Case Number: 3319914/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms J Boateng	v	Sequence Care Group Limited

Heard at: Watford **On**: 1-3 and 8 July 2020

Before: Employment Judge Hyams **Members:** Mr I Bone
Ms I Sood

Appearances:

For the claimant: Ms Tara Grossman, solicitor, of Litigation Friend
For the respondent: Mr Jack Duffy, of counsel

JUDGMENT

1. The claimant's claim of unfair dismissal does not succeed: she was not dismissed unfairly.

3. The claimant was not discriminated against by the respondent contrary to sections 15 and 39 of the Equality Act 2010.

REASONS

The claim and the procedure which we followed

1 The claim as originally made was apparently purely of unfair dismissal, contrary to sections 94 and 98 of the Employment Rights Act 1996 ("ERA 1996"). The claimant was dismissed summarily for what the respondent characterised as gross misconduct, but the claimant did not claim that she had been dismissed wrongfully.

2 At the start of the hearing before Employment Judge Hyams ("the judge") sitting alone on 1 July 2020, an application was made on behalf of the claimant by Ms Grossman, who was assisted by Mr Jake Filson, a non-practising solicitor, both of

whom were acting pro bono (and for whose assistance the tribunal was very grateful), to amend the claim to add a claim of disability discrimination within the meaning of the Equality Act 2010 ("EqA 2010"). The disability on which the claimant relied was Multiple Sclerosis ("MS").

3 The judge referred the parties to the main helpful case on the approach to take to applications to amend claims, *Abercrombie v Aga Rangemaster Ltd* [2014] ICR 209, and in particular paragraphs 47-51 of the judgment of Underhill LJ (with which Kitchin LJ and Sir Terence Etherton QC agreed) and adjourned the hearing so that he could read at least the relevant documents and the witness statements. He adjourned the hearing in order to assess the extent to which the proposed amendment would, if it were permitted to be made, widen the factual inquiry required.

4 Having done that and having resumed the hearing, the judge decided to permit the claimant to add a claim of discrimination within the meaning of section 15 of the EqA 2010, contrary to section 39 of that Act. That was in relation only to the claimant's dismissal, which it was claimed was not a proportionate means of achieving a legitimate aim. The judge's reasons for permitting the amendment were that it involved in reality the addition of a label to the conduct which was already the subject of the claim, namely the claimant's dismissal, and that the balance of hardship and inconvenience fell firmly in favour of the claimant in the circumstance that it would be possible for the respondent to add to its witnesses' evidence before the resumption of the hearing with the necessary additional members of the tribunal. That was on the basis that the hearing of 1 July 2020 ended at approximately 3pm and the substantive hearing was to start (with lay members in addition to the judge) at 12 noon on the following day.

5 On 2 July 2020, we (the tribunal) concluded that we would decide the question of liability first, and that we would decide whether the claimant had in fact done those things for which she was dismissed only if her either or both of her claims succeeded. We did not have enough time to conclude the hearing on 3 July 2020, and we adjourned the hearing to 8 July 2020 when we reconvened to hear the parties' submissions and to deliberate and form our conclusions. Both parties' representatives very helpfully put before us full written submissions in advance of the start of the hearing on 8 July and supplemented them with pithy oral submissions. We were grateful to both Ms Grossman and Mr Duffy for their assistance.

6 We state the issues in more detail below, after making our findings of fact concerning the circumstances which gave rise to the claim.

The evidence

7 We heard oral evidence from the claimant on her own behalf and, for the respondent, from (1) Mr Russell Day, who was at the time of the events in question the respondent's Head of Quality and Performance, (2) Mr Robert Dalrymple, the

respondent's Chief Operating Officer, and (3) Mr Tony Hegerty, who was at the material times the respondent's Director of Quality & Operations. We were referred to the contents of a 259-page hearing bundle, and several other relevant documents. Having done so, we made the following findings of fact.

The facts

8 The claimant was employed by the respondent at the time of her dismissal as the Registered Manager of a residential social care unit, catering for adults with special educational and social care needs. That unit was called Park House and was situated in Crouch End, which is in the area of the London Borough of Haringey ("Haringey"). The residents can exhibit extremely challenging behaviour. In paragraph 14 of her witness statement, the claimant said this:

> "The Unit I managed at the time (Park House) had the living, capacity for 6 residents. We had service users and this is their home where they will reside 24 hours a day for 7 days of the week. The service users have the follow[ing] types of conditions Learning disabilities, Prader-Willi Syndrome, Autism, Schizophrenia, and Bipolar, associated with challenging behaviours. Challenging behaviour would include Service Users, kicking, punching, slapping, pinching, scratching, spitting, and swearing. There would be reports of 1 or 2 incidents per day. When the unit is at full capacity of 6 service users there would 4-5 members of staff working and shifts would begin at 8am and end at 10pm."

9 We accepted that part of the claimant's evidence. We accepted the rest of that paragraph with reservations. It was as follows:

> "My role had me working in the office all-day, every day. When I was not in the unit, it would run as normal and there would be Shift Leaders, (senior staff members) that would run and manage the shift during the day and night. It is rarely ever a task for managers to get involved in the daily allocation and running of the unit. After 5pm the On Call manager takes over from the Day Manager of the Unit. The on Call manager is available to be contacted with any types of issues that arise in the unit between the hours of 5pm-8am the following morning."

10 Our reservations related to the extent to which the claimant could, consistently with her contractual obligations to the respondent, leave the running of the unit to the Shift Leaders and/or the On Call Manager. Our reservations will be apparent from what we say below.

11 The respondent as a company at the time of the claimant's dismissal employed about 400 employees in total and had 22 or 23 locations at which services were provided.

12 The claimant commenced her employment with the respondent in August 2014, when she was employed as a Service Support Officer. After about a year, she was promoted to the role of Deputy Manager of a service in Waltham Abbey. Approximately a year and a half later, the claimant was appointed to the post of Registered Manager of Park House. The term “Registered Manager” is used because the manager of a unit such as Park House must be registered with the Care Quality Commission (“CQC”) as the manager of the unit. The CQC interviews a proposed Registered Manager and the proposed Registered Manager needs to have acquired a particular level of qualification in the relevant area of expertise.

13 The claimant had, at the time of her dismissal, a clean disciplinary record. She also had a good work record, not least because late in 2018, as she said in paragraph 4 of her witness statement, her “team at Park House was the 1st unit in Sequence Care Group to achieve 100% score rating ... within our Quality Assurance Framework”.

14 The respondent’s managers were given the choice of 8am to 4pm or 9am to 5pm as their daily working hours. The claimant chose the former.

15 The claimant was diagnosed with MS in 2016. At that time she told the respondent’s Human Resources (“HR”) Manager, Ms Payal Puri, about that diagnosis.

16 The claimant was on maternity leave until August 2018. On her return, she found that she was experiencing particular fatigue. She discussed that fatigue with Ms Puri. The claimant’s description of that discussion was in paragraph 5 of her witness statement as follows (which we accepted):

> “this took place at her desk in head office. I discussed with Payal that I would like to make arrangements to work from home on Fridays and when I needed to. Payal explained that this would not be a problem as other managers also worked from home. Working from home mainly took place on Fridays, due to me becoming extremely exhausted towards the end of the week. It helped me to work from home amongst others so I didn’t have to travel.”

17 In paragraph 7 of her witness statement, the claimant said this:

> “I would like to make you aware of the conditions I was subjected to leading up to the incident that took place. For several months and in the time leading up to my dismissal my ability to fulfil my duties was severely hindered by the lack of support from my Operations manage[r], Laurence Levy, who did not support me, who was aware of the hardship that I was going through and had also contributed to it by removing my first team leader and placing in another unit without discussing with me prior. The conditions were as follows:
>
> - I had no Deputy Manager due to him having been on suspension for 10 months

- My 1st Team Leader was removed from my unit without my permission, this decision was made by Laurence Levy.
- My 2nd Team Leader was on Annual leave for just under 4 weeks, 1st January and 31st January.
- Personal issues such as the loss of my dear Father months prior and a miscarriage weeks before, had left me struggling personally and trying to get access to counselling services through my GP."

18 We accepted that the claimant's team was reduced in size to the extent that she stated, but she in turn accepted that the number of residents at Park House was at the time of the events which led to her dismissal 5, and that it was soon going to reduce to 4. It was Mr Hegarty's evidence that the claimant was not "under-resourced" in those circumstances. Whether or not the claimant was "under-resourced" was not determinative, for the reasons stated below, so we make no specific finding in that regard beyond saying that we accepted Mr Hegarty's evidence that it was his genuine view that the claimant was not "under-resourced" in the circumstances which led to her dismissal.

<u>The events of 10 January 2019 and their immediate aftermath</u>

19 On Thursday 10 January 2019, the claimant started work at her usual time of 8.00am. The office room in which she was based was being changed, and work was being done on both the room in which she was usually based and the one to which the office was being moved (a larger one at the front of the building). The claimant was that day working on rota amendments and (as she said in paragraph 16 of her witness statement) "a long CQC document that [she] needed to complete on or around 4 February."

20 The claimant's description in paragraphs 17-20 of her witness statement was in line with the contemporaneous documents to which we refer below, and it was of particular importance in our deliberations. We therefore set out those paragraphs in full:

> '17. At or around 10am, Sylvester Igbokwe (Senior Support worker at the Unit) ("Sylvester") came into my office and said something along the lines of Armani was giving personal care to [a service user whose initials are] LS and she found bruising on his body. I asked Sylvester to take pictures of the bruising on his phone and come and show me but he said that his phone memory was full so I asked Sylvester to bring LS to see me. Sylvester brought LS in to see me. Sylvester showed me the bruises. They were on the lower part of LS's back/upper part of his bum. He also had a mark on the left side of his face. Sylvester and I asked LS questions about what happened to him. LS said "he didn't know".
>
> 18. I asked Sylvester if he knew what had happened but he did not. I asked Sylvester whether there was any documentation (e.g. an Accident Incident Form ("AIR") or START FORM ("START") form in relation to this

bruising. An AIR form is used when there has been an accident involving a resident. A START form is recording a behavioural incident or mishap. Sylvester said that he would check. I told Sylvester that all bruising and marks should be documented in an AIR form and that he should book an emergency appointment with LS's GP.

19. Sylvester came back to me after a time and explained that the GP was fully booked that day and they had said call back the next day. I told Sylvester to call 111.

20. I thought at this point that there might be a safeguarding concern in relation to LS. A safeguarding concern is when you are worried about the safety or well-being of a vulnerable adult. Because I did not know how LS had gotten the bruises/marks, I thought that I might need to raise a Safeguarding alert. Safeguarding needs to be raised whenever there is alleged or suspected abuse of a vulnerable adult. We are trained that everyone who works with vulnerable adults is individually responsible for alerting safeguarding concerns to the Council. Raising a Safeguarding alert involves filling out a Safeguarding Form which goes to Haringey Council [Disclosure Document xxx[3]] and a Reg 18 Notification Form [Disclosure document xxx[4]] which goes to the Care Quality Commission (the regulator for the Care Home).'

21 Footnotes 3 and 4 were in these terms:

> "[3] Please note that I was not supplied with this document by the Respondent as part of disclosure. I only received it late in the week before the hearing because I made a subject access request to the Respondent.
> [4] As above – Respondent did not disclose this document to me in the ordinary course of disclosure."

22 The claimant had completed a START form by 12:10pm.

23 The following sequence of events was described by the claimant in paragraphs 23-40 of her witness statement (albeit that in paragraph 33 there is a comment which is not evidence). In paragraphs 41-43 of that statement, the claimant set out the content of several relevant emails to and from Mr Lee. The claimant gave oral evidence in addition about the sequence of events. We were referred in addition to the contents of the documents at pages 44-74 (i.e. pages 44-74 of the hearing bundle; any reference below to a page is to a page of that bundle). We accepted Mr Day's evidence that those documents were created and collated by him at the time, when he carried out the investigation to which we refer below. The claimant did not challenge the content of the documents at pages 44-74, but she did say that she had not seen those documents before the respondent disclosed its documents in the course of these proceedings, which was October 2019. We consider below whether or not she saw those documents before being dismissed, but in the meantime we state our findings of fact about the sequence of the

material events (bearing in mind that at the liability stage in a claim of unfair dismissal what is relevant is what the respondent knew at the time of the claimant's dismissal and that a claim of a breach of section 15 of the EqA 2010 has to be determined at least in the light of, albeit not necessarily solely by reference to, what the respondent knew at the time of the alleged breach).

23.1 Once the claimant had completed the START form, her computer, telephone, printer and internet connection were disconnected. She was then no longer able to do any more office work.

23.2 The claimant spent some time with LS in the unit's lounge area and asked for some classical music to be put on, to help LS calm down. LS then began to doze off. The claimant then told Sylvester and possibly one or two other members of the respondent's staff who were present, including Ms Sophie Lloyd-Smith, that she was going to go home and work there given that she could not continue to work at the office now that her computer, printer, telephone line and internet connection were disconnected. Ms Lloyd-Smith was employed by the respondent as a Speech and Language Therapy Assistant. As such, Ms Lloyd-Smith was a member of the respondent's multi-disciplinary team ("MDT").

23.3 After the claimant had gone home (which was about 45 minutes' drive from Park House), the situation worsened considerably. LS became agitated and violent towards everyone around him, plainly hurting a number of people in the process and plainly being very difficult indeed to deal with. Ms Lloyd-Smith as a result contacted two more senior members of the MDT: Ms Jena Hall (Speech and Language Therapy Lead) and Ms Orla Corbett (Behaviour Lead). As Ms Lloyd-Smith recorded at page 50 (in a note made on or shortly after 10 January 2019):

> "After this I called Juliet [i.e. the claimant] at 13:31 to tell her that the situation had severely worsened since she had gone home. I told her everything that had happened and told her that I had called both Orla and Jena and that they were on their way to the home. During the phone call Juliet didn't say very much or offer any advice and Just asked to speak to Sylvester, however I said he was upstairs with LS."

23.4 Ms Hall and Ms Corbett arrived at Park House at about 13:45. Shortly after they arrived, Ms Hall asked what was wrong with LS, and LS turned to her and said: "Adi hit me last night" (see page 54).

23.5 At 13:56, as Ms Lloyd-Smith recorded on page 50, the claimant called back and asked to speak to Sylvester, so Ms Lloyd-Smith gave Sylvester the telephone and he spoke to the claimant in another part of the building. He returned after about 5 minutes and gave the telephone to Ms Lloyd-Smith. Ms Lloyd-Smith's contemporaneous note continues (still on page 50):

> "Juliet said to me that too many MDT at the home trigger the service user's behaviour and that she was going to speak to Orla about only one MDT member coming per day. I told her that that morning LS had not even seen me because I went straight upstairs to work, so the only MDT member he had seen was Jyoti."

23.6 At 14:21, the claimant sent the email at page 215 to her line manager, Mr Rennie Lee. In it, she said this (and only this):

> "Hello Rennie
>
> Works are currently being carried out in my office and all equipment has been moved to new office. Due to No PC and telephone I have gone home to work.
>
> Kind regards"

23.7 Two minutes later, Mr Lee wrote back (also on page 215):

> "Hi Juliet,
>
> Hope you are ok.
>
> There is a problem at Park- could you call them, regarding an incident of aggression.
>
> Could you also send over the absence record from the 24th Dec to date for Sue. Asap."

23.8 A minute later (at 14:24; page 214), the claimant responded:

> "Hi Rennie
>
> I am aware as I am in talks with my unit of the current situation.
>
> Regards"

23.9 He responded (at 14:26, at the top of page 214): "Keep me updated, ta."

23.10 The next thing that happened was that at 14:53 Mr Lee sent the email at pages 203-204, which was in these terms:

> "Hi Juliet,
>
> The situation is out of control over in Park House,

Who is in charge i.e senior?

There is an allegation of harm from [LS] against Ade the night worker. Jena has reported bruising all over [LS] and a cut, no reports or info with how this happened.

Please action the following:

-Ade to be suspended immediately.
- With what Jena has explained to me, [LS] is also looking unwell mentally- She will call an ambulance, he needs to be checked /assessed.
- Authorise 1x staff if needed to escort and to monitor the behaviour upon his return if needed- have this in place for a day or so, NO more unless required. contact social worker to let them know of the situation, a further 1 x staff authorised to cover Ade's shifts if he is on rota.
- Chris has asked staff to produce statements.
- Jena is looking for any body maps
- If you can contact SG [i.e. Safeguarding] and send an alert plus a reg 18 [i.e. a notification in accordance with regulation 18 of the Care Quality Commission (Registration) Regulations 2009, SI 2009/3112, to which we refer further below]".

23.11 The claimant's witness statement and oral evidence was to the effect that she then tried to find out what was happening. In paragraph 29 of her witness statement, she said this (which we accept was an accurate description of what occurred so far as it went):

> "After I received that email I desperately tried to find out what was happening. I tried to call Sylvester's personal mobile phone to find out what was happening and I also potentially tried to call Sophie as I had her number on my phone from when she called me. When I got through to Sylvester, I asked to speak to Orla but was told Orla was busy and when I asked to speak to Jena, I was told she was on a call. It felt like they were deliberately avoiding speaking to me."

23.12 The claimant then at 16:29 sent Mr Lee her email at page 202, in which she expressed "how disappointed" she was "with both Jena and Orla regarding there [i.e. their] communication with me on what had been taking place since their arrival at Park House today" and said that she had at that time "no sufficient information on what has taken place".

23.13 In paragraph 21 of her witness statement, the claimant said that she had on that day, 10 January 2019, called Haringey's "general enquiries line to ask (on an anonymous basis) ... how long I had to complete and submit the Safeguarding form." She continued in that paragraph:

> "I usually complete a Safeguarding form straight away but because I did not yet know what had happened to LS, I knew I had to wait until … a medical professional had seen LS. I asked the general enquiries line how long I had to raise the Safeguarding notification, they told me I had 24 hours."

23.14 The claimant did not say that to the respondent at any time before she was dismissed. She said it for the first time in that witness statement, which she sent to the respondent for the first time on Monday 29 June 2020.

23.15 At 08:21 on 11 January 2019, Mr Day was asked by Mr Hegarty to carry out an investigation into the events of the previous day.

23.16 At 11:46 on 11 January 2019 (i.e. more than 24 hours after 10:00 on 10 January 2019), the claimant sent (see page 188) the CQC the regulation 18 notice at pages 189-201 about the situation of LS.

23.17 At 12:18 on the same day, i.e. 32 minutes later, the claimant sent a "safeguarding alert" form to Haringey about the matter (pages 208-213).

23.18 Mr Lee sent some further emails about the situation over the next day, one of which (at pages 206-207, sent at 17:58 on 11 January 2019) was relied on heavily by Ms Grossman, as in it, Mr Lee said this:

> "I have had a conversation with Lene [the head of the MDT] and we will be meeting next week to discuss the above, Juliet wasn't informed with what was going on? Correct? as the Registered Manager she needs to be the first person to [be] notified with anything. Teams really need to make sure the communication flows , as it is far easier to handle a difficult situation. Jena- thank you for talking me through yesterday and Orla-for the later update."

<u>Relevant related and subsequent events</u>

24 On 11 January 2019, Ms Puri referred the claimant to the respondent's occupational health ("OH") service provider (page 75).

25 At 15:00 on that day, Ms Corbett updated a statement that she had written at (she recorded at the top of page 66) 17:15 on 10 January 2019. At page 68, apparently shortly after 14:50, Ms Corbett wrote that she had seen the following things on LS's body:

> "There was a palm sized bruise on his left buttocks cheek, and a palm sized bruise on his right buttocks cheek. These were not identical in size and shape but similar, but were close to identical in colouring (red/pink/dark purple) and

position. There was a thin horizontal bruise connecting the two buttocks bruises on the upper area of his buttocks/lower back, The length of this bruise was 20-30 cms. The colour of the bruises were very intense. There was an old bruise (green/brown) on the lower buttocks area (I think it was on the right hand cheek). There was bruising on outside of his left thigh, and the outside of his right thigh. Both roughly the size of a palm and were red/pink/dark purple in colour. The position of the bruises were in roughly the same area but not identical. The intensity of the bruising was milder on the right side compared to the left thigh."

26 Mr Day's investigation led to the collation of the documents at pages 39-90. At pages 54-65, which was Ms Hall's statement of the events of 10 January 2019 which was evidently written in part on 10 January and otherwise in the following days, Ms Hall recorded that (1) she had called 999 on 10 January 2019 in relation to LS's injuries, (2) an ambulance had attended, and (3) LS had been seen by the paramedic crew of that ambulance who, having seen his bruising, had (as Ms Hall recorded at page 57) said that it looked as if LS had been dragged and asked whether the respondent had any safeguarding concerns. The paramedics had then said that they wanted LS to be checked over by a doctor and LS had gone in the ambulance with Ms Hall and one other staff member to the unit's GP's practice. The GP who saw LS said (as recorded at the top of page 59): "this man has been assaulted" and needed to be seen by a consultant.

27 Ms Hall had then gone with LS in the ambulance to the local accident and emergency department, and when they were there, as recorded by Ms Hall at pages 60-61:

> "The doctor pulled me to one side and said 'I spoke to my manager, I need to call social services, I am very concerned about the cause of these injuries, he has clearly been assaulted, this is a recent trauma to the body, consistent with an assault and I don't feel I am discharging him to a place of safety, have you called the police or raised a safeguarding".

28 On 16 January 2019, Mr Hegarty wrote a statement about his involvement in the events of 10 January 2019 (pages 82-83). One of the things that he recorded he had done on 10 January 2019 was this (on page 82):

> "I emailed JB [i.e. the claimant] expressing my concern that other people were sorting out issues in her service when she is the RM. Sent at 7:34 p.m.
> 'I've just had a call from Lene telling me the Reg 18 for CQC hasn't been done. Can you call me at 9 a.m. tomorrow and explain why not? In a situation like this I would expect the Registered Manager to seek to get a grip of a difficult situation in their service. That includes completing the appropriate notifications in a timely fashion. I have to be honest and say I'm disappointed that other managers in the organisation seem to be responding more quickly to a situation in your service than you are.

Please call me on 07969 277258 at 9 a.m. tomorrow.'"

29 On 17 January 2019, the claimant sent Mr Day a statement of what had happened on 10 January 2019 (pages 73-74). Also on that day, she was invited (see pages 84 and 85) by Ms Puri to an "Investigation Meeting" to discuss the events of 10 January 2019. (The claimant accepted that she had received that written invitation although she did not have a copy of it in the torn envelope to which we refer in paragraph 42 below.) Ms Puri wrote that the allegations were these:

> "It is alleged that you had failed to carry out your duties as a Registered Manager, details of which are allegedly leaving work early on 10th January 2019 despite being aware of the injuries to LS and leaving the service vulnerable. It is also alleged that although you were made aware of the injuries you failed to make the appropriate notifications on the same day."

30 That investigation meeting took place on 24 January 2019. There were notes of it at pages 97-99. On page 97, the claimant was recorded to have said this:

> "I felt annoyed that MDT had come in all guns blazing. I spoke to Orla at about 18pm. I was pissed off and I said to her I will send you the forms and you fill it out."

31 At the top of the following page, the claimant was noted to have said this:

> "Sophie had the decency to call me to let me know what was going on. I was p'd off. It felt like a witch hunt and I was waiting around for calls and I had a 1 year old to feed."

32 On page 99, the following exchange was recorded:

> "RD: Didn't you want to go back and take control of the situation?
>
> JB: MDT always knows best. They would have said we're handling the situation and leave you out."

33 On the following day, the claimant was seen by an OH Adviser whose report was written on 28 January 2019 and was at pages 106-107. In it, the adviser recorded these things:

33.1 "Based on the information obtained today and the fact that Julie[t] had no work absence reported, I believe that her medical issue [i.e. MS] does not impact on her ability to perform the role. She tells me that she is still able to perform all tasks when working from home, please discuss this with Juliet, if you felt that this is not accurate."

33.2 "Based on the information obtained today, I feel that it will be beneficial to Juliet's health if she had the flexibility of working from home when she is tired or fatigued. Based on the history she provided, I believe that being over tired and stressed, could be detrimental to her future health. The current accommodations suits Juliet, as she is not stressed/worried about being over tired and having to attend work (in person)."

34 On 30 January 2019, Mr Day completed a report of his investigation into the situation of 10 January 2019 (pages 108-112). On 1 February 2019, the claimant was invited by letter (at pages 114-115) to a disciplinary meeting concerning the events of 10 January. The claimant said to us that she did not receive that letter because it was not in the torn envelope to which we refer in paragraph 42 below. At page 115, this was said:

> "I also enclose a copy of the company's Disciplinary Procedure, for your information."

35 On 18 February 2019, the claimant was suspended. The suspension was recorded in the letter of that date at page 116. The reasons for the suspension were stated in that letter as follows:

> "We are currently investigating further allegations of a failure to carry out your duties as a Registered Manager and a continued failure to report safeguarding incidents and make the appropriate notifications. It is alleged that on 25th Jan 2019 you were informed of an incident involving a staff member holding a chair against LS and you allegedly failed to take appropriate action and report it to safeguarding. In addition to this it is alleged that on 10th January 2019 you were informed of a medication error which was made by a Senior Support Worker and again this was not followed up or reported as per process."

36 The claimant attended an investigatory meeting on 21 February 2019 to discuss those further allegations. Notes of the meeting were at pages 117-119. Those notes show that the claimant asked to see and was shown a short email chain between Ms Lloyd-Smith and the claimant. We were shown those emails, which were only in the bundle in the form of mobile telephone screenshots. They were in the following terms.

36.1 On 25 January 2019, Ms Lloyd-Smith wrote to the claimant (copying the email to Ms Hall):

> "Hi Juliet,
>
> I hope you've had a good week.
>
> I just wanted to inform you of something I observed on 23/01.

I was informed LS threw his dinner on the floor, and staff requested for me to go up to his room to see. I observed LS on the floor and Jerell had a chair in front/on him that he was holding in place with his foot that was preventing LS from standing up. LS kept kicking his legs and waving his arms and every time he did Jerell crossed them and held them down.

I informed Sylvester of the situation and I just wanted to make sure you were also informed of what happened.

Thanks."

36.2 The claimant had on 27 January 2019 replied (copying Ms Hall into the reply) simply:

"Thank you Sophie. I will address this."

37 In fact, the claimant did nothing more about the email set out in paragraph 36.1 above.

38 The notes of the investigation meeting of 21 February 2019 record that after the claimant was shown those emails, there was the following exchange between her and Mr Day:

RD: ... What did you do to address this?

JB: When this was mentioned to me I can't remember, I have acknowledged it. I remember an email from Jyoti which was similar and said she had seen a chair by LS's door, I addressed this in handover. Immediately after Jyoti's email I made a poster to put outside LS's door about the danger of staff sitting so close to the stairs. Staff have been sitting outside as he was hitting them and to give him privacy as he was masturbating a lot. I can't remember these emails, maybe I got distracted. I can remember Jyoti's email.

RD: So Sophie's email was never addressed?

JB: I can see this email and it says I will address but I don't know.

RD: So you haven't addressed and didn't speak to Sophie?

JB: No

RD: No safeguarding raised?

JB: No. The workload was a lot and I said I needed help. Bright was on leave, Wilson transferred and I didn't get the help I needed from the Op's manager. I can see this email but not read it properly and sent response to appease her.

RD: There was no incident form, no safeguarding, no supervision with the staff following this incident which I have seen on QAF. This is what Sophie rein acted [sic] as what happened with LS (photos shown). There was no evidence of START or AIR forms.

JB: She actually witnessed this and she didn't completed anything?

RD: No she reported it to the shift leader Sylvester at the time. He spoke to Gerel but Sophie didn't hear the conversation.

JB: I have acknowledged the email but honestly can't remember it. I'm racking my brain, remember Jyoti's but not this."

39 The investigation then moved onto the second allegation which had led to the claimant's suspension, concerning a medication error on 10 January 2019. At the end of the meeting, the claimant is recorded to have said that before her annual leave: "someone came and said be careful there is a witch hunt against you from your Op's Manager, there was no support."

40 The allegation that the claimant had wrongly failed to respond to Ms Lloyd-Smith's email set out in paragraph 36.1 above was added to Mr Day's investigation report, and he completed an updated version of it at pages 120-126. In both that report and the first one at pages 108-112, Mr Day listed a number of appendices. In the case of the report at pages 120-126 they included the emails which we have set out in paragraph 36 above. The medication error allegation was not pursued by Mr Day and therefore the respondent.

41 On 27 February 2019, the claimant was invited in a letter sent by Ms Zeira Hussain (pages 127-128) to a disciplinary meeting on 19 March 2019. In the letter, Ms Hussain wrote that a copy of the respondent's disciplinary procedure was enclosed, as were copies of the various statements taken or received by Mr Day in the course of his investigation, and a copy of the final version of the investigation report together with "Any other appendices mentioned in the investigation report".

42 It was the claimant's evidence that she did not receive that letter. That was because she did not have a copy of it in a torn envelope in which she said she had copies of all of the documents which she had received from the respondent or which she had given to the respondent in connection with the disciplinary proceedings which led to her dismissal. However, she accepted that she <u>did</u> receive a letter dated 11 March 2019 of which there was a copy at page 129, in which the date of the disciplinary meeting was changed to 27 March 2019 and in

which it was said that "All other information remains as per the letter dated 27th February 2019." Both letters contained a paragraph in these terms:

> "You have the right to be accompanied at this disciplinary meeting by either a work colleague or trade union official. If you wish to bring a companion, please let me know in advance who will be accompanying you."

43 The planned disciplinary meeting of 27 March 2019 went ahead. It was conducted by Mr Dalrymple as the decision-maker. The meeting was noted at pages 130-132. In relation to the incident of 23 January 2019 reported by Ms Lloyd-Smith to the claimant in her email of 25 January 2019 set out in paragraph 36.1 above, the claimant said this (as noted at page 132):

> "JB: Received email from SLS but did not read it properly. Thought it was the same issue that BV had brought up previously regarding chairs outside LS' room and staff sittind [sic] down outside LS' room.
> Responded to SLS that you would handle it.
>
> RD: So you are not disputing that you did not react accordingly?
> JB: There was a safety element of having a chair outside LS' room. Said to BV that you would look into it."

44 While that note is not crystal clear, since it refers in several places to "you" when it must have been intended to refer to "I", it is clear that the claimant was by then saying that she had read the email set out in paragraph 36.1 above as referring to the email from Jyoti about the chair, to which the claimant referred in the exchange set out in paragraph 38 above.

45 Mr Dalrymple decided that the claimant should be dismissed. His decision was sent to the claimant in the letter dated 9 April 2019 at pages 133-134. Having (1) referred to both allegations of misconduct on the part of the claimant, and (2) recorded the claimant's explanation about the email of 25 January 2019 set out in paragraph 36.1 above (that the claimant "thought [it] was related to something that was previously raised which it wasn't"), the letter included this sentence:

> "After careful consideration I find your explanation unacceptable, I uphold both allegations for not acting to safeguard the service user in both instances."

46 All three of the respondent's witnesses made expanded or additional witness statements between 30 June and 1 July 2020. It was Mr Dalrymple's oral evidence in his second statement (but not his first) that he would not have dismissed the claimant for her conduct on 10 January 2019 if that had been the only matter in issue. In paragraph 16 of his second witness statement, Mr Dalrymple said this:

> "16. In these circumstances, an alternative to dismissal was not appropriate, as safeguarding the adults we support is fundamental to our procedures

and a legal responsibility for a registered manager. I had both a loss of trust with Juliette as I did not believe her response for not acting to the alert on the 25th January and had [also] lost trust that Juliette would effectively safeguard the service users from abuse in the future. Our primary responsibility as an organisation is to safeguard the vulnerable adult[s] we support. By giving Juliette a lesser sanction and enabling her to return to her role as Registered Manager I believe I would have been putting the people we care for at risk, which was not an option."

47 As for the extent to which Mr Dalrymple took into account in deciding that the claimant should be dismissed what had happened on 10 January 2019, he said this in paragraphs 3 and 13 of his second witness statement:

"3. On 10th January 2019 there was an incident at Park House in which a service user had severe unexplained bruising and Juliet, as the Registered Manager, left the service early and did not take the appropriate steps to deal with the situation, including ensuring the safety of the vulnerable adult in question as well as others who also live at the service, report this to the relevant authorities without delay (The CQC and Haringey safeguarding team) and support staff at the service with an unfolding incident causing instability at the service."

"13. During the incident of 10th January, Juliette did not act appropriately to safeguard the alleged victim. This initially was not being investigated for gross misconduct and in isolation would not have led to a decision by me to dismiss."

48 In oral evidence, Mr Dalrymple said that the claimant should have sent a regulation 18 report to the CQC and a safeguarding report to Haringey as soon as the allegation of abuse by a member of staff of LS had been made by LS, in the circumstance that LS had unexplained bruising on him, and that if more information became available later then it could and should simply have been added then.

49 We accepted all that evidence of Mr Dalrymple (in part because of the content of the document to which we refer in paragraphs 54 and 55 below). We considered very carefully whether he was telling the truth, but we found his evidence to have been given carefully and honestly. We also asked ourselves whether, on the balance of probabilities, it was true. In the light of the difficulty of being confused by the clear terms of the email set out in paragraph 36.1 above and of confusing the subject-matter of that email with the situation described by the claimant in the extract set out in paragraph 38 above, we concluded that the evidence of Mr Dalrymple about the real reason for the claimant's dismissal and the justification for it was accurate.

50 The claimant appealed against her dismissal. Her letter of appeal was dated 17 April 2019 and was at pages 135-137. The claimant was invited to an appeal

meeting on 25 April 2019 to be conducted by Mr Hegarty. The letter inviting the claimant to that meeting was dated 18 April 2019 and was at page 138. Ms Hussain wrote in it that she was enclosing the notes from the disciplinary meeting. The appeal meeting was postponed to 9 May 2019. There were notes of it at pages 139-145. The claimant was represented at the meeting by a trade union representative, Ms Rose Mary. Ms Mary did not ask about any apparently missing documents. Mr Hegarty took time to consider the matter. He sent his decision letter on 21 May 2019. There was a copy at page 146. The claimant accepted that she received that letter even though there was no copy of it in the torn envelope to which we refer in paragraph 42 above. Mr Hegarty rejected the claimant's appeal. Although he did not state these things in the letter, he told us (and these things were in his witness statements, albeit that the first one referred only to the failure by the claimant to respond properly to the email from Ms Lloyd-Smith set out in paragraph 36.1 above):

50.1 he would not have dismissed the claimant if the only aspect of her conduct in issue had been what happened on 10 January 2019, and

50.2 he dismissed the claimant because (he said in paragraphs 10 and 11 of his second witness statement)

50.2.1 he "found it very difficult to believe that she had not understood the e-mail from Sophie dated 24/01/19";

50.2.2 he concluded that "she was not telling the truth in the appeal hearing in order to seek to protect herself" and

50.2.3 "As the Nominated Individual [i.e. with a particular responsibility as far as the CQC is concerned], I have to able to trust that Registered Managers will be honest about failings in their service or in their own behaviour. I no longer had, or have, that trust in Juliet's case."

51 We also considered Mr Hegarty's evidence in that regard very carefully. As with Mr Dalrymple, we found that Mr Hegarty's evidence was given carefully and honestly and on the balance of probabilities was true.

<u>Relevant reporting guidance or requirements</u>

52 Regulation 18(1) of the Care Quality Commission (Registration) Regulations 2009, SI 2009/3112 ("the 2009 Regulations") provides that, subject to irrelevant exceptions:

> "the registered person must notify the Commission without delay of the incidents specified in paragraph (2) which occur whilst services are being provided in the carrying on of a regulated activity, or as a consequence of the carrying on of a regulated activity."

53 The incidents referred to in paragraph (2) include "(e) any abuse or allegation of abuse in relation to a service user".

54 At pages 250-258, there was a document of the respondent's entitled "Safeguarding Adults". On pages 254-255 there were reporting requirements where "Abuse [is] suspected observed or alleged". They included this one (in the box at the bottom of page 254):

> "Where the Line Manager, is not the Home Manager, the Home Manager will be informed, so that they may immediately take any action to identify and address risks and decide if a referral is needed. Where more information is required to decide whether to make a referral, this should be done within 24 hours. If it is decided that a referral is required, it must be made immediately or at the latest within 24 hours of the incident. IF IN DOUBT AN IMMEDIATE REFERRAL SHOULD BE MADE."

55 At the top of page 255, this was stated:

> "The Home Manager will ensure that the appropriate regulatory notices are sent without delay and in any event within 24 hours.
>
> - CQC via Reg 17 or Reg 18 form."

Other disciplinary outcomes

56 At page 259, there was a table showing the outcomes of other disciplinary cases. There, it was recorded (about a case about which we heard no evidence) that an employee had been given a "Letter of concern" only for this recorded conduct:

> "Slapping service user on forehead, slapped two members of staff on neck when passing by."

Alternative appeal decision-maker

57 There was one other person of the same seniority as Mr Hegarty and who could in theory have decided the claimant's appeal against her dismissal. That was the respondent's Chief Financial Officer, Mr Burke. It was Mr Hegarty's evidence (which was not challenged) that Mr Burke was not experienced in the management of care services.

Statement of Mr Lee not appended to the reports of Mr Day and not put before the claimant before she was dismissed

58 In the course of his investigation into the events of 10 January 2019, Mr Day obtained or received a statement from Mr Lee. We were given a copy of it. Mr Day

said that it was an error (and by implication an innocent error) not to give the claimant a copy of it before she was dismissed. It was not put before Mr Dalrymple or Mr Hegarty, so they did not take it into account to any extent.

Emails, including between the claimant and Mr Lee, not put before the claimant before she was dismissed

59 The respondent disclosed and gave to the claimant copies of its documents in October 2019. A number of relevant emails were not disclosed to the claimant at that time and were furnished only pursuant to the Data Protection Act or the GDPR. They included the ones between Mr Lee and the claimant which we have set out in paragraphs 23.6 to 23.18 above.

The issues

60 As discussed with the parties on 30 June and 1 July 2020, the issues were these.

Unfair dismissal

60.1 What was the reason, or principal reason, for the claimant's dismissal? Was it a reason within section 98 of the ERA 1996? It was the respondent's case that the reason for the claimant's dismissal was her conduct. If that was indeed the reason for the claimant's dismissal, then the following questions arose.

60.2 Did the persons responsible for deciding that the claimant should be dismissed genuinely believe that the claimant had committed that misconduct?

60.3 Did the respondent conduct a reasonable investigation into the alleged misconduct of the claimant before deciding that she should be dismissed for that conduct, i.e. was that investigation one which it was within the range of reasonable responses of a reasonable employer to conduct? In this regard, the claimant complained of the following things:

60.3.1 Mr Dalrymple did not refer himself to the document at pages 254-255 or regulation 18 of the 2009 Regulations before deciding that the claimant should be dismissed in part for failing to notify the relevant authorities of the bruises on LS and his statement that a member of the respondent's staff had caused them.

60.3.2 Mr Hegarty was not as independent as Mr Burke would have been. In this regard, reliance was placed on paragraph 27 of the ACAS code of practice concerning disciplinary dismissals, which says that the appeal "should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case".

60.3.3 The statement of Mr Lee to which we refer in paragraph 58 above was not given to the claimant before she was dismissed.

60.3.4 The claimant was not given the investigation report of Mr Day or its appendices before she was dismissed, but those documents were relied on by Mr Dalrymple and Mr Hegarty.

60.4 Were there reasonable grounds for the belief of whoever decided that the claimant should be dismissed that the claimant had committed the misconduct for which she was in fact dismissed?

60.5 Was the claimant's dismissal within the range of reasonable responses of a reasonable employer? The claimant claimed that her dismissal was outside the range of reasonable responses for the following reasons.

60.5.1 She was dismissed by Mr Dalrymple in part for going home on 10 January 2019 when that was simply because of the absence of the facilities required by her to work, namely a working computer, printer, telephone and internet access.

60.5.2 She was "severely under resourced" at Park House and had been so for some time by 10 January 2019. The chaos which occurred on 10 January 2019 would not have occurred if that had not been the case, so the claimant's failure to notify the relevant authorities in time was attributable to the respondent's failures. It is the claimant's case that those factors were withheld from Mr Dalrymple.

60.5.3 It was "not shared with Mr Dalrymple ... that Rennie Lee, Juliet's manager that day had instructed Orla to provide Juliet with the information necessary to complete the appropriate Safeguarding and CQC notifications and that Orla had not done that."

<u>Disability discrimination – section 15 of the EqA 2010</u>

60.6 Was the claimant, by being dismissed, treated unfavourably because of something arising in consequence of her disability?

60.7 If so, then was her dismissal a proportionate means of achieving a legitimate aim? In this regard, it was the claimant's case (stated in paragraph 96 of the closing submissions put before us by Ms Grossman) that, while "safeguarding [the respondent's] service users is a legitimate aim":

> "the reason there was a problem with safeguarding at Park House was not due to the Claimant's conduct or even her capability, it was

> due to the lack of resources at Park House, simply put, there were not enough service unit staff. By dismissing the registered manager at Park House, this would not help with the resourcing issue and safeguarding the service users, on the contrary, it simply would have compounded the problem that Sequence Care had."

60.8 In addition, it was the claimant's case (stated in paragraph 97 of Ms Grossman's closing submissions) that:

> "If the Tribunal agrees with the Respondent that the Claimant failed in her safeguarding duties, a lesser measure which could have achieved the Respondent's legitimate aim would have been to send Juliet on a refresher training course regarding her safeguarding obligations."

The relevant case law

61 We were referred by both parties to a number of reported cases. We took them fully into account in arriving at our conclusions on the results of the application of the law to the facts as found by us. In addition, we took into account (1) the decision of the House of Lords in *Smith v Glasgow City District Council* [1987] ICR 796 and (2) *Paul v East Surrey District Health Authority* [1995] IRLR 305. Our findings on the facts meant that there was in our view no need to refer to the case law in detail in these reasons.

The parties' submissions

62 Similarly, we do not rehearse the parties' submissions here. These reasons are already rather long, and the parties' submissions were lengthy. If we do not refer specifically in these reasons to a submission made by a party, it is because we did not see it as being necessary to do so, either because on our findings of fact the submission was in our view not applicable, or because after discussion with the relevant representative, it was not pressed.

Our conclusions

Unfair dismissal

The real reason for the claimant's dismissal

63 We concluded that the real principal reason for the claimant's dismissal was her conduct, and in particular her conduct in response to, and in regard to, the matter raised by Ms Lloyd-Smith in the email set out in paragraph 36.1 above. While part of the claimant's response to that email was to do nothing, which was capable of being categorised as negligence rather than conduct,

63.1 that negligence was in our view gross, which meant that it was capable of being regarded as falling within the usual definition of "gross misconduct", but in any event,

63.2 the main reason why both Mr Dalrymple and Mr Hegarty dismissed the claimant was that they did not believe that she had told them the truth about her response to the email set out in paragraph 36.1 above.

64 Further, and in any event, in our view gross negligence is capable of being regarded as falling within the meaning of the word "conduct" in section 98(2)(b) of the ERA 1996, but even if it does not do so, then such negligence plainly falls within the meaning of the word "capability" as used in section 98(2)(a) of that Act.

65 Accordingly, the claimant's dismissal was for a fair reason, i.e. one which fell within section 98 of the ERA 1996.

66 For the avoidance of doubt, we concluded that Mr Dalrymple did not dismiss the claimant to any extent because she went home on 10 January 2019. If and to the extent that he dismissed her for the events of 10 January 2019, it was for what she did not do by way of supporting the staff of Park House and reporting the incidents/situation in a timely way to the CQC and Haringey.

Genuine belief and reasonable grounds

67 Both Mr Dalrymple and Mr Hegarty genuinely believed that the claimant had committed the misconduct for which she was dismissed. We had no doubt that they had reasonable grounds for doing so.

Fair procedure

68 We concluded that, overall, the procedure followed in deciding to dismiss the claimant was not outside the range of reasonable responses of a reasonable employer. The failure to give the claimant the statement of Mr Lee to which we refer in paragraph 58 above before deciding that she should be dismissed was unfortunate, but it was, we concluded, a genuine oversight by Mr Day and was in the circumstances not material. We did not see the statement as exonerating the claimant in any way significant way, as it was asserted on behalf of the claimant during submissions and in cross-examination. We also saw that statement as containing (as it was submitted by Mr Duffy in paragraphs 39 and 40 of his written closing submissions) something that actually did some harm to the claimant's case in the disciplinary proceedings. In any event, the content of the statement was in our view far outweighed as far as the factual matter was concerned by the other material in the possession of the respondent. For the avoidance of doubt, we did not see anything in the emails between Mr Lee and other members of the

respondent's staff (including the claimant) which were obtained by the claimant only pursuant to a subject access request and which were not put before Mr Dalrymple or Mr Hegarty, as containing anything which in any way (or at least in any significant or material way) exonerated the claimant.

69 We concluded also that the claimant was given the investigation report of Mr Day and all of its appendices, as well as the respondent's disciplinary procedure. We did so on the balance of probabilities, and taking into account the following facts.

69.1 The first time that the claimant said that she had not received those documents was on 1 July 2020. She did not say, when she saw them in October 2019 when they were disclosed to her by the respondent in the course of these proceedings, that she had not seen them previously.

69.2 The letter of 1 February 2019 at page 115 referred to the respondent's disciplinary procedure as being enclosed with it. It is true that the claimant now says that she did not see that letter at the time, and in that regard relies on the fact that it was not at the time of the hearing before us in the torn envelope to which we refer in paragraph 42 above, but given the factor referred to in paragraph 69.5 below, that absence was plainly not conclusive.

69.3 The respondent's disciplinary procedure as well as the investigation report and its appendices were referred to in the letter of 27 February 2019 at pages 127-128 to which we refer in paragraph 41 above.

69.4 The claimant accepted that she received the letter of 11 March 2019 to which we refer in paragraph 42 above, but did not then ask about the letter of 27 February 2019 which she now says she did not receive.

69.5 The claimant accepted that she had seen (1) the investigatory meeting invitation letter at pages 84-85 and (2) the appeal dismissal letter at page 146, even though she did not have copies of them in the torn envelope to which we refer in paragraph 42 above.

70 We concluded that the fact that Mr Dalrymple did not refer himself specifically to the document at pages 254-255 or regulation 18 of the 2009 Regulations did not make the process followed unfair: he had in mind the relevant requirements, and the claimant either knew them, or plainly should have known them. In our view they were, or should have been, part of the claimant's 'mental furniture' as the Registered Manager of Park House.

71 As for the facts that

71.1 Mr Hegerty had himself been involved in some way in the events of 10 January 2019 as recorded in paragraph 28 above and

71.2 there was a truly independent decision-maker available in the form of (see paragraph 57 above) Mr Burke,

we accepted Mr Duffy's submission that Mr Hegarty had no involvement at all in the investigation into the email exchange recorded in paragraph 36 above, which meant that in regard to the principal reason for the claimant's dismissal, Mr Hegarty was independent. However, we also concluded that (as it was also submitted by Mr Duffy) it was not outside the range of reasonable responses of a reasonable employer to have Mr Hegarty, who knew much about the business of a care services provider, rather than Mr Burke, who knew rather less about such business, deciding the claimant's appeal.

Was the claimant's dismissal within the range of reasonable responses of a reasonable employer?

72 Equally, we had no doubt that the claimant's dismissal was within the range of reasonable responses of a reasonable employer. Mr Hegarty's reasons for dismissing the claimant's appeal as set out in paragraph 50.2 above were, in our view, well within the range of reasonable responses of a reasonable employer.

73 If and to the extent that it was pressed (which it was, but only faintly, in paragraph 54 of Ms Grossman's closing submissions) that it was outside the range of reasonable responses of a reasonable employer to dismiss the claimant for what she did but not dismiss an employee for the physical abuse referred to in paragraph 56 above, we took into account the decision of the Court of Appeal in *Paul v East Surrey District Health Authority* which was to the effect that the circumstances of another case had to be truly comparable for it to be open to us to take them into account, and we heard nothing about those circumstances. In fact, the sometimes extremely challenging behaviour of some of the service users catered for by the respondent might have been a relevant factor in that other case, but in any event, what was in issue for us was whether on the facts of this case, the claimant's dismissal was outside the range of reasonable responses of a reasonable employer.

74 For the avoidance of doubt, the factors relied on by the claimant as set out in paragraph 60.5 above were in our view not such as to justify, let alone require, the conclusion that the claimant's dismissal was outside the range of reasonable responses of a reasonable employer. That is for the following reasons, taking those factors in the order set out in paragraph 60.5 above:

74.1 To the extent that the claimant was dismissed by Mr Dalrymple in part because of the events of 10 January 2019, he did that because of what she did not do, or did not to in a timely way, in relation to the safeguarding of LS.

74.2 What the claimant did or did not do on 10 January 2019 was unaffected by the number of staff at Park House. In any event, the claimant's case that the unit was under-resourced was stated by the claimant to Mr Day at the end of his investigation meeting with her of 21 February 2019 as we record in paragraph 39 above ("there was no support"), and the note of that meeting was before Mr Dalrymple. In addition, it was open to the claimant to say to Mr Dalrymple that she thought that a lack of staffing had led to the difficult situation of 10 January 2019, but she did not do so, which was explicable by reference to the fact that (as can be seen from what we say in paragraphs 23.5, 30 and 32 above) she blamed the MDT for exaggerating and making the situation worse.

74.3 Whatever Mr Lee did by way of asking Ms Corbett to do any of the necessary safeguarding reports, the claimant was well aware of the need to do them, as she recorded in paragraph 20 of her witness statement, which we have set out in our paragraph 20 above. In addition, even if she could reasonably wait for further information before sending the reports which, given our acceptance (in paragraphs 47-49 above) of paragraph 3 of Mr Dalrymple's second witness statement and related oral evidence, we did not accept, she did not (see paragraphs 23.16 and 23.17 above) comply even with her own self-imposed time limit of 24 hours.

Disability discrimination

75 We concluded that the claimant was not dismissed to any extent because of something arising in consequence of her disability: she was dismissed for not telling the truth by accepting that she had genuinely forgotten to deal with the email of Ms Lloyd-Smith set out in paragraph 36.1 above. Instead, she had made up an excuse which did not bear scrutiny and was not true. Doing that had nothing to do with, i.e. it did not arise from, her disability of MS.

76 If we had come to the conclusion that the claimant had been dismissed to any extent because of something arising in consequence of her disability, then we would have concluded that her dismissal was not a disproportionate means of achieving a legitimate aim. That is because it would not in the circumstances have been disproportionate to dismiss the claimant for (if it had been the case) failing to take appropriate care for the safety of LS because of a lack of concentration and forgetfulness caused by her MS. That is because in our view the safety of the vulnerable service users of the respondent had to be of paramount importance when put into the balance and determining what was proportionate.

77 For all of those reasons, the claimant's claims did not succeed and had to be dismissed.

78 We add one comment: we could see that the sometimes extremely challenging behaviour of the service users at Park House was a strong mitigating factor, and

the claimant's general tiredness, not least because she had a one-year old child at home and had MS, was another such factor. However, they were not such as to make the claimant's dismissal unfair or in breach of section 15 of the EqA 2010.

____
Employment Judge Hyams
Date: 29 July 2020

JUDGMENT SENT TO THE PARTIES ON

18 August 2020

....
FOR THE TRIBUNAL OFFICE