity leave on 18 April 2018, she had however accrued annual leave and returned initially working one day per week. Her line manager remained Ms Lovett until 15 May 2018.

77. It is not in dispute that there had been 10 service users at GC when the Claimant had started her maternity leave, following the death of one and the another leaving to live in their own accommodation, there were eight service users when she returned. It is accepted by the Claimant in cross examination that there was no particular change to the service user's needs.

78. JD during the investigation in October 2018 confirmed, that he had worked full-time at GC from 12 December 2017 to 13 April 2018. He accepted another role elsewhere (in Community Service) from Monday 16 April 2018. From 18 April he oversaw GC for two days per week until 15 May 2018, a period of approximately four weeks. The evidence he gave during the disciplinary investigation was that he had found it; "*difficult to manage both".*

79. The Claimant and JD were therefore it is accepted between the parties, jointly managing GC during this 4-week period from 18 April to 15 May 2018.

80. The undisputed evidence of the Claimant which is in any event supported by the evidence of Ms Lovatt and JD during the disciplinary investigation, is that there was no clear plan for how JD and the Claimant would share the tasks. The situation was not helped by the fact that they worked different days and were therefore not at GC at the same time during the week. The evidence of Ms Lovett during the investigation meeting on 13 November 2018 when asked about the Claimant's return mentions on a number of occasion the absence of a proper induction back to work, referring to it as having been "*necessary*" and a "*missed opportunity".* This was an unsatisfactory situation.

81. Ms Lovatt when asked about the training arranged for the Claimant to understand the new systems which had been introduced during her absence (such as Datix) she referred to managers booking their own training and that her focus during this period was not on GC.

82. It is clear that Ms Lovatt as the Claimant's line manager, was not spending much time during this period focussing on supporting the Claimant's transition back into a service which had clearly had problems during her absence or indeed on supporting JD who she trusted to deal with the problems at GC.

May 2018 – change of line manager

83. The Claimant's line manager changed in May 2018 to Ms Roxanne Rolland. Ms Rolland first visited GC on 15 May 2018 to facilitate a handover from JD (albeit she did not in the event meet with him).

84. JD left GC on 15 May 2018.

85. Ms Rolland in the investigation meeting notes (504 – 510) refers to not getting off

to the best of starts with the Claimant when she took over on 15 May 2018 because she raised serious concerns in an email dated 18 May 2018 (228-229);"*I was mortified with the things I discovered after my first visit*".

Pressure sore – May

86. The evidence of Ms Rolland which is not in dispute, is that she raised concerns about AP and her pressure sore on 15 May after visiting GC and because of that Gerry Morris, Quality Assurance went into visit GC. The evidence during the investigation of Ms Joanna Carruthers, of Quality Assurance, which is undisputed, is that Mr Morris had visited GC because of the pressure sore on 23 and 24th May 2018 to carry out a QA review. His report appears in the bundle and sets out a list of recommendations including putting in place checklists, support plans and risk assessments. It is not in dispute that the Claimant was now aware of the pressure sore and that it had not been reported.

87. The further concerns raised by Ms Rowland are set out in an email to the Claimant dated 18th of May 2018 and there are a number which include safeguarding concerns. The Claimant accepts that those concerns were raised with her.

88. Ms Rolland accepts in the investigation meeting that she had not herself received much of a handover from Ms Lovatt, and that she had not initially when sending this critical email, been aware of the details of the Claimants phased return namely that she had only been working initially 1 day per week, these had not been shared with her by HR.

89. Ms Rolland also explained in her evidence which is not disputed, how JD remained the Registered Manager in early June and the one therefore with the authorisation to access Datix, Finance and Payroll. Ms Rolland spent time showing the Claimant the new systems and notes in her meeting that the Claimant had felt *"… quite lost as all the systems had changed."* None of this was in dispute. Ms Rolland refers to there being no training available for other systems other than Datix, and the Claimant taking the initiative to contact the relevant departments for advice and support.

90. Ms Rolland describes the situation as being; "*not ordinary circumstances*" and how challenging it was for her with the Claimant working only one day per week, JD having left and the Assistant Manager on sick leave.

June 2018 – increase to 2 days per week

91. The Claimant increased her days to 2 days per week in around the second week of June 2018 at the request of Ms Rolland. The supervision report of Ms Rolland dated 13 June 2018 comments as follows; "*I am conscious that Marie is not fully back at work yet and there is already a huge amount of work to undertake and Marie does not have an assistant manager."* The comments from Ms Rowland during the investigation hearing includes (page 509) the following which corroborates the Claimant's account of what she was having to deal with and in what circumstances;

    "I felt that QA were coming in a lot, each time they were looking for more issues, I had a word with VP [Victoria Pilkington], we knew there were problems and what I needed was help to fix it rather than looking for more. There wasn't the manpower lots of things needed to happen . I asked around other services, but nobody could be spared at that time.MS needed to change everything..."

    "I think MS put a brave face on it, she didn't want to let anyone down, I think you underestimate of the enormity of the situation"

92. Ms Lovatt in her the meeting commented that following the earlier death of the service user from GC and the action plans put in place; "*The reaction to all this upon [Claimant's] return from the organisation with action plan after action plan, how does anyone cope with this, call after call, everybody knew was snowballing, everybody knew it and nobody stopped it."*

93. Ms Lovatt in her interview remarks that the Claimant did not ask her for help on her return from maternity leave but it is clear from her evidence during this hearing that she was aware that the Claimant was not coping. She refers it being an; "*impossible task*" and the Claimant appearing overwhelmed.

94. Ms Lovatt also expressed the view that; "*However*, absolutely *MS could have said I'm struggling and she didn't" (page 536).*

95. Ms Rolland visited on 5 June 2018 when she learnt that the pressure sore had still not been reported to safeguarding or the CQC and no Datix report had been made. The Claimant's undisputed evidence is that she was waiting for Mr Morris to come back to her about what to do because of the delay in having reported the pressure sore but that she reported it a week later.

96. Melanie Norris a QA Advisor visited GC to implement a better recording system for eating and fluids and a repositioning chart for AP.

Full Time – from 2 July 2018: Registered Manager

97. The Claimant increased her hours to full-time from 2 July 2018 albeit working over a four-day week following a flexible working request to work. It was agreed that the Claimant would work 35 hours per week over four days for an agreed period of 12 months thereafter to be reviewed ie in July 2019. It is not in dispute that this type of flexible working was important to the Claimant.

98. The undisputed evidence of the Claimant is that she registered as the Registered Manager again with the CQC from 2 July 2018.

Serious Concern Internal Notification – July 2018

99. During her visit to GC in July 2018, Ms Carruthers raised a serious concern internal notification regarding under-reporting of the drug Oramorph. The entry in the controlled drugs book was incorrect, showing that 270 ml of the drug was unaccounted for (although it was later identified that the correct measurement was less than this) and a failure by staff to count correctly what was being administered. It was also identified that the care plans and risk assessments in place were not acceptable.

Recruitment of Assistant Manager – 25 July 2018

100. Lucy Evans was recruited to GC to support the Claimant in the role of Assistant Manager from 25 July 2018.

September 2018 – CQC visit

101. The CQC conducted a visit to GC on 11 September 2018 and identified that fluid charts had not been filled in and some fluid and food charts had been ticked as correct when they were not. This is a serious welfare issue.

102. The report is within the bundle (page 356 -372) and refers to the risk of pressure sores. The report refers to the District Nurse informing the CQC that they believed a contributing factor was staff not consistency following their recommendations and an action arising was to make sure that the service users were monitoring that charts (fluid, repositioning etc) were completed accurately and that if AP refused fluids this was to highlighted on the chart rather than left blank.

103. A further action point was for the fluid chart to be reviewed and updated to indicate how much fluid is required and for the total balance of fluid to be recorded at the end of each shift and commented as follows;

"*Peoples' fluid intake is particularly important in the management of pressure care, as a precautionary measure of pressure sores developing and or, in the healing process of a pressure sore. The person's fluid intake record did not inform the staff what recommended level of fluid was required.* ***For three days prior to our inspection, the fluid intake record was inconsistently completed and showed the person had not received the recommended fluid intake. This meant we could not be sufficiently assured this person was receiving the care and treatment they required and recommended by external healthcare professionals.***

This person had a history of developing pressure sores and in May 2018 the provider identified staff were required to receive pressure care management training. The registered manager told us they had trouble in sourcing this training and provide a staff of the DVD on pressure care management to view. Information fact sheets had also been provided as an additional method to support staff knowledge. It ***was identified by staff training records, talking with staff and the management team, the staff had not viewed the DVD as required. The showed a lack of accountability by staff and the management team, in meeting this person's needs*** **effectively".**

104. The CQC Inspection report which dated 10 October 2018 gave an overall rating of "*Requires Improvement".*

105. It is not in dispute that the Claimant was offered the support of a second Assistant Manager around this time, but declined, stating at the time that she was able to complete the actions with the team she had.

106. The Claimant had one Assistant Manager, Ms Evans supporting her and two Team Leaders, with 11 or 12 support workers. The APs pressure sore had improved but deteriorated back to a grade 3. There is an email from the Claimant reporting this to Ms Carruthers and Ms Lovatt on 12 September 2018.

107. A number of witnesses commented during the disciplinary investigation about the reluctance of the Claimant to ask for more support. As Ms Rolland states on her interviews; *"I think MS was trying very hard in a difficult situation and probably she should have said I'm struggling" (Page 510).* The Claimant accepted that she had refused the help of another Assistant Manager because she thought they were *"fine".*

108. Helen Giblin, District Nurse delivered pressure sore care training to GC on the 19th and 20 September 2018. Within the bundle is an undisputed record of the training provided which included training on fluid intake and the importance of care plans.

109. Despite the Claimant turning down the offer of more support, there were serious and ongoing issues with the performance of the two Team Leaders (TLs) who I shall refer to simply as TG and LE. It was the TLs who were responsible in the first instance for checking the fluid charts for AP. The Assistant Manager Ms Evans was given responsibility for the day to day management of the TLs and the implementation of an Employee Improvement Plan (EIP) had been put in place by the Claimant and Ms Rolland in July 2018. It is not in dispute that the TLs were not performing to a satisfactory level and that the Claimant had serious concerns about their reliability and delegated the day to day management of the EIP to Ms Evans

110. At a supervision meeting with Ms Rolland, documented within the bundle, the content of which was not disputed, the Claimant expressed concern that staff were not completing the daily checks, the Claimant was instructed not to leave things with the TL's especially given the concerns with their performance and to; "

"I *advised [the Claimant] to ensure that things aren't just left with team leaders – especially when we have concerns with their performance – ensure that all notes are sampled frequently from MS and LE –especially with [AP] flood/fluid /movement charts.[The Claimant] must accept responsibility for her team's inaction and take steps to manage this ,it cannot be acceptable to make sweeping statements about the team, [the Claimant] must identify who is not completing the checks and take formal action where necessary …"ensure that all notes are sampled frequently form MS and LE especially with AP's food/ fluid/movement charts".(page 390)*

October 2018

111. Ms Carruthers visited GC on the 3 and 4 October 2018 with Mr Murray and reviewed the 161 action points that had been set for GC. It was identified that the fluid charts for the service user with the pressure sore were not being completed properly.

112. During this visit Ms Carruther saw a service user left alone with a work man who had not had a DBS check, the service user was exposed to noise during the work being carried out and the same service user's care plan had not been followed (in that she had not been offered fluids every hour as required). Ms Carruther was critical of the Claimant's response when she brought these matters to her attention.

Suspension – 5 October 2018

113. On the 5 October 2018 the Claimant was suspended by Lee Richards Regional Manager of the Midlands on the instruction of Ms Lovatt.

114. The allegations set out in the letter of suspension were as follows:

- **Failure to adequately manage the service leading to service user safety being compromised**

- **Failure to adequately provide management oversight of the service and its staff to ensure the delivery of a high-quality provision**

115. The Claimant was invited to provide a witness statement. The Claimant does not complain about the decision to suspend to her.

116. Although the headings in the suspension letter were general and lacking any specifics, on the 8 October 2018 Ms Randhawa wrote to the Claimant explaining

that she was to carry out the investigation and provided more details of what the allegation were, namely that in terms of failing to adequately manage the service, this related to the management of the service users care plans including AP, and in terms of failing to adequately provide oversight, this involved two issues;

a. Management of her team including the Team Leaders and other direct reports
b. Actions arising from the CQC visit earlier in the year.

117. The Claimant's evidence during cross examination was that that she understood the allegations and hence was able to prepare a detailed statement which was 13 pages. A copy of which is in the bundle.

Claimant's written response: 14 October 2018

118. The Claimant's written response which was submitted on 14 October 2018 sets out in full the background in detail with regards to her return after maternity leave and the difficulties she faced and included the following information;

119. The Claimant alleged that Victoria Pilkington (Director of Quality Assurance) had remarked to her that as a member of the senior management team, speaking for them, they had realised they have let the Claimant down as a manager and GC as a service.

120. The statement prepared by the Claimant set out her position regarding the pressure sore. The Claimant asserted that JD had not followed process and reported it to Datix, the Safeguarding team and to the CQC. That Mr Morris visited on 23th and 24th May when it was noticed that the pressure sore had was grade 3 and had not been reported. That she had spoken to JD who told her that he had not reported it because he had not been award of the severity of the sore. The Claimant stated that she had informed Mr Morris who advised her to report it.

121. The Claimant within this statement also commented on the team leaders, she referred to them not performing to a high standard, being on an Employee Improvement Plan (EIP) from the end of July 2018 and that she had "*advised for Lucy [Evans] to contact Human Resources, as I am concerned that there is no improvement being made*". (439)

122. With regards to the service user left alone with an unsupervised contractor, the Claimant explained that she had assumed that the contractors arranged by the Trust to carry out work would have been DBS checked but stated "I *know I shouldn't have done*". The Claimant asserted that she had spoken to staff who were on shift about the noise the service user was exposed to and the need to remove service users if they want to be moved.

123. The Claimant also referred to the frustration of the staff not completing supports plans, risk assessments and monitoring charts and to gaps in the records and that where the service user refuses fluids this was not being recorded.

Scope of Investigation

124. Ms Rhandawa confirmed in all oral evidence before this tribunal that the extent of the initial scope of the investigation was; issues with the fluid charts for SU with a pressure sore and the second allegation related to the Claimant's management of the two team leaders (TLs) and her line management of MB who was on long-term sick.

125. At this stage these were the only matters being investigated and Ms Randhawa confirmed that the scope of the investigation was the period from 6th April 2018 when the Claimant returned from maternity leave (albeit only working one day per week) up to the date for suspension on 5 October 2018. This was confirmed in a letter dated 18 October 2018.

Telephone Interview

126. A telephone interview took place with the Claimant on 29 October 2018. The Claimant accepted in cross examination that the minutes of the meeting were incorrectly dated 24 October (page 484-491) but otherwise she does not dispute their accuracy.

127. The email sent to the Claimant on 23 October 2018 inviting her to the investigation meeting refers to this as an "*informal meeting*". In cross examination the Claimant clearly understood however that this was a serious matter, she accepted that she had understood that the offences being investigated were capable of amounting to gross misconduct and that others were being interviewed and the matter taken seriously. The fact that it was referred to as an informal meeting therefore did not prevent the Claimant from understanding its significance and from understanding the importance of putting forward her case.

128. The telephone interview, according to the undisputed record of the meeting, was an hour and a half, from 12.30 to 2pm. It was therefore not a brief discussion. During this meeting the Claimant referred to trying to source pressure care training from Nottingham City Council but was unable to find any training, the Claimant stated that management were not aware that she was trying to look for training because she was looking for it herself and in hindsight said she should have asked management if they could provide training. With regards to the service user AP, the Claimant explained how AP was supposed to be offered X amount of fluids per day, admitted the staff did not complete the forms correctly and therefore they did not know if AP had been offered the appropriate fluids or if AP declined, because of gaps in the forms. On reflection the Claimant stated that she could not fit in completing the checks herself daily however; "*maybe I should have made time to do the daily checks myself. I checked the team leaders checks on a weekly basis as it was hard to fit them in daily with all the other actions"*.

129. With regards to the performance of the TLs, the Claimant explained how Lucy Evans was to liaise with HR with regards to further progress in terms of managing their ongoing issues.

130. With regards to MB remaining on sick leave, the Claimant stated that she had been at the stage of putting together an ill-health capability report and that; "*on reflection could have been dealt with a lot quicker. However, had to juggle all of the action plans as well.*"

Additional Allegations

131. It was also raised with the Claimant that there was an issue over an evacuation plan (PEEP document). This was an additional issue which it transpired had come to light after her suspension. There had been an inspection from Nottingham fire and rescue team who had noticed that keys were being left on hooks by the patio doors. The advice received was to get the locks changed to thumb locks. The Claimant's evidence was that the patio door locks were changed in 2017 or perhaps even 2016 and a later evacuation plan dated 13th August 2018 had been prepared recording this however it was put to the Claimant that the plan on file still

referred to keys being left by the door; the documents were not disclosed to the Claimant at this stage and she could not explain why the updated plan was not on the file.

132. The Claimant did not raise at the time any concern over the interview being conducted by telephone or being referred to as informal during the internal process. The Claimant did not raise any issue in her witness statement and in cross examination when asked what was her concern about the informal telephone meeting she stated; "*there wasn't*". The Claimant accepted she had been able to speak freely at the meeting.

133. Following the interview with the Claimant, telephone investigatory interviews took place with JD on 25 October 2018, Roxanne Rolland on 30 October 2018, with Joanna Carruthers on 5 November 2018, Lucy Evans on 7 November 2018, Lisa Lovett on 13 November 2018 and Gerry Morris on 22 November 2018.

134. Ms Carruthers in her interview on 5 November 2018 raised the issue of Oramorph and the inaccuracy of the measuring and recording of it. Ms Randhawa in cross examination explained, and this is not in dispute, that she was not aware of the Oramorph issue when she spoke with the Claimant. The notes confirm that the Claimant was not asked during the telephone meeting about any issues over the measuring and recording of the drug Oramorph however in cross examination when asked about the inclusion of this allegation and whether there was anything wrong with the way the investigation was carried out, her evidence was; "*No, not that I can recall."*

135. Despite carrying out all the interviews (other than JD's), after the call with the Claimant, the Claimant was not given an opportunity to comment on any of that evidence before the matter progressed through to the formal disciplinary stage. The Claimant was asked about this in cross examination and what her concerns were, however she did not identify any particular concerns.

136. It is common between the parties that the most serious allegation relates to the care of AP and the failings in respect of the fluid charts. The Claimant had accepted that there were gaps and had accepted that perhaps she should have carried out more checks. The Claimant had also accepted that there were concerns with the performance of the TLs who were completing the fluid balance checks, concerns so serious that they were not improving under a EIP and that she had even discussed with Ms Evans whether to add into their capability plans their failure to carry out the checks; " *LE and I double checked and found the Team Leaders had ticked off the checks to say no concerns but there were concerns."*

137. The Claimant does not allege that there were other witnesses that Ms Randhawa should have spoken to during the investigation process.

138. Ms Randhawa prepared a full report which is 29 pages in length and a copy of the report was provided to the Claimant before the disciplinary hearing. She was then aware of all the allegations including with respect to the issue over Oramorph that would be dealt with at the disciplinary stage.

139. The Claimant would have the opportunity at the disciplinary stage to respond to the evidence of the witnesses who were spoken to after her. The Claimant had however made admissions during her interview as to the performance of the TLs for example and admissions regarding the failings in the various checks. This was

not a case where it can be said that had the Claimant had the chance to respond to the evidence of other witnesses, there may have been no reasonable grounds to proceed with a disciplinary hearing and indeed this is not alleged by the Claimant and does not form one of the agreed issues in the case.

140. The Claimant also confirmed that the investigation report set out all the mitigation points she wanted to raise in relation to the allegations put to her.

Disciplinary Hearing – 12 December 2018

141. The Claimant was contacted by letter 4 December 2018 and invited to a disciplinary hearing on 12 December 2018 Chaired by Ms Tunstall. There was a second panel member, Ms McDaid.

142. The letter inviting the Claimant to the hearing sets out two separate allegations (page 598);

a. Failure to adequately manage the service leading to service user safety
b. Failure to adequately provide management oversight to the service and its staff to ensure the delivery of a high-quality provision.

143. The letter does not break down the allegations further into its composite parts and identify whether each alleged act which forms part for those allegations is of itself sufficiently serious to be considered gross misconduct. The letter refers to; "*These allegations are deemed by the Trust to be gross misconduct.*"

144. The Claimant in cross examination confirmed that she had no issue regarding the independence of Ms Tunstall and that had had the chance during the hearing to speak freely and had a copy of the investigation report and appendices to the report in advance of the hearing.

145. The Claimant does not take issue with the accuracy of the minutes of that meeting (pages 630 – 641). The Claimant was advised in the letter of the 4 December, that the allegations were deemed to be gross misconduct and that a range of responses are available which includes *"demotion or permanent transfer, dismissal or summary dismissal".*

Pressure Sore – reporting

146. During the disciplinary hearing the Claimant was asked about the incident involving AP and admitted to knowing grade 3 pressure sores are reportable and that when Mr Morris came in on 23 and 24 May he had made her aware that it had not been reported, she alleges he had said he would think about it and get back to her because it should have been reported earlier in March (page 640). It is not clear what the Claimant was waiting for Mr Morris to come to her about. During the investigation interview with Mr Morris (page 591-593) he was not asked about this allegation however, in the disciplinary meeting she admitted that with regards to reporting it, she should have done so immediately rather than delaying further to hear from Mr Morris;

"*I should have just done it"*

147. Mr Morris filed a focused visit – risk assessment which records that he had told the manager i.e. the Claimant, to report the pressure sore (page 233).

148. There is a delay of one week, until the Claimant is back in work before it is reported by her. It is not in dispute that the Claimant did not in the interim, try to speak further with Mr Morris.

149. Ms Tunstall in her evidence before this tribunal, in response to the tribunal's question of when the Claimant re-registered with CQC as the Registered Manager of GC, said that she did not know; *"I do not know if she was Registered Manager when working one day per week."* On the evidence, the Claimant was not the Registered Manager at this time however, JD had left and she was the only Service Manager at GC.

Fluid Balance Charts

150. With respect to the fluid balance charts when questioned about this by Ms Tunstall, the Claimant explained that these were a new thing, the support plans changed when the pressure sore was a grade 3 and then fluid charts were put in place. The Claimant discussed the confusion caused by two charts being used and that CQC had noted that the charts were not being completed properly during their visit in September. The Claimant stated that she told staff to record when fluid was offered but refused by service users (those with mental capacity cannot be forced to take fluids, however it is common between the parties that what must be recorded is whether the person has been offered sufficient fluids and if refused, this must be documented). When it was highlighted that these were not being completed the Claimant was asked about what steps she took (page 635) to which she made the following comment;

"I *had too much trust in my team, but unless they are monitored 24/7 not doing things. Lucy and I had handover every morning, the action plans for both TL – we will both working on them. Lucy met each week and informed me. There was no improvement though, so I contacted HR to see what next steps were, it needed to be more formal, despite support from Lucy e.g. when Lucy met with them to she asked for them to bring the improvement plans with then, [Z] misplaced her …* ***I have realised now how serious, you feel like you're screaming out for support, Roxy too"***

151. It was put to the Claimant that she was offered the support of another Assistant Manager to which she replied;

"*Yes, I was offered by Victoria but I said no, I felt more confident, I had Lucy which eased pressure, we work well together, we were fine but then that was so many action plans.*"

152. The Claimant was also asked whether a capacity assessment was carried out on a service user, AR because Ms Carruthers had alleged that one had not been carried out despite the District Nurse recommending one. This was to check if the service user had the mental capacity to make decisions for herself. The Claimant denied that this had not been done but that a doctor had visited and noted that AP had full capacity.

Service User- workman with no DBS check

153. With regards to the workman who had no DBS check and was left alone with a service user, the Claimant did not deny that this had happened. The Claimant said that she had "*assumed*" that someone in the Property and Estates department would have carried out the DBS check.

154. With regards to the service user not being removed from the noise, the

Claimant's evidence was that she was able to remove herself and that staff had asked if she wanted to be moved although the Claimant could not recall if she had mentioned that to Mr Morris and Ms Carruthers at the time. The Claimant denied not responding appropriately and denied telling Ms Carruthers that she planned to email staff, rather she had she said, spoken to the staff altogether. The Claimant also alleged that a member of staff (A) had apologised to Ms Evans as he felt responsible for this incident. The staff member A was not interviewed but the Claimant makes no complaints about that and is not in the list of procedural failings. The Claimant said that Ms Evans would be able to confirm this.

PEEP document

155. The Claimant raised a concern about the service user's evacuation plan which appeared to include an outdated document. The Claimant had received the document and noted that one page was an old document marked as such by having a line through it. The Claimant confirmed that it should not have been in the service users file and denied having put it there herself, she could offer no explanation for why the document was on the file.

Oramorph

156. The Claimant's evidence at the hearing was that she accepted there had been a "*massive discrepancy*" with the drug which looked like a transcript error. The method of measuring was to use cups but that did not in essence, ensure consistency of measuring. The Claimant alleged that she had tried to source other products and had been waiting for contact from Ms Giblin but she had not come back to her. The Claimant had then asked for advice from the pharmacy but no support was for coming. The Claimant confirmed that staff had full training and she had done the competences but had not been told how to physically measure.

Management of Ms MB's long-term sickness absence

157. The Claimant gave limited evidence regarding the allegation that she failed to manage the long-term sickness absence of MB other than to state (page 641) that she found this difficult when working only 1 day per week, that on a couple of occasions she had been unable to reach HR and that it "*could have moved quicker*" and "*it needed moving quickly".*

158. The Claimant when asked by Ms Tunstall generally at this meeting about how she manages the service effectively she stated;

"*Not been like was before with regard to standard, I could focus before, but now there are so many actions, don't know what to do first"* and; *"I have never blamed others. I can only try to put right what went wrong"*

Victoria Pilkington

159. Ms Tunstall informed the claimant at the close of the hearing, that she had had a follow up discussion with Ms Pilkington who denied having said that the senior management team had let the Claimant down. The notes do not record a comment from the Claimant in response and nor did she assert in her evidence before this tribunal that she made any comment in response to this. There is no record of that discussion however it is not disputed that a discussion took place or that Ms Pilkington denied making the comment. Ms Tunstall's account of what she had been was not disputed during her cross examination.

Further Investigation

160. Ms Tunstall carried out three further follow up investigation calls or meetings after the disciplinary hearing with the Claimant;

Meeting Lucy Evans

161. Ms Tunstall had a telephone call with Ms Evans on 19 December 2018 (page 642). Her evidence was that she understood that she would be responsible for performance managing the TLs and felt that she was completing the process well and updating the Claimant. She stated that the Claimant left her do this and did not get involved directly in addressing issues with the TLs. With regards to the incident with the workman, she denied any knowledge of a member of staff A, having apologised for the incident. Ms Evans also stated that she was not aware that the Claimant had held any staff meetings or tutorials during Ms Evan's time at GC.

162. The Claimant does not dispute the accuracy of the written account of what Ms Evans said but complains that Ms Tunstall did not revert back to the Claimant for her comments on the further evidence of Ms Evans.

163. Ms Tunstall in cross examination stated that she considered there was no point in coming back to the Claimant, as it was one person's word against another. She had spoken to Ms Evans as the Claimant had told her that Ms Evans could support her account of the admission of responsibility by A.

Helen Giblin

164. Ms Tunstall when communicating in writing the outcome of the disciplinary hearing, informed the Claimant that she had spoken with Ms Giblin for her comments on the Claimant's assertion that she had failed to respond to emails from her about the measuring of Oramorph. She informs the Claimant that IT had also carried out a search of the Claimant's emails but found no record of any emails to collaborate the Claimant's account that Ms Giblin had failed to respond to her.

165. Although we only have her account of what was discussed, it is not asserted by the Claimant that Ms Tunstall has not given an honest account of that discussion. What the Claimant complains about is not being told of the discussion and the search for emails, to allow her to respond. Ms Tunstall's explanation for not doing this was, under cross examination that having had IT check for emails and having Ms Giblin deny that she had failed to respond to emails, there was; "*no further discussion I felt we could have with [the Claimant]."*

Roxanne Rolland

166. Although Counsel for the Claimant asked Ms Tunstall in cross examination what was discussed at the follow up meeting/telephone call with Ms Rolland, before she had responded she was asked whether she accepted that she had not told the Claimant what had been discussed, which she confirmed. Neither Counsel for the Claimant nor Counsel for the Respondent in re-examination, explored with Ms Tunstall what had been said by Ms Rolland. In the outcome letter Ms Tunstall refers to discussing with Ms Rolland what supervision the Claimant had received and what support she had received from Ms Rolland, her answers are subsumed within the content of the outcome letter.

167. Although the outcome letter refers to enclosing copies of the notes of the three follow up conversations, the only notes in the bundle relate to the discussion with Ms Evans. In cross examination Ms Tunstall stated that only the notes relating to Ms Evans were separate and that "*clarification"* of the other two discussions is "*enclosed in the body of the letter*". Ms Tunstall in cross examination, when

pressed on the failure to allow the Claimant the chance to comment on the further evidence before proceeding to make a decision referred to the Claimant having the chance to address this on appeal.

Outcome

168. Ms Tunstall sent an email to the Claimant on the 21 December 2018 (page 645). This confirmed that the Respondent had found her actions to constitute serious misconduct and set out the sanction. It failed to confirm how long the final written warning would remain 'live' for and this is raised as a procedural failing. The duration of the written warning was however confirmed in the formal outcome letter which was sent afterwards on the 7 January 2018. The Claimant did not enquire in response to the email how long the warning would last and that I find is explained by the fact that under cross examination she accepted that having herself implemented the disciplinary policy, she knew that final written warnings last for 18 months (and indeed that is what is provided for by the policy).

169. Ms Tunstall's evidence as set out in her witness statement is that;

"*The main issue that we considered the allegations for was the pressure sore incident. The other issues weren't as major but gave this additional information around the claimant not ensuring that all the systems in the service were being followed" (para 24).*

170. The evidence of Ms Tunstall is that the panel formed the belief that the Claimant had committed the following acts which amount to serious misconduct and in summary the findings set out in the outcome letter of the 7 January 2019 are (page 658 – 667);

171. <u>Allegation 1: Failure to adequately manage the service leading to service users' safety being comprised</u>

172. It was determined that despite being back in the service albeit for one day per week until 2 July 2018, the Claimant had failed to identify and escalate serious deficiencies in the care of service users, particularly around the management and prevention of pressure sores. This was broken down into a number of alleged failings;

173. The finding is in summary that the Claimant failed to escalate the poor standards at GC, this only being escalated following Ms Rolland's visit on 5 May. That by the date of suspension the Claimant had been back full time from 2 July for 3 months and had an Assistant Manager for 2 months, that she had received support from her Regional Manager and QA. CQC had identified actions as requiring improvement in September 2018 which had been signed off as completed actions by the Claimant including the implementation of a fluid balance chart and system, but that these had not been implemented and reviewed effectively.

174. It is the case that the Claimant accepted during the investigation and disciplinary process that she received support, mainly from her Regional Manager and from CQC. In the disciplinary hearing she stated: "*External people support was provided. I felt JC was very supportive…*" The Claimant complanied however that this often led to more work to be completed, however it is clear from the evidence gathered during the investigation that support was available and that she did not take steps to obtain more support if required. The Claimant accepted that when offered another Assistant Manager, she declined it because she felt she was coping. The Claimant accepted in the telephone interview that she had not asked for support with the new systems (Datix etc).

175. The undisputed evidence of the Claimant which is supported by the interview notes with Ms Rolland, is that she was not the Registered Manager in May 2018 when working one day per week, that remained JD. However, she was in effect job sharing the role of Service Manager until 15 May 2018, and therefore had the same responsibilities albeit without being accountable to CQC. From 15 May, she was the only Service Manager at GC.

176. The Claimant did not deny that she should have reported the grade 3 pressure sore had she known about it however her evidence is that she did not know before Mr Morris came into GC on 23 and 24 May (page 487). The Claimant refers to not being informed by staff who she felt did not understand the significance of a grade 3 pressure sore. It appears from the evidence including the statement from JD that he did not raise this with the Claimant, as he himself had not appreciated the seriousness of a grade 3 pressure sore.

177. The Claimant did not dispute during the disciplinary proceedings that she signed to confirm that fluid charts completed by staff were "*All ok*" when in fact they omitted important information, namely what fluids had been offered and refused. She admitted being aware that there were gaps in the records kept by staff.

178. The panel also reached a finding on the evidence that there had been an absence of regular staff meetings or other information to staff regarding implementation of the new systems in light of the significant concerns. There was an expectation the Claimant would have conducted regular briefings, meetings and supervision with staff but there was no evidence so show meetings or information sharing. That the failure to instigate an effective, documented information sharing process was evidence of a failure to manage the service and a factor which impacted on service user safely.

179. The statement from Ms Evans during the investigatory process, which the Claimant had sight of prior to the disciplinary hearing, refers to there having been only one team meeting that Ms Evans had arranged, and that the one prior to that was when JD was at GC (prior to the pressure sore coming to light).

180. During the disciplinary hearing the Claimant is specifically asked about holding staff team meetings, and her evidence is; *"I can't remember"*

181. The Claimant is asked about how she sought to manage the service effectively and states; "not *been like I was before with regard to standard, I could focus before, but now there are so many actions, don't know what to do first. Comments- not taken accountability – I have never blamed others, I canny try to put right what went wrong"*

182. In the follow up interview with Ms Evans she refers to not being aware that the Claimant had held any staff meetings or tutorials during her time at GC.

183. The Claimant although asked about staff team meetings during the investigation did not provide or produce any further evidence of any meetings at the disciplinary hearing. There was therefore no evidence that after he return from maternity leave, she had arranged any staff meetings.

184. The panel also reached a finding that although the Claimant was concerned over the capability and competence of the two TLs and although instigating the EIP with Ms Rolland, had not provided further support to managing their performance beyond delegating the day to day management of their performance

to her Assistant Manager.

185. The Claimant referred during the investigation hearing to Ms Evans managing the TLs during the capability process and to asking Ms Evans to contact HR around September 2018 sometime because; "*there was no progression at all" (page 490).*

186. At the disciplinary hearing (page 635) the Claimant's evidence is that she had handovers with Ms Evans every morning and met with Ms Evans each week. She refers to realising it had to be made more formal hence the referral to HR and;

"I have realised now how serious."

187. In the follow up interview with Ms Evans, she refers to the Claimant not getting directly involved in addressing issues with the TLs, which is consistent with the Claimant's own account that she communicated with Ms Evans about the TL's performance but did not deal directly with them.

188. The panel reached a finding that Despite the implementation of a new fluid balance chart being introduced to help manage the care of the service user with a grade 3 pressure sore, this was not being completed accurately. There were gaps in the charts and yet they were being signed off. The Claimant had delegated this task to the TLs even though they were underperforming in their roles and this had a direct impact on the care of the service user;

189. This allegation is not disputed by the Claimant. She accepted that there were gaps in the fluid charts and the seriousness of those omissions in the disciplinary investigation (page 488);

"*SU was also supposed to be offered x amount of fluids per day, staff didn't complete the forms correctly and we didn't know if she had been offered or not if SU had declined – the forms had gaps"*; and

"…*maybe I should have made time to do the daily checks myself daily. I checked the Team Leaders checks on a weekly basis as it was hard to fit them in daily with all the other actions"*

190. The Claimant was asked again about this at the disciplinary hearing and again admitted to signing off fluid charts where there were gaps (page 640); "*I think gaps were where fluid charts were refused, signed off to say that I was aware that she had been offered – but refused*" and "I *have too much trust in my team but unless they are monitored 24/7 they are not doing things*." (page 635).

191. The panel reached a finding that the Claimant had signed the fluid chart herself on 3 occasions to say, "All ok" when in fact there was insufficient information on the fluid chart. The Claimant had signed the charts on 2 occasions after the CQC visit. During the disciplinary hearing the Claimant said she had signed the checks in the belief that AP had been offered fluids but rejected them and that this was the reason for the gaps however, this explanation was found to be unacceptable, in that the Claimant should have checked fluids had been offered and recorded this;

192. The Claimant had admitted to this during the disciplinary process.

193. During this tribunal hearing she accepted that this put the service user at risk. The form failed to identify what fluids had been offered, what had been refused (if any) or indeed what fluids the service user needed.

194. When taken to an example of the fluid chart in the bundle which the Claimant had signed off, she confirmed in cross examination that she had written '*All ok*' to say the service user had consumed fluid which in some of the entries was only 250ml which was significantly less than the service user should have had. The form did not indicate what amount the service user should have had or indeed if other fluids had been offered and whether they had been refused. The Claimant accepted during the tribunal hearing under cross examination that;

" *I did not check to the best of my ability"*

195. The Claimant accepted in cross examination that a grade 3 pressure can lead to death and she admitted that she knew that AP required more than 250ml of fluid (which was the amount recorded as taken by AP on some occasions) but could not recall under cross examination, what the required amount of fluids was; her evidence was;

"*I did checks and knew had fluids but I did not ask them if she had been offered and refused fluids. I put my trust in them. I signed to say if she had fluids, I wouldn't know if she had."*

196. Under cross examination the Claimant accepted that she had been the "*boss"* at GC and she stated; "*I never said I was not responsible, I never said I am not accountable"*.

197. It was put to the Claimant in cross examination before this tribunal that this was not a capability issue, that her capability was not in question to which she responded;

"It is not that I did not feel capable, I had such a lot of issues to deal with"

198. The panel also reached a finding that the date of suspension, some 3 -4 months after introducing of the fluid charts the Claimant had still not identified the key staff members responsible for recording appropriate care;

199. The Claimant was asked during the disciplinary hearing, what steps she had taken to identify who which members of staff were not completing the fluid charts correctly and stated;

"*Had conversation with LR and RR around pinpointing staff and was going to start doing that.*"

200. The Claimant's own evidence was that she had not yet taken any steps to identify which members of staff were failing to complete the forms (page 640).

201. In relation to Oramorph; Ms Tunstall in the findings explains how she had spoken with Ms Giblin after the disciplinary hearing, who stated that she could recall a conversation where she instructed the Claimant to contact the pharmacy for further guidance but could not recall any emails from the Claimant. Ms Tunstall had then arranged for HR to access the emails from the Claimant's work email account to check but none were located. An email as between the Claimant and Ms Rolland however was located on 3 September showing that the Claimant had made efforts to resolve the issue but had been unable to do so.

202. In conclusion based on the above and taking into account the CQC's own report, the panel concluded that the Claimant had not demonstrated the leadership and management of the service effectively to manage the health and welling of service users.

Allegation 2: Failure to adequately provide management oversight to the service and its staff to ensure the delivery of a high-quality provision.

203. In relation to the TLs, the finding of the panel in summary were that as Registered Manager the Claimant was required to retain overall responsibly for the service and performance of the staff and that she had failed to adequately support the Assistant Manager to ensure the performance of the team leaders in that;

- The performance of one of the TLs has been an issue before the Claimant went on maternity leave.

- An EIP plan was instigated with Ms Rolland on 19 July 2018 but up to the point of delegating responsibility to Ms Evans from 23 July 2018, the Claimant had not actively managed the performance issues up to that point.

- Little evidence that the Claimant had any direct involvement in managing the performance of the TLs after Ms Evan's joined, despite the serious impact on the performance of the service.

204. The above points were accepted by the Claimant in her own evidence during the disciplinary hearing, other than she did not accept that she had no direct involvement in management the performance of the TLs. However, the Claimant had accepted she delegated this responsibility to Ms Evans, she met with Ms Evans to discuss the EIP but accepted she did not meet with the TLs.

205. During cross examination before this tribunal, the Claimant referred to her frustration that the performance of the TLs not improving and when asked why she had not 'put her foot down' given vulnerable service users were at risk the Claimant referred to HR not replying to her but that she; *"wouldn't say I put my foot down".*

206. It is however difficult however to reconcile this comment that Ms Evans was more than capable of dealing with the performance of the TLs, with her concerns that the performance issues were not improving;

"I had advised for Lucy to contact Human Resources as I am concerned that there is no improvement being made. I am concerned that they are not working to a high standard by meeting the job description, despite the support that they are receiving from Lucy and me. This is very frustrating for me as I can't be on the floor holding their hand and looking over their shoulder 24/7 just to make sure that they are doing the job they are employed to do. I want to be able to feel confident and satisfied that they are carrying out their roles effectively. But at the moment I don't feel that."

"I feel that no matter how much support they receive whether this be from me, Lucy, any guidance, training that they are provided with, there is no evidence of them improving and they are not accountable for their actions. ***If the team leaders are going to continue to perform this way, Gregory Court will be on a downward spiral"***

207. Despite these very serious concerns, the Claimant does not dispute and accepted during the disciplinary process, that she was offered and rejected the support of another Assistant Manager.

208. The panel also found that there had been long gaps in the process of managing MBS absence, thus delaying the process;

209. With regard to the management of MB who was on long term sick leave, the findings were that the key steps were taken to manage the situation but that there were long gaps between meetings which delayed the process. Specific reference was made to a period from 9 to 29th August when no updates were provided to HR and the Claimant had accepted during the disciplinary hearing that it could have been managed in a swifter timeline.

210. The evidence of the claimant during the investigation process was;

"On reflection could have been dealt with a lot quicker. However, had to juggle all other actions plans as well. I contacted SS twice regarding this which also added to the process. In hindsight could have been dealt with a lot quicker"

211. With regard to the findings in relation to the incident with the service user left with a workman when no DBS check had been carried out, had not been offered fluids and was subjected to noise; it was determined that this allegation was upheld in that the Claimant did not immediately check on the service user, but made enquires of Property and Estates regarding the DBS check and emailed staff.

212. Although the Claimant's evidence was that she had spoken to staff and one staff member had accepted responsibility, this was not supported by Ms Evans. The Claimant had not however denied that a workman without a DBS check was working close to a service user and accepted that she should not have assumed that the Estates and Property department had arranged the DBS check.

213. The Claimant also commented on the fluid charts for this service user and confirmed that she had signed the checks. When it was put to her in the disciplinary hearing that it was not good enough to sign to say she had no concerns when there were gaps in the records, the Claimant's response was;

"*I think gaps were where fluids were refused, signed off to say that I' aware that she had been offered – but refused*".

214. The evidence of Ms Carruthers during the investigation meeting (page 515) included the following statement;

"I *asked staff about x movements and I established the last time someone had spoken to x was 1 hour 20 mins left alone in room. X is supposed to have fluids offered every hour. She had also been left in an environment with a workman alone. Spoke to Team leader and ascertained her care plan had not been followed. I went to see MS in the office with HM (LE may have been present). Told MS what happened, no fluid offered and left alone. SU was not being offered fluids, MS replied saying that is awful I shall email Team Seniors, that was not the response expected".*

215. Ms Carruthers in her interview explained that she would have expected the Claimant to have gone and seen the service user straight away and the Team Seniors; *"There was no sense of urgency."*

216. Although the Claimant denied having said she would email the Team Seniors, she does not assert that she went immediately to check on the service user, does not deny that the service users charts were not completed correctly (in that there were gaps) and does not deny that the workman did not have a DBS check.

217. As the Claimant accepted in cross examination at the tribunal hearing, as the Registered and Service Manger she was ultimately responsible for governance of the service.

218. The finding was that that in respect of Allegation 2 this should be uphold in that the Claimant had not adequality demonstrated that she had supported and lead her staff team to deliver a high-quality service.

219. The outcome letter also comments before turning to the two main allegations, on the evacuation document (PEEP). Ms Tunstall states that she accepts that having reviewed the document again it appears that the front sheet may be an old document however, it was found on a service users file and the Claimant had signed the document to say there had been no changes on 13 August 2018 when there had been changes. Ms Tunstall states in the letter that *"the content remains valid for the purposes of this hearing*" (page 659*).* However, this issue is not then referred to under the list of circumstances giving rise to the warning. It is therefore unclear to what extent this was relevant to the decision and this was not clarified before this tribunal nor was the lack of clarity over whether this formed part of the decision to issue the disciplinary sanction, asserted to be a procedural failing. It is reasonable to infer from the relative importance of this allegation and the fact it is not set out under the specific allegations, that it was taken into account but was not considered as important as the specific allegation set out under the two heads of allegations.

220. In terms of consistency of treatment, JD had been the Registered Manager during the Claimant's absence on maternity leave and on her immediate return, he had not reported the pressure sore, had not performance managed the TLs or it appeared taken any steps to effectively manage the issue of MB's long-term absence. The tribunal enquired of Ms Tunstall what action had been taken if any, regarding JD. Ms Tunstall's evidence was action was taken but she did not know what. This was not an issue raised in the list of issues by the Claimant and Ms Tunstall was not cross examined about this. The serious issues with the fluid records however were not relevant to JD.

Outcome of Disciplinary Hearing – sanction

221. The Claimant was informed of the outcome in an email dated 21 December 2018 following a call from Ms Tunstall.

222. The outcome was that the Claimant's actions constituted serious misconduct;

"*However, we have given consideration to the weight of the mitigation provided during the hearing, detailed in the investigation report and appendices and from further investigations following the hearing. We have also taken into account your phased return to work after your maternity leave affecting your time to complete the actions requires; lack of Assistant Manager until July 2018, the fact that you only returned to work on a full time basis on 2 July 2018 and the large number of works needed to turn around the service. It is also noted that before your maternity leave your service was rated as Good by the CQC*"

223. It was decided that there was sufficient mitigation to avoid a sanction of summary dismissal or dismissal with notice, however the failure to impose appropriate governance and oversight of the service and the continued significant issues raised by QA and again by CQC affecting the health and wellbeing of the service users led the panel to conclude that the Claimant's actions constituted serious misconduct and that;

"*should you return she position of service manager, there would be a significant risk that without an unsustainable and unreasonable level of intense supervision and daily management of your performance, the* ***Trust could not be confident*** *that the ongoing safety and wellbeing of the service users would not be compromised".*

"*Therefore, I can confirm that with effect from 27 December 2018 you will be demoted to the role of Assistant Manager based at Victoria House…*

224. The Claimant was informed that the role of Assistant Manager at Victoria House would not accommodate condensed working hours and therefore her flexible working arrangements (full time worked over 4 days) would end on 28 February. The Claimant was also issued with a final written warning.

225. In terms of her disciplinary record, there was no reference in the outcome letter to any previous disciplinary issues and Ms Tunstall in cross examination confirmed that the Claimant had an unblemished record. I do not find therefore that the comment in the grounds of resistance that the Clamant did not have a blemished record were relevant to the decision taken during this disciplinary process.

226. The Claimant accepted in cross examination during the tribunal hearing, that she understood that save for the mitigation, she would have been dismissed.

227. The Claimant's evidence in cross examination was that she would have accepted the outcome had it been a final written warning, what she was not prepared to accept was a demotion when there was no contractual right to demote.

228. Ms Tunstall was cross examined on a failure to consider putting the Claimant on an EIP. However, Ms Tunstall explained that she did not accept that the issues could have been addressed through the EIP as opposed to demotion because;

"*Roxanne Rolland is her line manager and as the Regional Manager was not based at GC. Capability management needs a lot of support, have to consider if can do remotely*".

229. It is to be noted that there was no evidence presented to the tribunal that the CQC had recommended the Claimant's removal as Registered Manager.

230. Ms Tunstall in cross examination confirmed that she had understand, incorrectly that the Respondent had the contractual right to impose demotion.

Appeal

231. The Claimant appealed the decision by letter of the 11 January 2019.

232. The Claimant was contacted by letter of the 23 January 2019 regarding the appeal, which was to be heard by a panel comprising of Ms Ward as the Chair and Angela Beecroft, Regional Manager. The Claimant was informed that it would not be a rehearing but;

- Review of any new evidence to ensure the Trust had;
- Ensure that the Trust followed a fair procedure
- Review whether the sanction was appropriate

233. Prior the appeal the Claimant contacted Ms Randhawa and requested a copy

of the PEEP document and where this had been found. Ms Randhawa replies to explain that she had been made aware of the document from a senior manager following a visit to GC on 15 October 2018. The Claimant also requested from me Randhawa a copy of a team leader's checklist which she was said to have counter signed which she did not believe she had. The Claimant at her request is also given access to her work emails.

Appeal hearing – 19 February 2019

234. At the commencement of the hearing the grounds of appeal are set out and agreed with the Claimant and they are;

- Being given two sanctions
- Demotion being a breach of contract
- Demotion being a breach of the implied term of mutual trust
- Feeling not able to evidence some of the points the Claimant made due to the fact the Claimant could not access emails.
- During the investigation documentation had been overlooked
- The Claimant felt scapegoated.

235. The Claimant was given an opportunity to present her case in relation to each of the grounds of claim and elected not to be accompanied.

236. It is clear from the evidence of Ms Ward under cross examination that she understood that the disciplinary proceedings were "*mainly fluid charts and pressure sore case.*"

237. I will not set out the findings in relation to each ground of appeal, it is agreed that the only issues which the Claimant relies upon with regards to the fairness of this appeal are as follows;

a) Failing to properly consider the imposition of two disciplinary sanctions
b) Failure to consider whether the Claimant should for example, be put on an Employee Improvement Plan as opposed to demotion.

<u>a) Being given two sanctions</u>

238. The Claimant referred in the appeal hearing itself to having not much evidence on this point but that it felt "*quite harsh*" that she had been given two sanctions and that it does not state in the contract or disciplinary policy that two sanctions can be given; "*it is usually one*".

239. The finding of Ms Ward is that the disciplinary policy at page 9 states that an employee can receive a demotion as part of the disciplinary process and that the policy does not prevent a warning being given concurrently with a demotion. Ms Ward confirmed in cross examination that she understood, incorrectly that the Respondent had the right to impose demotion as a disciplinary sanction without the agreement of the employee and that "*hindsight is a great thing*" and that it had; "crossed *my mind that it should be gross misconduct and therefore considered two sanctions not to be onerous".*

240. The complaint within the list of issues is that Ms Ward did not 'properly' consider the imposition of two sanctions. It is clear she considered it. It is unclear on what grounds it is alleged she did not consider it *'properly'*.

241. The Claimant complains that two sanctions are onerous and yet her second ground of complaint, is that the second sanction should have been an EIP rather than demotion. It would seem to be therefore the type of sanction that she objects to rather than the principle of two sanctions. It is to be noted that the Acas Code does not recommend that only one sanction is ever applied, and I raise this in terms of a general principle of fairness.

c) Failure to consider an EIP

242. With regards to the Employee Improvement plan, Ms Ward is very clear in her oral evidence before this tribunal that she did not consider this because the appeal was concerned with conduct and not capability proceedings and in any event the Claimant did not raise this as a ground of appeal.

243. In terms of the grounds on which it is alleged that the disciplinary hearing was flawed I shall set out my findings in relation to the additional evidence that was provided at this appeal in relation to those complaints;

Meeting and interviewing Lucy Evans on 19 December 2018 after the disciplinary meeting on 12 December 2018 without reverting to the Claimant;

244. The Claimant was given the opportunity at this hearing to put forward evidence to show that she had supported Ms Evans in rebuttal of the evidence Ms Evans had given to Ms Tunstall. The Claimant alleged that she had spoken with Ms Evan's however at this hearing she could produce no written records of discussions with Ms Evans to evidence that she was more directly involvement in managing the performance of the TLs. This ground of appeal was therefore dismissed.

Interviews with Ms Giblin and Ms Rolland

245. With regards to Ms Giblin and the dispute over whether Ms Giblin had failed to contact the Claimant to provide further advice on the drug control/measuring issue, the Claimant produced for the appeal emails dated 3 September 2018. The emails include exchanges with the Claimant, Ms Rolland and Ms Giblin. The last email from Ms Giblin (page 354) dated 3 September 2018 was timed at 15:51, which is after the email sent by Ms Rolland informing the Claimant that Ms Giblin would call her. In Ms Giblin's email she instructs the Claimant regarding delivery and storage arrangements for the drug, suggests use of an adaptor and syringe and ends by asking the Claimant;

"*It's great that you are competing checks of controlled drugs, can you confirm how you are monitoring the amount left*?".

246. At the appeal hearing the Claimant accepted that although she was complaining that Ms Giblin did not contact her further, that she herself had not followed up this email from Ms Giblin; "*No, I didn't ask for further advice*".

247. This complaint was not upheld because despite the evidence of having asked for advice, the Claimant did not follow this up further and as an experienced Registered Manager Ms Ward believed that this would be expected of her.

Victoria Pilkington

248. The Claimant raised the fact that there had been two assurance calls between her and Ms Pilkington on 17 July and 10 September for which no minutes had been provided and that it may have been during one of those calls that Ms Pilkington

had made the comment about lettering the Claimant down. The notes were not located and the undisputed evidence of Ms Ward is that she had tried to find the minutes.

249. Ms Ward disregarded this ground, as the Claimant was not able to produce any further supporting evidence to prove that the comment had been made.

Outcome

250. The appeal was not upheld and the Claimant is asked to confirm whether she is prepared to accept the demotion. Mr Ward informs her that;

"the *only alternative to you accepting the demotion. will be the termination of your employment with notice*"

251. The letter makes it clear that the only alternative is dismissal, it does not refer to the consideration of any other alternatives.

252. The Claimant responded by email on 11 March 2019 noting that the only options she was being given were demotion or dismissal. The Claimant reaffirmed her case that the Respondent had no contractual right to demote and that she would not accept demotion (page 743).

253. The Claimant is then sent a letter dated 12 March 2019 (page 745) which repeats the options as dismissal or demotion and warns her that the meeting may result in notice of termination. Ms Strachan of HR is to be present.

254. The Claimant responds by email of the 14 March 2018 (page 747). The Claimant has been absent due to work related stress and states; "*What else is there to discuss and what is the purpose of this meeting? I ask this genuinely and seriously as this whole saga has made me ill…"*

255. By email of the 14 March 2018 (page 746) Ms Ward explains that the purpose is to;

"…*to discuss the prospect of your employment being terminated as a result of you confirming that you do not intend to take up the position of Assistant Manager at Victoria House. Prior to making a final decision with regard to this matter, I would like the opportunity to discuss the situation with you and give you the opportunity to make representations…*"

256. The Claimant is not willing to accept the demotion and therefore explains that she will not attend the meeting.

Termination for SOSR – 19 March 2019

257. The Claimant then receives a letter dated 19 March 2018 (page 757 -758) headed; *Termination of Employment – Some Other Substantial Reason".* Within the letter it states that the reason for dismissal is;

"…I *confirm the decision to terminate your employment for Some Other Substantial Reason. This is due to your refusal to take up the position of Assistant Manager at Victoria House and the Trust's position that due to the failings in your conduct addressed by the disciplinary process, which placed our services users at risk of harm, the **Trust would be failing in its duty of care to service users if it allowed you to return to the role of Service Manager"*** *[my stress]*

258. The letter goes on to state as follows;

"*In reading this decision I have considered **if there are any alternatives to the termination of your employment, including any alternative roles**, which may be available. However, without the benefit of further input from yourself, and following your confirmation that you cannot accept the demotion to Assistant Manager at Victoria House imposed as an outcome of the disciplinary process, I was unable to identify an alternative position for you" [my stress]*

259. The Claimant had not been informed before this hearing that there would be any discussion about alternatives to dismissal which Ms Ward states in this letter she would have explored with the Claimant had she attended. Ms Ward does not identify what those alternatives would have been. The words "*including any alternative roles"* implies that alternatives other than other roles, would have been considered.

260. Ms Ward's evidence in cross examination, when she is asked where it is shown that she told the Claimant she would <u>consider other options</u> she responds;

"No, but it is one of the things we would have considered"

261. Ms Ward accepts that she did not minute the meeting on the 12 March.

262. Ms Ward was referred in cross examination to a spreadsheet of jobs which was in the bundle (page 754 – 755). This was a document produced by the Respondent and Ms Ward when questioned about it referred to it as a list of roles vacant at the time and then described it as "example of jobs available". Ms Ward referred to the fact the document is not dated and could provide little assistance on what information it contained. It is not in dispute that this document had never been shown to the Claimant.

263. The tribunal asked Ms Ward to confirm whether the meeting of the 12 March was a disciplinary hearing; her evidence was; "*no, to determine if other alternative roles – I accept potentially unclear"*

264. When asked by the tribunal, in the context of the reference to other alternatives, whether a temporary transfer rather than permanent demotion for example was considered, to allow perhaps the Claimant to 'refocus' as identified by Ms Tunstall, Ms Ward's evidence was that; "*I did consider it at the time but didn't consider it appropriate".*

265. Ms Ward did not produce any evidence that she had considered it, she did not mention this in her witness statement, she did not mention it at all until asked directly by the tribunal and taken to the disciplinary policy where this is included as a potential sanction. Ms Ward's reply was unsatisfactory and vague, she did not explain whether this had been discussed with her panel member and why it was considered inappropriate other than to comment on the seriousness of the allegations.

266. I find on the evidence including her own oral evidence, that Ms Ward did not apply her mind to the possibility of any alternatives other than dismissal. The communications by letter and email to the Claimant in advance of the hearing are unequivocal and make no mention of alternatives, whether alternative jobs which were vacant or other sanctions.

267. Ms Ward never minuted the meeting despite the presence of an HR professional. Ms Ward gave no evidence regarding any efforts she had made prior

to the hearing to obtain details of available vacancies and nor did she give an evidence regarding any attempts to discuss with the Claimant's line manager the feasibility of an alternative sanction. Despite the impression Ms Ward attempted to give at the hearing that she was open to considering "*other alternatives*", the position as set out in her witness statement is emphatic (para 30); "*There wasn't any other option than to dismiss her for some other substantial reason.*"

268. I find on the evidence and on a balance of probabilities, that alternatives to dismissal were not considered by Ms Ward and that had this been her intention, she had not explained that to the Claimant who believing that the meeting was only to discuss the option of demotion, chose not to attend.

Appeal against SOSR – 1 April 2018

269. The Claimant appealed against the SOSR dismissal in an email dated 25 March 2019 (page 761). The Claimant asked for the appeal to be dealt with by way of written representations because she believed the appeal would "achieve very little". The appeal is on 5 grounds, which I summarise as follows;

- The disciplinary policy does not stipulate that two sanctions can be given
- Been unable to get points across at each stage
- The Respondent has no contractual right to demote
- The decision to dismiss is unfair and is was consider serious to dismiss following the disciplinary hearing
- Contradiction in being offered an Assistant Manager role when she would still be providing support to service users, while at the same time dismissing because she presents a risk to service users.

Panel Members

270. The panel consisted of Ms Anne Bygrave as Chair and Victoria Pilkington. Ms Pilkington had of course not only given evidence during the disciplinary process but the Claimant had made an allegation that she had admitted to letting the Claimant down, an allegation which Ms Pilkington had denied.

271. The Claimant received an acknowledgement her appeal email on 27 March which simply stated that the contents would be considered and she would be responded to as soon as possible. The letter neglected to explain that the panel were to hold the meeting to discuss her appeal on 1 April. The Claimant was denied a chance to submit any further representations, however she does not allege that there was any further evidence or documents she intended to submit. The Claimant was not told who the panel members would be. The Claimant did not have the chance to raise any objections therefore.

272. Ms Bygrave in cross examination admitted she was aware of the conflict of having Ms Pilkington on the panel but her oral evidence under cross examination was as there was no proof Ms Pilkington had said what was alleged, therefore she discounted it.

273. There is no written record of any request for advice from HR or any record of her deliberations on this issue.

274. In response to the tribunal asking whether someone else could have sat on the panel, Ms Bygrave confirmed that there; "*may have been someone else available at this level."* Ms Bygrave did not allege that she had made any enquiries about an alternative panel member.

275. There is a record of the panel discussion dated 1 April 2019 (page 765). The panel at the outset refused to consider 3 out of the 5 grounds of appeal because they had been considered in the original disciplinary hearing and as she states in her witness statement they were out of scope because they were not relevant to the Some Other Substantial Reason for dismissal; this included a complaint that there was no contractual right to demote and no right to give two sanctions. The panel were not prepared to deal with her complaint that it was inconsistent to demote her because she posed a risk to service users, while offering her a role as an Assistant Service Manager which would require her to deputise for the Service Manager during their absence (for leave/sickness etc). This was however a valid ground of appeal which should have been considered. She was dismissed because of the alleged risk to service users and yet was offered a responsible role whereby she may have had to deputise for the Service Manager, this was relevant to the issue of whether therefore the dismissal was fair.

276. It is the case that Ms Tunstall was asked in cross examination about the need to remove the Claimant as a Service Manager if it was considered that she could be trust to work at as Assistant level. Ms Tunstall's evidence was that there is a distinction in terms of who is responsible for overall governance.

277. Ms Bygrave asserts in her witness statement that they; "*found it hard to consider the detail as we were only able to consider the information which the Claimant had provided*" and that;

"*It would have been preferable for the Claimant to have attended the appeal hearing as both Victoria and **I would have liked to ask further questions** in order to gain a greater understanding of the Claimant's views before reaching an informed decision". (para 9 and 10)*

278. Ms Bygrave was critical of the Claimant not attending the appeal and of the detail within her appeal email;

"It was felt by the panel members that should [the Claimant] have wished to ensure her point was made it would have been considered a reasonable approach to have either attended in person or provided a greater level of detail in the appeal letter."

279. Ms Bygrave in cross examination accepted that despite alleging that she had wanted to ask the Claimant questions, she made no attempt to write to the Claimant seeking any clarify by way of further written representations. In cross examination Ms Bygrave stated that there were in fact; "*no particular questions*" she wanted to ask.

280. Ms Bygrave could of course have contacted the Claimant and explained the importance of her attending, assuaged her concern that it would achieve letter and/or asked for more detail. Ms Bygrave took none of those steps.

281. The findings in relation to the two grounds of appeal that were considered were as follows;

282. *At all stages of this process I have been left unable to get my points across and feel that my comments and explanations have been misconstrued.*

283. Ms Bygrave complains that the Claimant had not provided sufficient information in order for them to uphold this ground of appeal and it was rejected.

284. My dismissal was unfair as stated in my termination letter that the reason for my

dismissal is due to my refusal to take up the position of Assistant Manager and that the trust would be failing in its duty to care to service users to allow me to return to the role of service manager yet were not serious enough to warrant gross misconduct and the disciplinary decision to dismiss in the circumstances is wholly unreasonable;

285. Ms Bygrave within the notes of the panel meeting comments as follows;

"…*we could see from the* ***notes*** *that Claire Ward had considered whether there were other roles available for [the Claimant] at that time but that there weren't. The Disabilities Trust had no option than to make a decision in order to resolve the matter and this was taken under Some other substantial reason"*

286. However, when asked in cross examination about the notes of Ms Ward referred to as evidence that consideration had been given to other employment, Ms Bygrave could not refer this tribunal to any notes or any record Ms Ward had made which assisted Ms Bygrave. Ms Bygrave did not explain what the nature of those notes were nor did she elaborate on what was in them. When pressed to clarify what written record she had, her response was; "*what we know is Claire considered other options"* and then later identified the letter from Ms Ward confirming the decision to dismiss for SOSR as the notes she was referring to. The letter from Ms Ward however provided no details of what if anything, she had considered, within it Ms Ward had stated;

" …*without the benefit of further input from yourself, and following your confirmation that you cannot accept the demotion to Assistant Manager at Victoria House imposed as an outcome of the disciplinary process, I was unable to identify an alternative position for you". (page 758)*

287. I find on the evidence that Ms Bygrave was not prepared and made no effort, to consider any other options or check what steps Ms Ward had taken to consider alternatives. Ms Bygrave took at face value the statement by Ms Ward that there was no other option and failed to carry out any investigation of her own or check what if anything Ms Ward had in fact considered. If she required 'further input', she failed to explain that to the Claimant before dismissing her appeal. She stated under cross examination;

"…*only natural other choice was an Assistant Manager role – refused so no other option at that time*"

288. In response to questions from the tribunal, Ms Bygrave explained that there are different types of services managed by the Respondent. There are brain injury and autism services but Ms Bygrave's evidence was that the Claimant's experience was in complex case and she considered it '*inconceivable'* to put the Claimant into a complex brain injury. The Claimant may have the basic skill set but it is not usual to move Service Managers across different types of service centres. Ms Bygrave's evidence was that she only considered the alternative roles within complex case

289. The Claimant's evidence before this tribunal was that in her view her skills were transferable and that managing a "*house is very much the same*" and that in the past she has had to train and develop new skills and that she had spent a short time within a brain rehabilitation centre in the past.

290. The Claimant was informed by letter of the 11 April 2019 that her appeal was not upheld and the decision to dismiss for SOSR was upheld.

Conclusions: Applying the Legal Principles to the Facts

Respondent's Submissions

291. It is the Respondent's case that it carried out an investigation which was within the band of reasonable responses and arrived at a reasonable belief in the Claimant's guilt during the conduct proceedings. The sanction of demotion it is contended was within the band of reasonable responses and provided as an alternative to dismissal. It is conceded that demoting without sufficient reason may constitute a breach of the implied duty of mutual trust and confidence and I am referred in his written skeleton argument to the EAT case of **Hilton v Shiner Ltd Builders Merchants [2001] IRLR 727.** This was a case where the EAT held that alternative work (and a written warning) offered to the employee (following allegations of dishonesty) had been a demotion and had accordingly required his consent. There was no contractual right to demote. In this case the employee had resigned and claimed constructive unfair.

"34.. *Merely to say that an employee is no longer trusted to handle money, when it is plain that the employer still has sufficient confidence in him to wish to continue to employ him, is not in our view a breach of the implied term not to conduct oneself so as to be likely seriously to damage or destroy the relationship between employer and employee, in circumstances where there are fully justified suspicions of dishonesty and the alternative to retention in employment is dismissal. The Employment Tribunal found that, far from being conduct which destroyed the relationship, it was a "generous offer in an attempt to avoid immediate dismissal of a long-serving employee."*

292. I was also referred to the case of **Saminaden v Barnet Enfield and Haringey NHS Trust UKEAT/10018/08.** This was a case where the employer dismissed the employee for misconduct and on appeal proposed to demote him. It was held that as the disciplinary policy required the employee to consent to any demotion, the original decision to dismiss remained effective. However, I do not consider that case to be of assistance in this case.

293. The submissions from Counsel focused on the Burchell Test and the fairness of the original decision to demote, the Respondent reverting to the sanction of dismissal when demotion was not accepted.

Claimants Submissions

294. Counsel for the Claimant submits that the Respondent did not have a fair reason for dismissing, whether by reason of conduct or SOSR. SOSR Counsel asserted does not apply as there was no business need to reorganise, and further that the dismissal is only fair if the Respondent had acted reasonably during the dismissal and disciplinary process.

295. Counsel repeated the alleged substantive and procedural matters which are already set out in summary form in the agreed list of issues to support an argument that the disciplinary process was unfair, focussing on the disciplinary proceedings as they apply to conduct cases.

Did the Respondent have a fair reason for dismissal?

296. The first issue for the tribunal is what is the reason for dismissal. The Respondent Counsel referred to SOSR in this case having elements of conduct. I

have considered whether SOSR is the correct label. I find on balance that it is, it is a fine distinction however the reason for dismissal was not in the event the Claimant's conduct, which the Respondent decided, given the mitigation did not warrant dismissal. The reason for dismissal was the risk to service users of returning the Claimant to her role as Service Manager. The Respondent no longer had trust and confidence in the Claimant to carry out the responsibilities of a Service Manager while accepting that there was mitigation that warranted a lesser sanction than termination.

297. I do not accept the submissions of Counsel that SOSR cannot apply in this case because it does not involve a reorganisation. That is too simplistic an approach to SOSR which can cover any reason outside of section 98 (2) providing that it is a substantial reason. It can cover a breakdown in trust and confidence as in this case.

298. I find that the Respondent has established a potentially fair reason for dismissal namely SOSR.

Did the Respondent follow a fair and reasonable procedure in dismissing the claimant?

The Investigation

299. As the disciplinary proceedings were in relation to conduct and it is the findings of that process which led to the Respondent's decision to dismiss for SOSR, it is relevant to consider the fairness of the process and whether the Respondent had in mind reasonable grounds upon which to sustain the belief that the Claimant had failed to adequately manage the service and compromised service user safety because this is what led to the alleged breakdown in trust and confidence.

300. I am guided by the EAT in **Governing Body of Tubbenden Primary School v Sylvester 2012 ICR D29.** The tribunal at first instance had considered the fairness of the proceedings in relation to the conduct which led to the breakdown in trust and confidence and determined that**;**

"*…we are unanimously of the view that this dismissal cannot be tested solely by reference to whether or not the reason was, in all the circumstances of the case, a sufficient reason to amount to "some other substantial reason". It is our unanimous view that it is essential to fairness in the circumstances of a case such as this that the process by which the Claimant arrived at the position in which her employment was under threat is examined in some detail."*

And

"We were […] of the view that in light of the nature of the allegations against her, each of which was specifically by reference to conduct on the part of the Claimant, that many of the principles applicable to cases where misconduct is alleged were equally applicable to ensure fairness in this case. We could see no good reasons why an employer in the position of the Respondent should be in a position where it might apply a lower standard of procedural fairness to an employee by invoking 'some other substantial reason' for the dismissal when that reason is, in reality, no more than the corollary of some form of conduct to which the employer has taken exception."

The EAT observed as follows;

"Where the substantial reason relied upon is a consequence of conduct (and in this case it can be no other), there is such a clear analogy to a dismissal for conduct itself that it seems to us entirely appropriate that a Tribunal should have regard to the immediate history leading up to the dismissal. The immediate history is that which might be relevant, for

instance, in a conduct case: the suspension; the warnings, or lack of them; the opportunities to recant and the like; the question of the procedure by which the dismissal decision is reached. It cannot, in our view, always and inevitably be trumped simply by the conclusion that there has been a loss of confidence without examining all the circumstances of the case and the substantial merits of the case, as section 98 would require.

38. …if it were to be open to an employer to conclude that he had no confidence in an employee, and if an Employment Tribunal were as a matter of law precluded from examining how that position came about, it would be open to that employer, at least if he could establish that the reason was genuine, to dismiss for any reason or none in much the same way as he could have done at common law before legislation in 1971 introduced the right not to be unfairly dismissed. Lord Reid in Ridge v Baldwin [1964] AC 60 observed that the law of master and servant was not in doubt; that an employer could dismiss an employee for any reason or none. It was to prevent the injustice of that that the right not to be unfairly dismissed was introduced. The right depends entirely upon the terms of the statute, but there is every good reason, we think, depending upon the particular facts of the case, for a Tribunal to be prepared to consider the whole of the story insofar as it appears relevant and not artificially, as we would see it, be precluded from considering matters that are relevant, or may be relevant, to fairness.

301. The Appeal Tribunal rejected the argument that when considering a SOSR dismissal for loss of confidence, an employment tribunal was not entitled to have regard to the circumstances leading up to that loss. I shall address the fairness of the procedure which was followed in this case from the conduct proceedings through to the dismissal for SOSR and appeal;

302. The Claimant identified three procedural failings with the investigation itself;

303. With regards to the inviting the Claimant to an informal meeting by telephone on the 29 October, she accepted in cross examination that she was aware that the investigation was in fact a formal process and she prepared a full and detailed statement prior to being interviewed. In cross examination she raised no concern with the telephone interview and raised no issue within her witness statement. I do not find that undermines the fairness of the process.

304. The second issue is that the investigation report was then produced without Ms Randhawa speaking with the Claimant, after having carried out further interviews. The Claimant raised no complaint about this within her witness statement and confirmed in cross examination that this was not a concern for her. The Claimant received the statements before the disciplinary hearing. I do not find that this undermines the fairness of the process.

305. In terms of the third issue; expanding the allegations to the issue around the management of the drug Oramorph; again, the Claimant raised no concerns about this in her evidence before this Tribunal. The investigation had clearly identified that there were grounds to proceed to a disciplinary hearing where this additional allegation could be discussed with the Claimant.

306. The investigation outcome is detailed and sets out the concerns based on the evidence collated. The Claimant has identified no issue with the report itself and indeed confirmed in cross examination that it reflected in full the points that she had wanted to be put forward in mitigation.

307. It was not alleged by the Claimant that the investigation officer should have spoken with any other witnesses.

308. I find that the Respondent had carried out as much investigation as was reasonable in the circumstances.

Disciplinary hearing

309. Ms Tunstall conducted a disciplinary hearing with the Claimant on 12 December 2018. The Claimant complains that Ms Tunstall met and interviewed Lucy Evans on 19 December 2018 but failed to revert to the Claimant to let her know what Ms Evans had said and give her an opportunity to respond before arriving at her decision.

310. The Respondent's disciplinary policy provides that the employee will be provided with all relevant information that the Trust intends to rely upon not less than 3 working days in advance of the hearing (page 131). This failure to provide the Claimant with all relevant information was therefore a breach of the Respondent's own policy.

311. The Claimant was given an opportunity at the appeal hearing to produce documents to rebut what Ms Evans had said about the Claimant not supporting her in managing the performance of the TLs however, she was unable to produce any written record of their discussions. This procedural breach was however rectified at the appeal stage.

312. The Claimant also complains that interviews were conducted with Helen Giblin and Roxanne Rolland after the disciplinary meeting with her, and that she was not given a chance to consider and comment on their further evidence either.

313. Ms Tunstall when communicating in writing the outcome of the disciplinary hearing, informed the Claimant that she had spoken with Ms Giblin about the Claimant's assertion that Ms Giblin had failed to respond to emails from her about the measuring of Oramorph. The Claimant was given the opportunity to address this also in the appeal process but in the event, although there was an email from Ms Rolland referring to Ms Giblin going to call the Claimant, the Claimant conceded that she had not followed up herself with Ms Giblin. It was thus determined that as the Registered Manager, she should have done so. The Claimant therefore did not have anything material to add in response to the evidence of Ms Giblin but was given the opportunity to do so thus remedying this procedural failing.

314. With regards to Ms Rolland, Ms Tunstall refers to discussing with Ms Rolland what supervision the Claimant had received and what support she had received from Ms Rolland. Ms Tunstall refers to Ms Rolland's answers being contained within the content of the outcome letter. It is not satisfactory to fail to clearly identify what the evidence of any witness is however; the Claimant does not assert that any comments within the letter which relate to the support and supervision provided by Mr Rolland are inaccurate.

315. The Claimant in cross examination confirmed that despite not being told in the initial email of the 21 December 2018 that the final written warning was for 18 months, this was confirmed in the letter of the 7 January 2019. The Claimant was also aware that the standard period was 18 months. I do not find that this was anything other than an oversight.

Reasonable Belief

316. I do find that the Respondent formed a reasonable belief that the Claimant had failed to provide management oversight to the service and its staff and failed to manage the service leading to the service user's safety being comprised, as

determined at the disciplinary hearing and set out in the outcome letter of the 7 January 2019. That this reasonable belief was based on the Respondent carrying out as much investigation as was reasonable in the circumstances.

317. In relation to each allegation, as set out in my findings, this was supported by evidence. In connection with most of the allegations the Claimant admitted to the events but her main argument in rebuttal was the volume of work and the problems she inherited on her return from maternity leave.

318. The Claimant crucially admitted to knowing there were gaps in the fluid records for service users and that she had even signed to say, "All ok" when a service users record did not record the fluids she had had and/or refused. The Claimant admitted to not taking steps to identify which members of staff were not completing the records despite the risk this placed service users in.

319. The Claimant had been informed of a grade 3 pressure sore and admitted to still taking a week to report it. Although she maintained that she was waiting for Mr Murray to come back to her, she also accepted that she should not have waited and should have immediately reported it. A grade 3 pressure sore is incredibly serious and as she accepted, put the service user in a 'dangerous' position.

320. The Claimant maintained that she held staff meetings but the evidence did not support this. Ms Evans stated that the Claimant had never organised a staff team meeting and the Claimant could produce no documents/minutes.

321. A service user had been left unsupervised with a workman who had not had a DBS check. The facts were not in dispute and while the Claimant had assumed that the Estates and Property Department had carried one out, she accepted she should not have assumed this. It was also accepted that the service user's fluid charts had not been correctly filled in and that she had not been offered fluids every hour.

322. The Claimant maintained that she was directly involved in managing the serious issues with the TLs and yet the evidence showed that this was delegated to the Assistant Manager and there was no direct intervention by her even when it was clear that their performance was not improving and was putting the service users at risk.

323. The evidence produced during the disciplinary and investigation supports the findings and although there was considerable mitigation, the Claimant was ultimately responsible for the service. The Claimant referred to being overwhelmed with tasks but accepted that she was offered and refused further support.

324. The evidence before this Tribunal, which was not disputed was that the "*main issue"* as described by Ms Tunstall in her witness statement (page 24) was the pressure sore incident. The evidence of Ms Ward was that she understood that the disciplinary proceedings were "*mainly fluid charts and pressure sore case.*" This was not disputed and the evidence of the Claimant was that she accepted the issue with the fluid charts was serious and an act of potential gross misconduct of itself. Ms Tunstall states in her disciplinary outcome letter of 7 January 2019 that;

"*It was the Claimant's lack of personal responsibility* ***around every issue*** *raised with her that made us feel it would be unsafe to return her to being Service Manager at GC or anywhere else within the organisation".*

Appeal

325. There was then an appeal hearing Chaired by Ms Ward. It is clear that this appeal hearing was by way of a review of the original decision.

326. The Claimant was given an opportunity at this hearing to put forward her grounds of appeal and adduce additional evidence in response to the findings of the disciplinary hearing.

327. The Claimant complains only about the failure of Ms Ward to 'properly' consider the imposition of two sanctions. Ms Ward did consider this and could see nothing within the disciplinary policy which prevents two sanctions being applied (indeed the Claimant's case appears to be that it would have been fair to have subjected her to both an EIP and a final written warning rather than demotion) and thus rejected this ground of appeal. There is nothing within the disciplinary policy which stipulates that only one sanction can be imposed.

328. As for the second ground, that Ms Ward did not consider putting the Claimant on an EIP as an alternative, this was not a ground of appeal put forward by the Claimant and thus I do not consider that it was outside the band of reasonable responses for Ms Ward not to consider this. The Claimant herself in cross examination stated that it was not her capability but that she had too much to do. The Claimant had however not asked for help or accepted it when offered, she had an obligation to do so where service users were being put at risk. Counsel for the Respondent put it to the Claimant that it was pride which stopped her from asking for help, whether it was or not, it showed poor judgement.

329. There are no other issues raised within the list of issues in connection with the fairness of this appeal hearing.

Dismissal for SOSR

330. After upholding the disciplinary demotion, Ms Ward arranges a further meeting with the Claimant on 19 March 2019 to discuss whether she is prepared to accept the Assistant Manager role and if she is not, "*the only alternative would be the termination of your employment".*

331. The Claimant does not attend the hearing but prior to the hearing enquires what will be discussed by email of the 14 March 2019. Ms Ward replies informing her that it is to discuss the prospect of her employment being terminated and for her to ask any questions or make representations.

332. The Claimant therefore is given the chance to attend a hearing and make representations, she understands that the Respondent is considering terminating her employment for SOSR and why.

333. Ms Ward's evidence is that in reaching the decision to uphold the demotion and final written warning, she relied on the findings of Ms Tunstall and believed that the Claimant could not return to her role as Service Manager. Ms Ward considered if there were any alternatives to the termination of the Claimant's employment *including* alternative roles.

334. In a case of SOSR, whether alternative employment is available may be a factor in whether it is reasonable to dismiss. I find that it is relevant to this case. I am not concerned with what this tribunal may or may not have done, but with what the Respondent in fact stated that it would do before dismissing.

335. As I have set out in my findings, I find that Ms Ward did not give any consideration to any alternatives; she did not consider for example whether the Claimant could have been offered a temporary transfer into a role with a period of

close supervision or whether there was another job she may have been prepared to accept. The issues with regards to the Respondent's trust and confidence in her ability to work as a Service Manager were not issues of performance and therefore I do not accept that it was unreasonable of the Respondent not to consider placing the Claimant on a EIP as an alternative to removing her from her role, I may however have been combined with a temporary transfer. The Claimant would have required, as Ms Tunstall refers in her outcome letter, to 'unsustainable' levels of monitoring.

336. The Respondent in this case clearly considered that dismissal would not have been necessary if the Claimant had been employed in a different post. I therefore consider that it was a case where having committed to considering alternatives, it was unreasonable for the Respondent not to properly explore alternatives to dismissal. Ms Ward stated that she had intended to do so had the Claimant attended the hearing; there is no evidence however that Ms Ward did so and nor did she explain in advance of the meeting that she was prepared to do so. I do not accept the evidence of Ms Ward on this issue.

337. Ms Ward had committed to considering alternatives but I do not find that she did so. By this stage the Respondent had closed its mind to anything other than the role of Assistant Manager at Victoria House. Ms Ward did not inform herself of what other roles were available and no information was provided to the Claimant.

Appeal against SOSR dismissal

338. The Claimant appealed the decision terminating her employment but asked that it would be done by written representations. The appeal was submitted on the 25 March 2019. At no point within that email does the Claimant refuse to provide further information or answer questions.

339. The Claimant received a brief acknowledgement to her email but she was not told that the panel were planning to meet on 1 April.

340. The inclusion of Victoria Pilkington as a panel member, given that there was a dispute between her and the Claimant about what had been said during an assurance call, gave rise to an obvious conflict and risk of bias. The Claimant was not informed that Ms Pilkington would be a panel member and was given no opportunity to make representations. Ms Bygrave's evidence was that as there was no proof that Ms Pilkington had made the alleged comment, she discounted it. I struggle to understand her reasoning. Ms Pilkington had been accused of making a comment by the Claimant which she denied making, this give rise to an obvious conflict. The Acas code provides that an appeal should be heard by someone who has not been involved previously in the matter, while the Acas Code may have no application to this appeal against an SOSR, the principle is based on general fairness.

341. Ms Bygrave is critical in the outcome letter of the Claimant not attending or providing more details in support of her appeal, however Ms Bygrave did not explain in her statement or evidence why she did not contact the Claimant to give her the chance to provide further details if she felt these would be helpful.

342. Ms Bygrave made comments in the outcome letter about alternatives to dismissal having been considered by Ms Ward during the appeal however, I find that all Ms Bygrave did was take Ms Ward's outcome letter at face value without investigating what steps had actually been taken to consider alternatives. Both Ms Ward and Ms Bygrave committed to considering alternatives to dismissal but both failed completely to do so.

343. The Respondent failed to consider alternatives to dismissal despite agreeing to do so, there may have been no roles suitable and no other options available to it, but they failed to carry out any reasonable investigation into alternatives before deciding to dismiss for SOSR. I find that even though the Respondent formed a reasonable belief that the Claimant was guilty of misconduct, based on reasonable grounds after carrying out as much investigation as was reasonable and formed a reasonable belief that there had been a breakdown in trust and confidence such that it considered allowing the Claimant to work as a Service Manager would place service users at risk, it was not when the band of reasonable responses to dismiss for SOSR in circumstance where they committed to considering alternatives but failed to do so.

344. There was scant evidence put before this tribunal of what jobs may have been available. There was a schedule of jobs but it remained unclear when this was produced and for what purpose. Ms Ward commented on it but was vague about the document and had not referred to it when she had made the decision to dismiss.

345. I am mindful that there may have been no alternatives to offer the Claimant however, this was not explored before dismissal and therefore whether it would have made a difference is a matter for remedy.

346. Although the tribunal explored with Ms Bygrave and the Claimant whether she could have been transferred to another type of service, this was not at any point during the internal proceedings raised as an option. Further, although the Claimant's evidence is that she had transferable skills, she did not identify any role below Service Manager in those centres which she could have been considered for and which she would have been willing to accept.

347. Although a temporary transfer was not considered and may have been more attractive to the Claimant, this was not suggested by her during the appeal process. At no point during the giving of her evidence did she state that she would have considered a temporary transfer to a more junior role, if offered to her.

348. The Respondent did not act reasonably in dismissing for SOSR on 19 March 2018, taking all the circumstances into account.

Contributory Fault

349. I have considered carefully to what if any extent, the Claimant caused or contributed to her dismissal. Although there were mitigating circumstances surrounding many of the allegations, the most serious allegation involved the failings with the care of the service user with the grade 3 pressure sore and the fluid charts. The Claimant accepts this was a serious matter which was potentially an act of gross misconduct and put a vulnerable person at risk. The Claimant was offered more support but to the detriment of the welfare of the service users, declined it.

350. I find that although that the dismissal was unfair because of a failure to consider alternatives before dismissing and on appeal, the Claimant by her own admission in cross examination before this tribunal, admitted that what she had done was potentially gross misconduct and put the service user in danger. The Claimant did not deny that she had failed to check fluid charts correctly and that she had signed to say "*All ok*" when important information had been omitted. The Claimant had also during the internal proceedings admitted that she should have reported the grade 3 pressure sore immediately as soon as she became aware of it.

351. The issue with the fluid charts and pressure sore was serious, it was according to Ms Tunstall and Ms Ward the most important consideration and it is the case, that the Claimant's failings put at risk the welfare, if not the life, of that vulnerable person.

352. The Claimant was the Registered Manager, she was ultimately accountable for the care that was delivered to GC. Her conduct is without doubt blameworthy.

353. The Claimant's conduct in relation to the fluid charts alone, breached the Respondent's disciplinary policy in that it was behaviour which compromised service user "*trust, care or safety".* It was also a breach of The Skills for Care Code of Conduct for Healthcare Support Workers and Adult Social Care Workers in England (the "Code") and specifically Appendix 39 in that she failed to; *"report any actions or omissions by yourself or colleagues that you feel may compromise the safety or care of people who use health and care services"* and the requirement to *"work in collaboration with your colleagues to ensure the delivery of high quality, safe and compassionate healthcare, care and support"* and the obligation to "*maintain clear and accurate records of the healthcare, care and support you provide".*

354. The Claimant's conduct including in respect of other issues beyond the care of the service user with the pressure, in which the Respondent held a reasonable belief as to her guilt, led directly to the breakdown in trust and confidence.

355. I must consider what would be just and equitable in the circumstances.

356. I consider in this case that the Claimant was substantially to blame for the termination of her employment on the 19 March 2018 and find that that the correct reduction to the basic award and the compensatory award is 75%.

Polkey

357. The Claimant was not prepared to accept an Assistant Manager role. The Respondent did not disclose to the Claimant the roles available however the Claimant herself had not identified (either during the internal proceedings or these tribunal proceedings) any positions below Service Manager she would have been prepared to accept. The Claimant had not herself raised as an option a temporary transfer as something she would have considered although this was not an option raised by the Respondent either.

358. The parties will be given the opportunity at the remedy hearing to make submissions on Polkey in light of these findings.

359. The matter will be set down for a one-day remedy hearing to determine the compensation to be awarded.

Employment Judge Broughton

Date: 18 February 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE