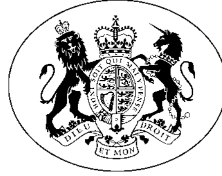

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms A Uzuegbu		Hestia Housing and Support Limited

Heard at: London Central **On**: 12 and 13 November 2020

Before: Employment Judge Stout

Representations
For the claimant: In person
For the respondent: Mr S Crawford

JUDGMENT

The judgment of the Tribunal is that the Claimant's claim of unfair dismissal under Part X of the Employment Rights Act 1996 is well-founded.

REASONS

1. Ms Uzuegbu (the Claimant) was employed by Hestia Housing and Support Limited (the Respondent) from 14 January 2008 until she was dismissed for what the Respondent says was gross misconduct on 5 December 2019. The Claimant claims that her dismissal was unfair contrary to Part X of the Employment Relations Act 1996 (ERA 1996).

The type of hearing

2. This was an in-person hearing. It was listed for three days but completed in two, finishing late on the second day because the Claimant had a medical

appointment on what was to have been the third day of the hearing. I reserved my judgment. I apologise to the parties for the delay in promulgating this judgment, which was owing in part to our late finish, and also to the fact that I unfortunately had to start a long case on what would have been the third day of the hearing of this matter.

The name of the Respondent

3. I have identified the Respondent in this judgment as being Hestia Housing and Support Limited, although the Claimant's contract does not identify that her employment is with the limited company, and the parties in their claim and response did not refer to the limited company. Regrettably, I did not notice this issue at the hearing. If I have made an error in the name of the Respondent, the parties may seek reconsideration of that at the Remedy Hearing.

The issues

4. The issues to be determined at this hearing were agreed to be as follows:-

   (1) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the ERA 1996? The Respondent asserts that it was a reason relating to the Claimant's conduct or some other substantial reason (irretrievable breakdown in trust and confidence between the parties).

   (2) If so, was the dismissal fair or unfair in accordance with ERA 1996 section 98(4), and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'?

   (3) What, if any, deduction or limitation should be made to the award to reflect the chance or probability that the Claimant would have been lawfully dismissed either at the time of dismissal or later had the Respondent followed a fair procedure (*Polkey*)?

5. The third issue above was not an issue pleaded by the Respondent, but it was raised on the face of the Respondent's witness statements because after the Claimant's dismissal they had discovered that she was working for another company occasionally while also working for them and they said that they would have dismissed her in any event because of this. The Claimant agreed that this was an allegation that she could answer in her evidence and so I permitted the Respondent to amend its case in this respect and indicated that I considered it was an appropriate issue to be determined as part of this hearing on liability.

The Evidence and Hearing

6. The Respondent had prepared a bundle running to 520 pages which I had in both hard copy and electronic format. As the Claimant was unrepresented I read the whole of the bundle rather than expecting the parties to take me to relevant parts as is the norm in other cases. After I had completed my reading, I noted that my hard copy bundle was missing about 70 pages of documents that were in the electronic bundle. The Claimant thought that her bundle was missing those pages too, so she was given a different, complete bundle, by the Respondent and I then went through each of the missing pages with her to check whether she had seen them before. There were about 10 pages beginning with each of pages 116, 123, 127, 147-8, 155, 164 and 168 that the Claimant did not appear to recognise and so I gave her time to read these before we started the evidence. Later in the hearing, it transpired that the Claimant's original bundle had had those 70 pages in it, they had only been missing from my bundle.

7. I record all of this only because it illustrates the extent to which the Claimant in this case evidently struggles to read, remember and deal with paperwork. This is a point that is of some relevance to the issues of liability that I have had to decide. It is also material to the way that I conducted the hearing, given my duty under the over-riding objective in Rule 2 to ensure that, so far as possible (consistent always with fairness and justice) the parties are on an equal footing.

8. The Claimant in this case was not represented at any point during the disciplinary process or in these proceedings. In her ET1 the Claimant alleged that the matters for which she had been dismissed were allegations that had only been made by her colleagues in retaliation for her (i.e. the Claimant) having raised a grievance against a colleague. She further complained that she had not had regular supervisions from her line manager, that she was very stressed during the disciplinary process, that the real reason for dismissal was her mobility problems (her discrimination claims were withdrawn) and that her dismissal was generally unfair. She referred in this context to her long service.

9. The Claimant had not prepared a witness statement for this hearing as she had misunderstood the case management order to that effect. She had, however, sent the Respondent's solicitor an email on 26 October 2020 which she at the beginning of the hearing indicated could stand as a witness statement in these proceedings. In that email she made again the point that the allegations against her were the result of a group of colleagues 'ganging up' against her and asserted that what she was dismissed for was not sufficient to justify dismissal given her long service. I quote (sic): *"I had very good working record for 12 years and 11 months I have worked with them (roughly 13 years) , whatever i had done was not tantamount of the unfair dismissal of me. How come they claimed i make people "obnoxious" after almost 13 years of good service to them? the team was divided into two, 3 of their employees hated my guts, connived against me by getting vulnerable*

residents with mood swings due to their mental state to sign a statement . against me."

10. At the hearing I heard oral evidence from the Claimant and the following witnesses for the Respondent:

    a. Ms Ana-Maria Stosic (Team Manager and Service Manager from December 2019). Ms Stosic conducted the disciplinary investigation in the Claimant's case;
    b. Mrs Ella Read (Area Manager since April 2018, responsible for the Respondent's modern slavery services). Mrs Read was the dismissing officer;
    c. Miss Gemma Chandler (Operational Project Lead since 3 May 2018). Miss Chandler heard the Claimant's appeal against her dismissal.

11. The Claimant had hardly prepared any questions to ask the Respondent's witnesses, and my strong impression was that she was unable to cope with the volume of documentation in this case. Having read the bundle myself, I found I had a number of concerns about how the Respondent had handled the disciplinary process against the Claimant and as to the matters that the Respondent had relied on in dismissing her. Most of these concerns were within the scope of the case as raised by the Claimant that she had been the victim of retaliatory action by other employees and/or that it was potentially unfair for the Respondent to have treated the matters for which it dismissed the Claimant as being matters that justified dismissal in all the circumstances, including Claimant's long service. Some of my concerns fell outside that scope. In particular, I was concerned that the Respondent had failed to comply with the ACAS Code of Practice on Disciplinary Procedures, which is a matter to which I am bound to have regard by virtue of s 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992).

12. As a result, I asked the Respondent's witnesses a large number of questions at the hearing to ensure that I had understood their position both in relation to the Claimant's case and in relation to the additional points that concerned me. In doing so, I was at all times conscious that it was not my role to represent the Claimant, and I did not seek to do so. The questions that I asked were those that I felt I needed to ask in order properly and fairly to determine the claim before me.

Rule 50

13. In this case there has been a lot of evidence from and about the users of the Respondent's services. These are all vulnerable adults with mental health difficulties. The publication of their names in this judgment would involve also disclosing both the fact that they were in the Respondent's care and some further details of their time with the Respondent. This would interfere with their right to privacy under Article 8 of the European Convention on Human Rights (ECHR). In those circumstances, Rule 50 permits an order to be made anonymising them if it is interests of justice to do so, giving full weight in that

consideration to the principle of open justice and to the Convention right to freedom of expression.

14. I take into account in this respect that it can be valuable both to open justice and the Convention right to freedom of expression for individuals involved in cases, even on the periphery, to be named in a judgement. However, in this case, it seems to me that the public interest in the identification of these vulnerable adults is minimal. There would be no significant impact on the principle of open justice were their names to be anonymised. There has been a public trial and this will be a public judgement recording all facts that are material. On the other hand, the potential impact on them as vulnerable adults of the publication of their names in the judgment would be significant. Given the nature of their difficulties, I can accept that without receiving specific evidence from any of them on that point.

15. I therefore make an order under Rule 50 prohibiting the identification of any of the service users referred to in these proceedings. In this judgment, I refer to them by initials. The parties were in agreement with this course.

The facts

16. I have considered all the oral evidence and the documentary evidence in the bundle. The facts that I have found to be material to my conclusions are as follows. If I do not mention a particular fact in this judgment, it does not mean I have not taken it into account. All my findings of fact are made on the balance of probabilities.

<u>Background</u>

17. The Claimant was employed by the Respondent from 14 January 2008 until she was dismissed, the Respondent says, for gross misconduct on 5 December 2019.

18. The Respondent is a registered charity which supports adults and children in times of crisis. It delivers services across London and the surrounding regions. Service users include victims of modern slavery, women and children who have experienced domestic abuse, people with mental health difficulties, young care leavers and older people. They provide service users with a home and help them get the right mental health support.

19. The Claimant's job title for the Respondent was latterly "Recovery Worker". As part of her role, she was required to create a welcoming and supportive space for service users with mental health needs; to facilitate the empowerment of people on their journey towards independence and recovery.

20. The Claimant's line manager was Sandra Hippolyte. She had been her line manager for some years. She was supposed to carry out regular supervisions

with the Claimant. There were some documents in the bundle that purported to be records of supervisions, although the Claimant denied ever having seen them, and in the absence of any evidence from Ms Hippolyte (and in light of the Claimant's consistent denials that she had had any supervisions in recent years), I conclude that these notes are notes of 1:2:1s that Ms Hippolyte (supervisions, in effect), but which Ms Hippolyte did not share with the Claimant.

21. There is also in the bundle an Annual Appraisal form for the Claimant, completed by Ms Hippolyte, which has a printed date of February 2019. The Claimant did recollect seeing this form, but she was sure that it had not been completed in February 2019. In oral evidence she remembered it being around May/June/July 2019 when there were what she describes as *"all these bad vibes"* in the team, i.e. around the time of the incidents for which she was later dismissed. In the appeal hearing with Miss Chandler, however, she thought that the appraisal took place in June or July and as the matter was fresher in her mind at that point I accept that the date was June or July 2019. I accept the Claimant's evidence in this regard, not only because it has been consistent and none of the Respondent's witnesses was in a position to challenge it, but also because the content of the document does fit with the other evidence that I have received in relation to what happened in this period.

22. In this appraisal the Claimant said that she did not agree with the 360 degree feedback she had received from her colleagues about her negative mood, not being respectful and not following the Respondent's policies and procedures. The Claimant complained that she had not had the opportunity to do 360 degree feedback for her colleagues. Her line manager had however, given her a C rating and put in the overall comments: *"Angela must ensure that she put[s] in more to improve her behaviour towards staff and service users alike. This is important when working with colleagues and supporting service users on her day to day activity."*

<u>The Respondent's policies</u>

23. The Respondent had put a document in the bundle titled Disciplinary Procedure which was three pages long and contained very little detail as to the procedure to be followed by managers. Mrs Read said that there was another, more detailed policy that she had seen, but this was not produced.

24. The Respondent's Code of Conduct provides that a breach of the Protecting Adults at Risk of Abuse Policy and Safeguarding Children Policy will normally be regarded as gross misconduct. The Safeguarding Adults Procedure provides at paragraph 3.10.5 that: *"Abuse of an adult with care and support needs is a safeguarding issue, is also gross misconduct and may lead to the staff member being dismissed from Hestia"*. The Indicators of Abuse guidance refers to psychological abuse, which it defines as including *"'emotional abuse' and takes the form of threats of harm or abandonment, deprivation of contact, humiliation, rejection, blaming, controlling,*

*intimidation, coercion, indifference, harassment, verbal abuse (**including shouting** or swearing), cyber bullying, isolation or withdrawal from services or support networks"* (emphasis added). It then sets out the indicators for psychological abuse as including such matters as the vulnerable showing *"untypical ambivalence, deference, passivity, resignation"* or appearing *"anxious or withdrawn, especially in the presence of the alleged abuser"* and *"untypical changes in behaviour"*.

The Claimant's grievance

25. On 14 May 2019 the Claimant complained to her line manager about the conduct during the previous week of another member of staff, Yasmin Warsame. It is apparent from other evidence in the bundle that Ms Hippolyte had been off work during the week in question. In her grievance the Claimant said that Ms Warsame had insisted that the Claimant personally collect a medication key from a service user's room that was up a number of flights of stairs, even though the Claimant had been advised by occupational health not to go beyond the second floor following her knee replacement operation. She also complained about Ms Warsame's conduct in relation to a number of incidents that subsequently formed part of the reasons that the Claimant was dismissed. These included the incident with NS and his plate (where she accused Ms Warsame of shouting at her), and the incident regarding Ms Warsame's decision to put her (i.e. the Claimant's) suicidal key client (NS) onto self-medication without following the usual procedure for doing this. The Claimant accused Ms Warsame of screaming at her *"I don't want to hear from you", "stop talking to me"* and storming out of the office and locking herself in a second office. The Claimant said that Ms Warsame's behaviour had caused her to have sleepless nights and her blood pressure had gone up. She did not feel that she could continue to work with her.

26. The Respondent has provided no evidence as to what happened with the Claimant's grievance, or how it was investigated and dealt with, save that it appears from the other evidence I have received that Ms Warsame also raised a grievance and at some point there was a mediation meeting between the Claimant and Ms Warsame. The notes of that mediation meeting were viewed by Miss Chandler as part of her consideration of the Claimant's appeal, but they were never shared with the Claimant and have not been made available to me. In the circumstances, I do not consider it would be fair for me to take into account Miss Chandler's quote from those mediation minutes in her appeal outcome letter, and I have not done so.

27. Although the Claimant argued during the disciplinary process (see her emails of 9 November 2019 to Ms Stosic, her statement/defence for the disciplinary hearing, and her grounds of appeal), as well as in these proceedings, that the allegations made against her were made or instigated by Ms Warsame and a group of employees who were friends with Ms Warsame as a result of her raising this grievance of 14 May 2019, this point was not investigated by Ms Stosic (who conducted the investigation) and Mrs Read (who dismissed her) misunderstood it. She read the Claimant's email of 9 November 2019 to

Ms Stosic as being an indication that the Claimant wished to bring a grievance and said in her witness statement that she *"considered this a reaction to her being invited to a disciplinary process"*. The Claimant's email of 9 November 2019 is in fact very clear and Mrs Read's misunderstanding in this respect was not a reasonable one.

28. As a result, although the Claimant referred repeatedly to her grievance during the process, and sent Mrs Read and Ms Stosic a copy of it on 25 November 2019, it does not appear to have been taken into account by Ms Stosic or Mrs Read and the Respondent never considered the Claimant's central point that the allegations against her for which she was dismissed were raised by Ms Warsame in retaliation for the Claimant making that grievance. This is significant in this case because (save for a passing reference by the Claimant in oral evidence to what sounded like a disciplinary process to which she was subject about 10 years ago), there is no evidence that prior to the Claimant raising her grievance on 14 May 2019 anybody had ever complained about her conduct.

<u>The service users' complaints against the Claimant</u>

29. In May 2019, subsequent to the Claimant raising her grievance about Ms Warsame, two service users made complaints against the Claimant. The Claimant's belief is that it was Ms Warsame and two other colleagues who instigated the two residents to complain. There is no direct evidence of this, however, and the Respondent as noted did not investigate this issue.

30. The first complaint ("Complaint 1") was made on 16 May 2019 by service user ZA. ZA's statement, which was appended to the formal complaint form was as follows (AU is the Claimant and YW is Ms Warsame):-

Staff member AU shouted and spoke to ZA in a rude manner when ZA cooked a meal for the service a few weeks ago which ZA didn't like. ZA was in the kitchen cooking rice and AU spoke to ZA in a sharp tone of voice because he didn't do something correctly.

ZA also reported that AU's behaviour was getting out of hand last week (w/c 06.05.19) because ZA could constantly hear AU shouting. ZA said that he don't know why AU was shouting but ZA said this is unacceptable in the work place. AU was shouting at staff YW in the office and other service users.

ZA said that AU is a good worker but ZA would like AU to be careful how she speaks to others at times because AU sometimes comes across as being rude when that may not be her intention.

31. A second complaint ("Complaint 2") was made on 17 May 2019 by service user MK. His statement appended to the complaint form was as follows:

> Staff member AU has spoken to MK in a rude manner on more than two occasions which MK said he didn't deserve. MK gave two examples:
>
> A few weeks ago, MK came downstairs to breakfast. Staff AU said 'Oh, someone is hungry this morning'. MK said he was not happy with AU's comment because MK pays his weekly personal charge (PSC). MK didn't eat breakfast/meals for the next few days because of AU's comment.
>
> Another example: during dinner time a few weeks ago, MK asked AU if she can give MK bread because MK does not like sausages. AU replied 'bread is not on the menu' in a rude manner. This comment upset MK because staff members give service users bread throughout the day whenever they request even when it is not even dinner time. MK confirmed that he is okay with AU's comment but not happy with AU's tone of voice. MK said that staff AU is a good worker, but MK would like AU to be reminded 'to think about her tone of voice and the words she uses when she speaks to you because this type of behaviour impacts on your well-being'.
>
> MK cannot remember the exact dates and there were no witnesses to the above incidents. MK did not report it immediately because he tried to forget about it and move on but MK decided to say something because he wants AU's behaviour towards him to change.

32. The complaints were reported by the Respondent to the local authority's safeguarding team. Incident reports for both service user complaints were completed on 20 May 2019, outcome letters were sent to the residents on 30 May 2019 and on 6 June 2019 the complaints were recorded by Paul Burns (Service Manager) as being closed on the basis of an action plan for the Claimant. This included that the Claimant should complete Effective Communication and Professional Boundaries training and that issues regarding her behaviour should be addressed through supervisions with her line manager.

33. The action plan was discussed with the Claimant on 17 June 2019 by Paul Burns and an email from him following that discussion thanks her for being reflective at that meeting.

34. The action plan provides for various e-learning and training actions to be carried out and for various things to be discussed between the Claimant and Ms Hippolyte in their 1:1s. The Claimant and her line manager are identified as having *"responsibility for actions"*.

<u>The Claimant's emails</u>

35. The Claimant's complaints about being taken off night shifts were set out in emails of 13 and 14 June 2019. In those emails the Claimant that in this respect too she was being penalised for complaining about Ms Warsame. She said that the change was difficult for her as it meant with her leg problem she had to travel in rush hour. She complained that the Respondent was "playing god", "discriminating" and "biased" (p 138). These emails were sent to Ayesha Johar (Area Manager), among others.

36. Mr Burns in his email to the Claimant following their discussion on 17 June 2019 explained to the Claimant that the reason the Claimant's hours had been changed and she had been taken off sleep-in duties was to manage risk and protect service users and the Claimant from further allegations.

37. On 19 June 2019 Ms Johar and Mr Evans met with the Claimant (following a joint meeting with her and Ms Warsame) and had a chat with her about the content of her emails and how they were unprofessional and rude. At least, this is how Ms Johar describes it in her later email of 20 October 2019 (p 314). Ms Johar there stated that the Claimant had said that she meant to be rude because she was upset with them, but *"after I explained that this is a work environment with policies and procedures to follow and if she felt upset there are professional avenues she should follow. [The Claimant] appeared to have understood at that point and agreed not to send any further rude emails."* The Claimant did not recall Ms Johar and Mr Evans speaking to her about this as she recalled only that this was a meeting with Ms Warsame about her grievance, and I accept her evidence in this regard as being honest as she has been consistent about not remembering that the emails were raised with her. However, I also accept the Respondent's evidence that the emails were in fact raised with the Claimant by Ms Johar and Mr Evans informally on 19 June 2019. I infer that this was with regard to the tone of her emails of 13/14 June, which was not professional. It is right to note, though, that the Claimant had reasonable cause for being upset at the time those emails were sent as she had been taken off night shifts as a result of the complaints by service users and not returned to day shifts immediately even once those complaints were resolved. This had made life difficult for her because of her mobility issues. In any event, this discussion with Ms Johar and Mr Evans was no more than an informal chat. No formal record was kept of the meeting and the Claimant was not given any written warning of any sort.

38. On 29 June 2019 the Claimant responded as follows to her team members in response to a suggestion by Linda Fort that the team might have to reimburse for a petty cash discrepancy of £19.16p:

> I said earlier that I will not put my penny again when petty cash is down. People should learn to keep the bunch of keys with them when they are shift leading. Petty cash is in a mess because of lack of focus.
>
> Sharing the bunch when staff is shift leading, is this also part of co-production? Is it part of moving with time and adapting to changes? I will not reward working outside the policy, outside rules and regulations of the house by adding money to the petty cash that is down. I think head office should be involved in this, let them hear how staffs here take laws into their hands and work outside the policy. Oh! It's all part of co-production.

39. Ms Warsame forwarded this on to Ms Johar, Mr Burns and Ms Stosic on 1 July and Ms Johar appears from the email chain then to have discussed the Claimant's case with HR and it was decided that there should be an investigation into the Claimant's conduct. Ms Stosic was to carry out that investigation and Ms Johar forwarded onto Ms Stosic the Claimant's email of 29 June 2019 and two more emails (those of 13 and 14 June 2019). She also

said that service users had complained about her shouting and they do not find her approachable and strict. This appears to be a reference to the two service user complaints. Ms Johar fails to mention that these were resolved as set out above. She states: *"This is an ongoing issue with [the Claimant] and the grievance [Ms Warsame] brought against her is alarming as it raises issues which has been confirmed by the two resident complaints, the customer insight officer interviews confirmed this and I guess as managers we have seen conduct which we find questionable"*.

40. Ms Johar's reference to 'customer insight officer interviews' is a reference to an annual survey done of residents by independent officers. Although the Respondent's witnesses at the hearing thought this had been done in July, given that Ms Johar refers to it in her email of 4 July, it must in fact have been carried out earlier, probably in June 2019. Extracts from it have been provided in the bundle. Of note:

    a. NS said that the Claimant used to be his keyworker. He said *"Angela goes more by the book, she's more professional. I think you need to have more of a friendly approach. The strict approach makes me feel uneasy. I told Sandra about it and she said if the issues aren't resolved I can change the keyworker"* (and he had done).

    b. SS said that the Claimant was his keyworker and *"she's alright. We hardly talk. I had a cooking session with her but the second one she wasn't there. I'd prefer a different keyworker, she's difficult to talk to and not approachable. Not scared of her. …"*

    c. MK, who was one of the ones who had previously raised a complaint against the Claimant said *"The service is very good … All of the staff are lovely … No issues with staff"*

    d. C? said *"I didn't get a good decision on my PIP and haven't been able to get any help with that. [the Claimant] is my keyworker and she's not been helping me enough with my PIP as I didn't get a good decision…."* [PIP is Personal Independence Payment, a state benefit]

    e. S? said *"been here 13 months. … [The Claimant's] my keyworker and I think she's nice and good. I've asked to help get move on and it's the only thing that hasn't happened. PIP help didn't happen."*

    f. NR said *"I like the staff"*.

41. Miss Chandler gave evidence, which I accept as I found her evidence on this point persuasive, that it is very unusual for there to be complaints about an individual staff member in the customer insight officer interviews.

Disciplinary investigation

42. Ms Stosic who was appointed to investigate the allegations against the Claimant knew the Claimant but had not worked directly with her or been responsible for managing her.

43. On 4 July 2019 Ms Stosic sent the Claimant a letter by email that stated she would be investigating allegations of "unprofessional behaviour at work" that had been made against her. She gave no details of the allegations and there is no way the Claimant could have known what was being investigated.

44. The Claimant emailed on 11 July 2019 to say that she was surprised by this letter as she did not know what she was supposed to have done wrong. Ms Stosic did not reply.

45. There are supervision notes for the Claimant for 17 July 2019 from which it is apparent that the Claimant had returned to her old shift pattern. The Claimant complained of stress and had been off sick for 2 days. The notes indicate that Ms Hippolyte discussed with the Claimant a number of emails which she had sent to colleagues which her line manager considered to be rude, inappropriate and sarcastic. It is apparent from the notes that the emails discussed included the emails of 13 and 14 June 2019 (when the Claimant was off sick with stress) and that of 29 June 2019 where the Claimant had been upset about the suggestion that she contribute to the petty cash shortfall.

46. Ms Stosic obtained these supervision notes as part of her investigation but did not appear to have noted that the emails had been discussed at that supervision. Ms Stosic did not interview Ms Hippolyte as part of her investigation.

The witness interviews

47. Ms Stosic interviewed a number of witnesses as part of her investigation.

48. ZA (the maker of Complaint 1) was interviewed on 23 July 2019. He was asked by Ms Stosic about Complaint 1 which related to the argument between the Claimant and Ms Warsame in the office on 6 May 2019 about which the Claimant had originally complained in her grievance. He said that both Ms Warsame and the Claimant were shouting in the office about NS. He said that since his complaint the Claimant's behaviour had improved and that he was not aware of her shouting at anyone since.

49. Ms Warsame was interviewed on 24 July 2019, with follow-up email exchanges in the week that followed. She made a lot of complaints about the Claimant and appears to have re-submitted to Ms Stosic the grievance that she had previously raised against the Claimant. This included multiple allegations about the Claimant's conduct during the period 5 May to 14 May 2019, including about her being disrespectful to service users AH and SS;

about a complaint from NR about the Claimant on 5 May; that the Claimant was verbally abusive to her on 8 May; that she was strict with NS about it being inappropriate for him to self-medicate and later shouted at him; that the Claimant's behaviour towards service users on 9 May was *"appalling and terrorising"*; about NS being unhappy about the Claimant stopping him from keeping his plate in the office on 9 May and wanting to change from the Claimant as keyworker; that the Claimant shouted at her on 10 May in the office about NS's medication; she also complained about Linda Fort's conduct towards her on 14 May. She made no allegations about misconduct by the Claimant after 14 May 2019.

50. SS (service user) was interviewed on 1 August 2019. He was asked about the argument between the Claimant and Ms Warsame in the office. He had heard only one person shouting, but he said he did not know who was shouting. He was asked how this made him feel and he said that he did not have any feelings about it.

51. NS (service user) was interviewed on 1 August 2019. He was asked about the argument in the office. He said he could not remember it. The argument had been about his medication, however, and so Ms Stosic asked whether he remembered anything about that. He said that the Claimant had been *"strict"* with him when she realised that Ms Warsame had agreed that he could start self-medicating. He said that the Claimant said it should have been discussed with her as his keyworker. He said that he wanted to change his keyworker as *"She is professional but she is not an easy person to talk to comparing to other staff members. … She does not have people skills … She does not have an easy presence. Like – I feel, not scared but apprehensive to talk to her. I think she has a strict manner."* He was asked if there was anything else he would like to add and he raised a complaint about the Claimant's handling of his plate of food during Ramadan when he was fasting (which was another issue mentioned by the Claimant in her 14 May 2019 grievance). He said Ms Warsame had tried to explain to the Claimant that he did not want to be tempted by the food during Ramadan fast. He said that the Claimant said that she was Christian and <u>does</u> understand about other religions *"but her tone of voice was not nice. It just seemed she does not understand me"*. He said that the Claimant kept arguing against what he wished to do which was to keep the plate in the office. He said that he gave up and kept the plate in his room. He did not complain about anything that had happened since 14 May 2019.

52. It is agreed that NS changed keyworker after this incident. The Claimant gave evidence, which I accept as it was not challenged and sounds plausible, that service users frequently asked to change keyworker and that she had accepted a number of transfers of service users from other keyworkers.

53. MK (the maker of Complaint 2) was interviewed on 1 August 2019. He was asked about the argument in the office and said that he had not witnessed it. He was also asked again about the matters he had raised in Complaint 2. He was asked if there was anything he would like to add and he said *"Sometimes*

things like this happen but I do like [the Claimant]. She is very friendly and funny. It's just on that day – she might have had something on her mind."

54. Mr Theo Ogboru (staff member) was interviewed on 12 August 2019. He was asked about how the team was in May. He said that the team had been aware that there was an issue between the Claimant and Ms Warsame in May and that that this was the first time that any staff issues had unsettled the team. He recalled hearing that Ms Warsame had thought that NS could self-medicate during Ramadan and also that the Claimant had thought that given NS's potential suicide risk she as his keyworker should have been consulted before this arrangement was put in place. He had not witnessed the argument between them, but he said that Ms Warsame had told him the Claimant had shouted at her.

55. Ms Angela Rodrigues (staff member) was interviewed on 12 August 2019. She was asked how the team had been in May. She said that it was all fine until Ramadan and the issue about letting NS self-medicate. Ms Rodrigues said there was another client (for whom Linda Fort was keyworker) who it was thought could self-medicate too, but that when Ms Fort saw how angry the Claimant was about the decision to let NS self-medicate, Ms Fort had changed her mind and did not want her client to self-medicate either. She said that she witnessed the Claimant shouting about the medication change and that she did this in front of NS too. She said that the Claimant had also been rude to another service user, NR. She said that the Claimant had been in a bad mood for several days and this had affected everybody. She said that the Claimant's behaviour had not improved after this and that she had seen her be 'sharp' with NS even after she had achieved her goal of getting him back to supervised medication. Ms Rodrigues' account generally supported Ms Warsame's grievance.

56. ASH (service user) was interviewed on 15 August 2019. He was asked about the staff generally and said, without naming any names, *"Staff is sometimes good and sometimes not so good. Sometimes they are not so good with me"*. He could give no details however.

57. NR was interviewed on 15 August 2019. He was asked how he was getting on with staff generally and responded *"All right. No problem"*. It was then put to him what had been said by Ms Rodrigues and Ms Warsame that there had been an occasion in May when he had complained that a member of staff was always shouting and is rude. He said that was the Claimant and *"Yes that was the case but she is ok now."*

58. Ms Fort (staff member) was interviewed on 22 August. She was asked how the team was in May when Ms Hippolyte was on leave. Ms Fort said that it was all right until the incident regarding NS's medication and then there was tension. She said that this was particularly between the Claimant and Ms Warsame who were not talking to each other. She saw Ms Warsame as being the main problem. She did not see the Claimant as being particularly difficult but that she *"always talks with a loud voice. She talks in a loud voice even when she is not angry. So sometimes it is difficult to tell whether she is angry*

or not. She is always talk loudly". She said that after Ms Warsame and the Claimant argued, Ms Warsame threw the keys at the Claimant and told her not to talk to her. She thought that both the Claimant and Ms Warsame had behaved unprofessionally over this incident, although she had not personally witnessed either of them shouting.

59. Mr Wells (staff member) was interviewed on 22 August. His understanding was that the argument in May 2019 had been a case of the Claimant not appreciating that a service user was of a different religion. He had not witnessed anything himself or seen any unprofessional conduct.

Investigation meeting with the Claimant

60. On 8 August 2019 the Claimant complained to Ms Hippolyte about the investigation letter that Ms Stosic had sent to her home address. As noted above, she used block capitals in her emails and Ms Hippolyte reminded her about the need for professionalism in her response of 13 August 2019. The Claimant responded indicating that she disagreed and still did not know what was being investigated.

61. On 14 August 2019 the Claimant wrote to Ms Hippolyte and Ms Stosic again complaining that she still did not know what the investigation was about and it was bad for her blood pressure to come into work, walking on eggshells and not knowing what the investigation was about.

62. By letter of 15 August 2019 Ms Stosic invited the Claimant to an investigation meeting on 23 August 2019. This letter did not set out what specific allegations being investigated.

63. Ms Hippolyte replied to the Claimant on 19 August 2019 seeking to reassure her that she was not being investigated because she raised a grievance, but that she did need to improve her behaviour.

64. On 22 August 2019 the Claimant emailed Ms Stosic to say that her blood pressure had gone up and she would be seeing the GP in the morning and could not attend the interview. She also wanted a staff member from HR to be present.

65. The meeting was re-arranged for 13 September and the Respondent paid for the Claimant to have a taxi to Maya House to attend the interview.

66. The Claimant was interviewed on 13 September 2019. The notes of the interview show that the following matters were put to her and she responded as follows:

    a. *Her emails of 13/14 June 2019 to Ms Johar about wanting to get back to her old shifts*. She said that she had been very emotional about the change in her shifts and on reflection she would not have sent these emails.

b. *The email of 29 June 2019 about the petty cash*. She said that on reflection she would still have sent the email about the petty cash, but then Ms Stosic pointed out that the email seemed sarcastic and the Claimant accepted that on reflection it was sarcastic and agreed that being sarcastic in an email was not professional.

c. *That she had had a meeting with Ms Johar and Mr Burns about the way she communicated*, which she denied saying that the meeting was about her grievance with Ms Warsame. She said that she was still waiting for an outcome on that, but that she was working with Ms Warsame professionally;

d. *The incident about NS had being put on self-medication*. She said she had responded professionally. She said (as she had in her original grievance of 14 May 2019) that she had not shouted at Ms Warsame, Ms Warsame had shouted at her and thrown the key at her. She said that *"two colleagues have been trying to change this into a religious ground".* This suggests to me that she was saying that Ms Warsame and Ms Rodrigues were trying to turn this into an allegation that she does not understand other religions (when she herself had said to NS at the time that she did understand), but Ms Stosic in her investigation report took her comment as an indication that the Claimant *"does not see having a positive regard about client's cultural background including religious beliefs as a positive step"*.

e. *The incident regarding NS's plate of food during Ramadan*. She said that he had not been sharp with him.

f. *The incident about NS requesting a change in keyworker*. She said that she did not know the reason and she was not sharp with him.

67. Ms Stosic's witness statement for these proceedings listed six allegations against the Claimant which she said she had identified from the evidence against the Claimant. Of those, however, she only asked the Claimant about three of them in her investigation interview. She did not ask about those she mentions at paragraphs 25.4, 25.7 or 25.9 of her witness statement and in oral evidence she said that she had not in fact found those three allegations to be made out (i.e. the allegations of being disrespectful to service user AH following him asking for tissues for dinner on 4 May 2019; of aggressively raising her voice at a number of residents on 9 May 2019; or aggressively throwing a set of keys on the table in front of Ms Warsame).

<u>Mr Wells' emails</u>

68. At or around the beginning of October 2019, Ms Warsame left and her key clients were divided up, some of them being given to the Claimant. There is evidence of inappropriate emails in the bundle from Mr Wells (a colleague of

the Claimant's) about this (p 332). Also on 30 October 2019 the Claimant sent a reasonable email to team members about bulk medication checks, to which Mr Wells responded very rudely, and the Claimant then replied in kind (pp 341-343). This escalated and both the Claimant and Mr Wells were very unprofessional to each other in emails (p 344). Mr Wells was subsequently subject to disciplinary action for his part in this exchange, but not dismissed.

Investigation report

69. The Claimant was informed by Ms Stosic by email of 8 October 2019 that she had nearly completed her investigation report and would finalise it *"by the end of this week at the latest"*. In fact, nearly a further month elapsed before it was sent to the Claimant and the Claimant was invited to a disciplinary hearing under cover of an email with attached letter of 5 November 2019. The letter set a date for the hearing on 15 November 2019.

70. The allegations were set out in the letter as *"unprofessional behaviour at work, specifically unprofessional emails (inappropriate use of emails), being unpleasant towards colleagues, shouting at colleagues or in front of colleagues, shouting at service users or in front of service users"*. These were identified as potential gross misconduct with the possibility of dismissal. No details were given in the letter as to the specifics of the allegations or the dates when they were supposed to have occurred.

71. Ms Stosic's disciplinary investigation report set out in detail some of the evidence she had collected and identified the various policies and code of conduct that they breached. In relation to the allegation of unprofessional behaviour at work, it also did not identify the specific incidents that had occurred or draw together the evidence that each witness had given on each incident so as to form a balanced view of what happened. Instead, it relied heavily on the accounts of Ms Warsame and Ms Rodrigues, quoting much of what they said verbatim, and not testing what they had said against the evidence of other witnesses. It included some additional negative bits from other witness interviews and none of the positive bits. It failed to make reference to a number of factors that were in my judgment relevant:

    a. It did not make clear that all the complaints about unprofessional conduct towards service users related to the period between 6 and 14 May 2019 and there were no complaints about her since that date. Indeed, it is written as if there were ongoing problems, although Ms Stosic had not obtained any evidence of ongoing problems;

    b. Likewise, it made no reference to the evidence that all events related to a short period in the office when Ms Warsame and the Claimant had fallen out, a picture which is clear from the evidence from all the staff and service users interviewed, in particular Mr Ogboru, Ms Fort and Ms Rodrigues;

c. It did not acknowledge that Complaint 1 and 2 had been dealt with locally by Mr Evans and resolved with an action plan for training and supervision (even though this is apparent on the face of those Complaints);

d. It did not indicate that there was evidence from ZA (the maker of Complaint 1), MK (the maker of Complaint 2) and NR that since those complaints there had been no problems with the Claimant, nor did it note that MK even said he liked the Claimant and got on well with her;

e. It did not acknowledge that the Claimant had submitted a grievance about Ms Warsame on 14 May 2019 or that she alleged that Ms Warsame had also shouted and was unprofessional in relation to the medication incident, even though the Claimant's case in this respect was supported by at least the evidence of Ms Fort and ZA, and not contradicted by SS;

f. It referred only to the negative service user feedback about the Claimant in the customer satisfaction surveys and not to the positive feedback.

72. Appended to the investigation report were approximately 100 pages of documents including:

a. The two complaints from ZA and MK of May 2019;
b. Email of 13 June 2019 to Paul Burns and SH complaining about fact that her grievance about YW has not been dealt with and her shifts have been changed;
c. Email of 14 June 2019 to PB, SH and AJ complaining about same point;
d. Email of 29 June 2019 in response to threat to deduct petty cash;
e. The disciplinary investigation interview notes of all witnesses; and,
f. The Respondent's policies.

73. These documents were sent to the Claimant electronically. As noted below, it appears that the Respondent also tried to send the Claimant a hard copy bundle, but this was returned unopened, so I find that the Claimant only had the investigation documents in electronic copy.

<u>The disciplinary hearing</u>

74. Mrs Ella Read was appointed to chair the disciplinary hearing. She had not met the Claimant before.

75. On 9 November 2019 the Claimant responded to the invite to the disciplinary hearing saying that no date had been set for the meeting. In this respect she had not read the letter properly as it clearly set a date for the hearing. She disputed the contents of the notes of the investigation meeting with her on 13

September 2019. She complained that Ms Stosic had focused on the evidence of Ms Rodrigues and Ms Warsame *"two friends who are obviously against me"*. She said that everything Ms Warsame was alleging again her, she had said in her grievance she (Ms Warsame) had done to her (the Claimant). She concluded *"since I took this grievance, I feel I am being punished for doing something 'wrong'"*. She also sent a further email on 9 November 2019 setting out more complaints about other staff, and denying the allegations against herself.

76. On 12 November 2019 the Claimant requested more time to prepare for the meeting and to find a representative. The hearing was duly rescheduled to 22 November 2019.

77. On 18 November 2019 the Claimant submitted a statement for consideration. In this she deals with the three emails of 13 and 14 June and 29 June 2019. Then she addresses the allegations about unprofessional conduct as being:

    a. The occasion when her key client NS (who was suicidal) was put on self-medication by Ms Rodrigues and Ms Warsame (on which point she repeats what she said about Ms Warsame in the grievance she raised against her on 14 May);
    b. The incident about saving the plate of food and NS when the Claimant says that Ms Warsame was again the one shouting;
    c. NR's complaint about her;
    d. She denies telling AH to buy his own tissues;
    e. She then sets out evidence about how she recognises and respects other's cultural differences, giving specific examples of how she has accommodated different religious views, and dietary needs, and counselled Muslim service users referring to the Quran, encouraging the celebration of Diwali, etc;
    f. She says again that all the allegations are from two biased friends (Ms Warsame and Ms Rodrigues).

78. The matters addressed by the Claimant included some but not all of the matters referred to in Ms Stosic's investigation report, and one incident (the tissues with AH) which was not mentioned.

79. In her statement the Claimant asked the Respondent, among other things, to *"get the opinion of my line manager Sandra Hippolyte whom I have worked alongside with for 10 years, she knows me well"*. In my judgment this would have been important because, given the nature of the allegations against the Claimant, it was important to understand whether the behaviour towards other staff and residents was confined (as appears on the evidence to one week in May 2019) or whether it was an ongoing issue, and how it had been addressed in supervisions. Given Mrs Read's interest in the action plan set by Mr Evans' on 17 June 2019 it was also important to know how that had been dealt with by Ms Hippolyte (who had joint responsibility for its implementation). However, Mrs Read did not speak to Ms Hippolyte. In oral evidence, she accepted that in hindsight she should have done.

80. The Claimant also suggested that Ms Fort and Mr Ogboru should have been interviewed and asked *"how come their comments was not here"*. On this, she was mistaken because they had been interviewed and the electronic documents sent to the Claimant included the notes of their interviews, although Ms Stosic had not included any of their comments in her disciplinary report. The Claimant's comment here indicates that she had not managed to read all the appendices to the investigation report.

81. The disciplinary hearing took place on 22 November 2019. Ms Stosic presented the case against the Claimant and Mrs Read asked questions of the Claimant. The Claimant was not represented. She has not been represented at any point in the disciplinary process or these proceedings.

82. Mrs Read asked the Claimant about the action plan that she had been given by Mr Evans on 17 June 2019 and she asked the Claimant whether there was a reason why the Claimant had not completed the training. The Claimant initially did not recognise the term 'training plan'. She then said that she had spoken to her line manager about how she finds the e-learning system difficult. She was asked whether she had spoken to anyone about how she was having trouble completing it and she said that she had not. The failure to complete the action plan appears to have been held against the Claimant by the Respondent, and she was questioned about it at this hearing, but I cannot see the relevance of this in circumstances where, as a matter of fact, there was clear evidence that the Claimant's behaviour towards service users had significantly improved after this period in May 2019, with ZA, MK and NR all specifically confirming that the Claimant had been fine since then.

83. In the course of the hearing, the Claimant was asked about the petty cash email and she said that she would still have sent an email making clear that she did not consider she should be required to contribute to the petty cash, but she would word it differently and not make the sarcastic comment about co-production. At the end of the hearing the Claimant apologised for the emails and said she was sorry she had been unprofessional.

84. Mrs Read asked the Claimant about the incident where she is alleged to have shouted at Ms Warsame. Mrs Read stated: *"There are four accounts of hearing raised voices and in all accounts the individuals believe it was you doing the shouting"*. She said this a few times in various ways, emphasising that two service users had heard the Claimant shouting. This was incorrect because ZA in his investigation interview said that both the Claimant and Ms Warsame were shouting and SS did not know who was shouting. Only Ms Warsame and Ms Rodrigues said the Claimant was shouting.

85. There was then some discussion about the plate incident with NS, and about ZA's Complaint 1, and the Claimant said that she had apologised to ZA about that. Then they discussed MK's Complaint 2 and the Claimant said that on that day she was cooking and MK had come in and asked for bread and there was none and so she had said that 'bread was not on the menu', meaning it in a jokey way. MK had complained and the Claimant had apologised. The Claimant denied making a comment about not understanding other religions.

Mrs Read then put to her the general allegation about the Claimant *"shouting, being abrupt, not having an easy presence and not being nice"*. The Claimant said she did not know why people thought that. She denied shouting at service users or staff but said that Ms Rodrigues and Ms Warsame did shout a lot.

86. The Claimant sent further emails with more information on 25 and 26 November 2019. These made clear that the incidents happened on 8 and 10 May 2019. They also included key work plans for NS and her plans to support him with Ramadan, and also her grievance about Ms Warsame as submitted to Ms Hippolyte on 14 May 2019. Her email of 26 November 2019 also explained that Ms Warsame had now left the Respondent and that the Claimant had agreed to keywork ZA as no one else wished to do so because of his allegations against staff. She also said that MK had now moved out to an independent life and had come to thank her before he left for her care and support and the good food they had cooked together.

87. On 3 December 2019 the Claimant's hard copy of the papers for her disciplinary hearing were returned to the Respondent unopened. I asked Mrs Read at the hearing whether the Claimant had any papers at the disciplinary hearing and she could not remember. The papers had been sent to her electronically, so she did have copies, but as noted above it seems to me that the Claimant had not read the appendices to the investigation report as she thought that Ms Fort and Mr Ogboru had not been interviewed when they had.

88. On 5 December 2019 the Claimant was informed that she was being dismissed. Mrs Read in her letter identified the following as being the reasons for the dismissal:

    a. Three inappropriate emails – conceded to be inappropriate and therefore in breach of Code of Conduct, in particular given the discussion about emails that the Claimant had had with Mr Burns and Ms Johar on 19 June 2019;
    b. Five service users *"reported you shouting at work, speaking to others disrespectfully, not being approachable and strict"*;
    c. Two members of staff say you have been rude, angry and shouted at work.

89. Mrs Read concluded that the evidence demonstrated a number of safeguarding issues and that there was substantial evidence of breach of the Respondent's Code of Conduct and other policies.

90. She also reminded the Claimant about the need to be careful about language she uses in the workplace and made clear that banter and jokes are not appropriate.

91. In oral evidence, I asked Mrs Read which allegations were the operative reasons for dismissal. She said that the emails alone would not have led to dismissal. A formal warning would have been appropriate for them. She also

said that it was not the treatment of other staff either as she did not think the evidence was convincing with regard to treatment of staff and in any event she said in her witness statement that the misconduct towards colleagues would not have been regarded as gross misconduct on its. She said that it was treatment of service users that was particularly concerning to her and which she regarded as gross misconduct, especially the shouting, which she identified in her statement as being *“psychological abuse”* with regard to the Respondent’s Definition Indicators of Abuse policy.

92. However, on exploring the evidence of witnesses with her, it appeared that the incidents that she regarded as being the most serious evidence of abuse were Complaints 1 and 2, which complaints were resolved informally at the time by Mr Evans as set out above and both complainants (ZA and MK) confirmed in interview with Ms Stosic that they had had no problems with the Claimant since and MK described her as *“friendly and funny”*. Mrs Read accepted in oral evidence that it was not fair for treatment that one part of the organisation had already dealt with and decided did not warrant disciplinary proceedings to be picked up and treated as being gross misconduct warranting dismissal five months’ later by another part of the organisation.

Appeal

93. On 9 December the Claimant appealed against dismissal. Miss Chandler was appointed to hear the Claimant’s appeal. She had no prior knowledge of the Claimant or the matters which led to her dismissal. Nor had she worked closely with Mrs Read.

94. On 13 December 2019 Ms Stosic emailed Ms Hippolyte to ask her various questions about the Claimant’s case. Most of these questions concerned allegations the Claimant had made about other people’s conduct. Ms Hippolyte replied on 20 December 2019. Of relevance to the Claimant’s own case, Ms Hippolyte confirmed that the Claimant had raised a grievance about Ms Warsame in May 2019 and that she had discussed emails with the Claimant in supervisions and by email, although had not kept any formal record of the discussions.

95. The appeal hearing took place on 30 December 2019. Miss Chandler went through the Claimant’s grounds of appeal with her. In relation to the allegations of shouting at staff members and service users, she said that she was not looking at what staff members had said because *“they said one thing and you said another”*, but she said that with regard to the service users, she was looking in particular at the two complaints from ZA and MK and said *“several other SUs claim to have heard you shouting on the day of the plate and medication incident”*. This repeats the error made by Mrs Read at the disciplinary hearing, because as noted above ZA in his investigation interview said that both the Claimant and Ms Warsame were shouting on that occasion, while SS did not know who was shouting. None of the other SUs heard shouting on that day (although NR had made a previous complaint to Ms Warsame about the Claimant shouting, but did not raise that himself in the

interviews). Only Ms Warsame and Ms Rodrigues said the Claimant was shouting on the day of the plate and medication incident.

96. Miss Chandler asked the Claimant whether she had any evidence to demonstrate that it was Ms Warsame shouting but not her. As noted there is in fact evidence in the bundle supporting the Claimant's version of events, but it is apparent from the notes of the appeal hearing that Miss Chandler was not aware of this. The Claimant also does not point to what is in the statements in the bundle because, I find, she was not able to deal with that volume of documentation or take in its contents.

97. By letter of 16 January 2020 Miss Chandler informed the Claimant that her appeal had not been upheld. Miss Chandler had obtained further information from Ms Hippolyte as noted above, but this was not shared with the Claimant. Miss Chandler also obtained the minutes of the mediation session between Ms Warsame and the Claimant, and referred to them in the appeal outcome letter as further evidence of the Claimant's unreasonable conduct. However, she did not share those minutes with the Claimant and the Claimant had never seen them. She also referred to the Claimant's inappropriate email exchange with Mr Wells as further evidence of misconduct, although these had not been raised with the Claimant at any point. She states that the Claimant had been *"unable to provide me with any evidence that information gathered reviewed in the investigation regarding your verbal conduct towards staff and service users was false"*. She considered the Claimant's complaint about lack of supervision, but found that the Claimant had received supervisions from her line manager.

Work for a competitor

98. The Claimant's contract of employment included the following:

> 21. COMPETITION
>
> a) You shall not during your employment directly or indirectly, either on your own account or as a partner or as an agent, employee, officer, director, consultant or shareholder of any company or any other entity or member of any firm or otherwise, engage in or undertake any business trade or occupation which is or may be in competition with that of Hestia without the express permission of Hestia's Chief Executive Officer.
>
> b) You must disclose all additional employment outside the employment relationship with Hestia to your manager either upon employment with Hestia or prior to starting the additional employment.

99. The Claimant had for the purposes of remedy in these proceedings disclosed to the Respondent payslips from an employment with London Cyrenians Housing Limited. The Respondent contended that she was working for that company in breach of clause 21 of her contract and that it would have dismissed her for that had it known about it. However, the Claimant in oral evidence explained that London Cyrenians was her previous employer, that she had gone on their locum list when she started with the Respondent in

order to supplement her income when she could. She said that she had told Mr Evans about it at the start of her employment and indicated that she had been asked to sign what sounded like an opt-out from the maximum 48-hour working week imposed by the Working Time Regulations 1998.

100. I gave the Respondent an opportunity to consider their position in the light of the Claimant's above answers in cross-examination, and indicated that it could include this issue not being dealt with as part of the liability hearing or them having an opportunity to put in further documentary evidence to deal with the point if they wished, but after a short adjournment, the Respondent informed me that they did not wish to make any application and I should determine the issues on the evidence available to me.

Conclusions

The law

101. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason falling within subsection (2), ie in this case conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason for dismissal is the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss, or alternatively what motivates them to do so, save in the limited circumstances (not relevant here) identified by the Supreme Court in *Jhuti v Royal Mail Ltd* [2019] UKSC 55, [2020] ICR 731.

102. If dismissal is for a potentially fair reason, then the Tribunal must consider whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee (s 98(4)(a)). The question of fairness is to be determined in accordance with equity and the substantial merits of the case (s 98(4)(b)). At this stage, neither party bears the burden of proof, it is neutral: *Boys and Girls Welfare Society v McDonald* [1997] ICR 693.

103. The Tribunal must not substitute its own view for that of the employer, but must consider whether the employer's actions were (in all respects, including as to procedure and the decision to dismiss) within the range of reasonable responses open to the employer: *BHS Ltd v Burchell* [1980] ICR 303 and *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111. Not every procedural error renders a dismissal unfair, the fairness of the process as a whole must be looked at, alongside the other relevant factors, focusing always on the statutory test as to whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee: *Taylor v OCS Group Ltd* [2006] ICR 1602 at para 48.

104. A failure to afford the employee a right of appeal may render a dismissal unfair (*West Midlands Cooperative Society v Tipton* [1986] AC 536), and a fair appeal may cure earlier defects in procedure (*Taylor v OCS Group* ibid), but an unfair appeal will not necessarily render an otherwise fair dismissal unfair. Unfairness at the appeal stage is always relevant and may render a dismissal unfair even if dismissal was fair in all other respects, but not necessarily: it is a matter for assessment by the Tribunal on the facts of each case: *Mirab v Mentor Graphics (UK) Limited* (UKEAT/0172/17) at para 54 *per* HHJ Eady QC.

105. Where conduct is relied on as the reason for dismissal, in determining whether dismissal is fair in all the circumstances under s 98(4), the Tribunal must be satisfied that the employer has a genuine belief that the employee committed the misconduct in question, and that that belief is held on reasonable grounds, the employer having carried out such investigations as are reasonable in all the circumstances of the case: *BHS Ltd v Burchell* [1980] ICR 303 and *Foley v Post Office* [2000] ICR 1283.

106. Where a breakdown in working relationships is relied on, the EAT in *Stockman v Phoenix House Ltd* [2017] ICR 84 at paragraph 21, indicated that, as a minimum, an employer is required to: *"fairly consider whether or not the relationship has deteriorated to such an extent that the employee holding the position that she does cannot be re-incorporated into the workforce without unacceptable disruption. That is likely to involve, as here, a careful exploration by the decision maker … of the employee's state of mind and future intentions judged against the background of what has happened. Of course, it would be unfair … to take into account matters that were not fully vented between decision maker and employee at the time that the decision was to be made. Ordinary common sense fairness requires that … [an] employee [should be given] the opportunity to demonstrate that she can fit back into the workplace without undue disruption"*.

107. In reaching a decision, the Tribunal must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. The following paragraphs of that Code are of particular relevance to this case (emphasis added):

> 5. **It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay** to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.
>
> 9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. **This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting**. It would normally be appropriate to provide copies

of any written evidence, which may include any witness statements, with the notification.

11. **The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case**.

18. After the meeting decide whether or not disciplinary or any other action is justified and inform the employee accordingly in writing.

19. Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.

20. If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation.

23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct.

108. If the Tribunal concludes that the dismissal was unfair but is satisfied that if a fair procedure had been followed (or that as a result of some subsequent event such as later misconduct or redundancies) the employee could or might have been fairly dismissed at some point, the Tribunal must determine when that fair dismissal would have taken place or, alternative, what was the percentage chance of a fair dismissal taking place at the point: the *Polkey* principle as explained in *Contract Bottling Ltd v Cave* [2015] ICR 46.

Conclusions

109. I find that the Respondent's principal reason for dismissing the Claimant was her conduct, in particular that the Respondent (Ms Stosic, Mrs Read and Miss Chandler) all genuinely believed that the Claimant had shouted at or within the hearing of service users. There was other conduct of the Claimant's that was taken into account as well, but the principal reason for dismissal, and the element that was regarded by the Respondent as gross misconduct was the shouting. This is a reason that concerns the Claimant's conduct and I therefore find that there was a potentially fair reason for the Claimant's dismissal.

110. I do not, however, accept that there is evidence to support the Respondent's alternative reason for dismissal namely irretrievable breakdown in trust and confidence between the parties. This does not feature expressly in the dismissal or appeal letters. There is reference at appeal stage to the mediation between the Claimant and Ms Warsame, which is an oblique reference to the falling out between the Claimant and Ms Warsame, but there is no evidence that they had not managed to work together successfully after May 2019 and Ms Warsame had in any event left by September 2019. If

reliance on some other substantial reason was intended by the Respondent as a proxy for no longer having confidence in the Claimant as a result of her misconduct, then the fairness or otherwise of that as a reason is the same as for the misconduct itself, to which I now turn.

111. I find that the dismissal was not fair in all the circumstances within s 98(4) for the following reasons:-

    a. Although Ms Stosic had gone through the motions of carrying out a fair investigation, and had interviewed a large number of witnesses, her investigation report was one-sided and unbalanced. It failed properly to record the evidence that she had obtained, to assess or weigh that evidence and was materially misleading in some respects for the reasons I have set out above at paragraph 71. It was not therefore a reasonable investigation.

    b. The investigation report led both Mrs Read and Miss Chandler materially to misunderstand the evidence in relation to the key issue of the Claimant's shouting. In particular, as noted above, they were both under the impression that there was a lot of evidence to support the allegation that the Claimant had shouted at or in front of service users, and none to support the Claimant's case that Ms Warsame had also shouted. As recorded above, ZA in his investigation interview said that both the Claimant and Ms Warsame were shouting on that occasion in the office, while SS did not know who was shouting. None of the other SUs heard shouting on that day. Only Ms Warsame and Ms Rodrigues said the Claimant was shouting on that occasion. NR had made a previous complaint to Ms Warsame about the Claimant shouting on other occasions, which Ms Warsame raised as a further allegation against the Claimant in the course of the investigation, but NR never complained about this himself and although he confirmed in interview that he had mentioned it to Ms Warsame on that one occasion, he had not had any difficulties with the Claimant since. Although it would have been open to the Respondent to find that the Claimant shouted at Ms Warsame on this occasion even if they had properly assessed the evidence, as a matter of fact the Respondent's belief in the Claimant's misconduct in this case was based on an incorrect understanding of the evidence and was not therefore based on reasonable grounds.

    c. The strongest allegations against the Claimant in respect of her treatment of service users were those in Complaint 1 and Complaint 2, but her conduct on those occasions had been dealt with informally by Mr Evans and closed by 17 June 2019, which was at least two weeks prior to the disciplinary investigation commencing and an action plan was in place to help the Claimant improve her conduct. Whether as a result of that or for other reasons, there was no evidence that there had been any further problems with the Claimant's conduct towards service users and MK and ZA both

confirmed that she had been fine with them since. As Mrs Read accepted, given that Mr Evans had dealt with these potentially serious allegations informally, it was not fair for a different part of the Respondent's organisation to treat those same allegations as gross misconduct warranting dismissal nearly six months later. That is inconsistent treatment that is plainly outside the range of reasonable responses open to an employer.

d. The Respondent also failed to appreciate a fundamental part of the Claimant's case, which was that Ms Warsame and Ms Rodrigues were raising allegations against her in retaliation for the Claimant raising a grievance about Ms Warsame on 14 May 2019. The Claimant's case in this respect is plausible because her grievance does indeed appear to be the first thing that happens, all the incidents with service users are confined to this short period in May 2019, there was no evidence of any prior complaints about the Claimant during her decade of service, and the evidence of staff given during the investigation was that there was a falling out between Ms Warsame and the Claimant during this period. The failure to investigate this part of the Claimant's case was not reasonable.

e. The failure to interview Ms Hippolyte at all at the dsciplinary stage, even when specifically asked to by the Claimant, was not within the range of reasonable responses given that a fair judgment in relation to the Claimant's conduct required the deciding officers to understand how the Claimant's conduct had been line managed. It was also not fair to take into account an apparent failure by the Claimant to complete her action plan, when the line manager had joint responsibility for ensuring that action plan was implemented, without interviewing the line manager. This defect was not cured on appeal because in the written questions to, and responses by, Ms Hippolyte the Respondent did not obtain Ms Hippolyte's views on the specific incidents that had led to the Claimant's dismissal (which were in fact all matters she had personally dealt with previously), and the information it did get from Ms Hippolyte that was relevant to the Claimant's case (about her grievance and supervisions) the Respondent did not take properly into account.

f. With regard to the Claimant's emails of 13, 14 and 29 June 2019, I accept that it was within the range of reasonable responses for these to be picked up as part of a formal disciplinary after Ms Johar and Mr Evans had spoken to the Claimant about the tone of her emails on 17 June 2019. However, it was not within the range of reasonable responses for these to form any part of the reason for dismissing the Claimant given that the same emails had been dealt with by Ms Hippolyte the Claimant's line manager in supervisions on an informal basis. The next stage, in line with best practice and the spirit of the ACAS Code of Practice, should have been a formal warning. Had there been a formal warning, it is quite possible that the Claimant

would have heeded that. As it was, she genuinely did not recall being warned informally about this by Ms Johar and Mr Evans on 17 June 2019, and her further email on 29 June 2019 should have been viewed in light of that mitigating circumstance. Had there been a formal warning, it is also possible that the Claimant's further inappropriate exchange with Mr Wells would not have happened since there is evidence from the disciplinary process that the Claimant was able to accept, reflect on and express remorse for the tone of her emails. In the absence of a formal warning, it was in my judgment not within the range of reasonable responses for the Respondent to conclude (as Mrs Read and Miss Chandler effectively did) that the Claimant was someone who would not be able to moderate her emails in future.

g. While it was open to the Respondent to pursue the exchange of emails with Mr Wells as a formal disciplinary matter, it was not fair to bring those in at the appeal stage without putting them to the Claimant or giving her a chance to comment on them. That breached basic principles of natural justice.

h. It was also in breach of basic principles of procedural fairness to refer at the appeal stage to the minutes of a mediation meeting between the Claimant and Ms Warsame that the Claimant had never seen and did not know was to be taken into account against her.

i. The investigation was not carried out within a reasonable time as required by paragraph 5 of the ACAS Code of Practice. It commenced six weeks after the first complaints (Complaints 1 and 2) were made, which was in itself unreasonable, and then took until 5 November 2019 (4 months) to produce an investigation report. This was not reasonable, given that all interviews bar that of the Claimant were completed in early August, and the Claimant's interview on 13 September. There is no adequate explanation from the Respondent for this delay.

j. I also find that, in breach of paragraph 9 of the Code of Practice, the notification to the Claimant of the disciplinary meeting, did not contain sufficient information about the alleged misconduct or poor performance to enable the Claimant to prepare to answer the case at a disciplinary meeting. Although there may be cases in which it is reasonable to make a generalised allegation against an individual of 'inappropriate conduct' or 'shouting' (or similar), in this case the conduct in question occurred over a short period of a week in May 2019 and consisted of a series of specific incidents in respect of which there were competing accounts from witnesses. There was not sufficient information in the 5 November 2019 letter for the Claimant to know what the alleged misconduct was, and the disciplinary investigation report did not supply that information either because it consisted of a lengthy, unfocused recitation of some of the allegations made by some witnesses against the Claimant without

identifying particular 'charges' with any specificity at all. The inadequacy of this as a means of identifying the allegations against the Claimant was underscored by the fact that Ms Stosic herself included in her witness statement three allegations that she did not in fact make against the Claimant, while the Claimant's own response to the disciplinary investigation report answers some of the points made in it, but not others, and at least one point that was not in it at all. It is also in my judgment a large part of the reason why the Respondent failed at any point properly to assess the witness evidence it had obtained. If it had identified specific charges and considered what the evidence was for each charge, it would have been noticed before this hearing that there were competing accounts in the witness evidence and some of them favoured the Claimant.

112. For all these reasons, I find that the decision to dismiss the Claimant was unfair in all the circumstances within s 98(4).

113. I further find that no *Polkey* reduction should be made for the Claimant's working with London Cyrenians. The Claimant had disclosed that work to her manager Mr Evans as required by Clause 21(b) of her contract. Although I have not seen evidence as to whether the Claimant had the 'express permission' of the CEO as required by Clause 21(a), the Respondent has not adduced evidence of how that permission might or might not be given in practice and whether it is, for example, delegated to line managers to authorise. It seems to me that the Claimant had done all that was reasonably required of her to obtain permission for that work and the Respondent has accordingly failed to show that the work was being carried out in breach of Clause 21.

Overall conclusion

114. In the circumstances, I find that the Claimant's claim of unfair dismissal is well-founded. The question of what remedy the Claimant is entitled to will be determined at the Remedy Hearing on 26 January 2020 (1 day) as listed at the hearing.

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Employment Judge Stout

Date15/12/20

JUDGMENT [& REASONS] SENT TO THE PARTIES ON

16/12/2020

FOR THE TRIBUNAL OFFICE