EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4102904/2019 & 4107066/2019

5 **Held in Glasgow on 22, 23 and 24 October 2019 and 27, 28 and 29 January 2020**

Employment Judge: Claire McManus

10 **Mrs M Kelly** — **First Claimant Represented by: Ms D Flanigan - Solicitor**

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Ms Jacqueline Irvine — **Second Claimant Represented by: Ms D Flanigan - Solicitor**

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St Mary's Kenmure Ltd — **Respondent Represented by: Mr D Hay - Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

- It having been conceded by the Respondent that the First Claimant's
30 dismissal by the Respondent was an unfair dismissal, it is determined that the First Claimant is entitled to an unfair dismissal award of £2,533.65 and a compensatory award of £10,199.69 and the respondent is ordered to pay to the First Claimant the total sum of £12,733.34 (TWELVE THOUSAND SEVEN HUNDRED AND THIRTY
35 THREE POUNDS AND THIRTY FOUR PENCE), subject to the effect of the Recoupment Regulations, as set out below.

- It having been conceded by the Respondent that the Second Claimant's dismissal by the Respondent was an unfair dismissal, it is

determined that the Second Claimant is entitled to an unfair dismissal basic award of £5,472.91 and a compensatory award of £52,469.73 and the respondent is ordered to pay to the claimant the total sum of £57,942.64 (FIFTY SEVEN THOUSAND NINE HUNDRED AND FORTY TWO POUNDS AND SIXTY FOUR PENCE).

REASONS

Background

1. The claimants' claims are each for unfair dismissal against the same respondent. Both claimants were employed by the respondent and both dismissals arise from occurrences within the respondent's Arran unit on the same day. There were no Preliminary Hearings prior to this Final Hearing. The claims were conjoined on agreement, following the claimants' representative's application.

2. In preliminary discussions at the commencement of these proceedings, prior to evidence being commenced, it was noted that the decision to dismiss in respect of the First Claimant was made at the Disciplinary Hearing stage. In respect of the Second Claimant, the outcome of the Disciplinary Hearing was a Final Written Warning but that was changed to dismissal following her Appeal Hearing, and no further appeal stage was given.

3. At the stage of these preliminary discussions, it was confirmed by the claimants' representative that she was satisfied that there was no conflict in her representation of both claimants. At this stage in these proceedings, the respondent's position was that neither claimant had been unfairly dismissed. It was not in dispute that that conduct was the respondent's reason for both dismissals. At that stage in these proceedings, the claimants' representative position in respect of the 3 stages of the test set out in *BHS v Burchell*, was that at that time of the dismissal of each claimant the respondent had believed that each claimant was guilty of the misconduct alleged, but that it is not accepted that there were reasonable grounds for that belief and not accepted that there was as much investigation as was reasonable in the circumstances. It was further the position of each claimant that their dismissal

was unfair in terms of section 98(4) of the Employment Rights Act 1996 ('the ERA'), with particular reliance on consistency of treatment. It was the position of each claimant that the decision to dismiss them was outwith the band of reasonable responses.

5 4. As noted below, the position changed during the course of the hearing. After the evidence from the respondent's witnesses, the respondent conceded that each of the claimant's dismissals was an unfair dismissal.

Proceedings

5. Both parties were professionally and very ably represented at the Hearing. I
10 am grateful to both representatives for the professional way in which they each represented their client(s) and assisted the Tribunal. I apologise for the delay in issue of this decision, which has been due to my ill health.

6. Parties relied on documents contained in a Joint Bundle, initially with items 1 to 33 numbered consecutively in pages [1] to [392]. During the course of the
15 hearing, without objection, additional documents were added, e consecutive pages up to [413]. The numbers in squared brackets ('[ ]') in this Judgment refer to document page numbers in this Joint Bundle.

7. Evidence was heard on oath or affirmation from all witnesses. For the respondent, evidence was heard from Mr William McKeown (Assistant
20 Director of Services), Ms Bernie Sanderson (HR Manager) and Ms Caroline Dearie (Director of Services). The evidence from the respondent's witnesses concluded on 24 October 2019. Evidence from the claimants, and parties' submissions, were heard in the January 2020 Hearing days.

8. It was discussed and agreed that in order to ensure confidentiality and to
25 minimise the risk of a young person's identification, the young people referred to in these proceedings would be referred to by initials AB, CD, EF, GH, IJ, KL and MN. Parties and witnesses utilised a table to identify those initials to the particular young person referred to. It was discussed and agreed that there is no need for those young people to be further identified in this
30 Judgment and that the findings in fact would be made seeking to avoid any

immaterial fact which may increase the risk of identification of those young people.

9. At the re-commencement of the Hearing on 27 January 2020, the Respondent's representative informed that it was the Respondent's changed position that unfair dismissal was conceded in respect of each claimant. It was then the respondent's revised position that each claimant had been unfairly dismissed but that arguments were being made by the respondent in respect of contribution, on application of any uplift for failure to follow the ACAS Code, and in respect of mitigation. The respondent's case was closed and evidence was then heard from the first claimant (Mrs Kelly). It became apparent that it was important to have clarity on the scope of the respondent's concessions, in order to ensure that evidence was heard on the matters on which findings in fact required to be made. The Hearing adjourned early on 27 January, before commencement of cross examination of the first claimant, to allow the respondent's representative to consider the respondent's position and to take instructions.

10. On 28 January, the respondent's representative confirmed that the respondent conceded that the dismissal of each claimant was both procedurally and substantively unfair. He confirmed that it was conceded by the respondent in respect of each claimant that their dismissal was unfair in terms of section 98(4) ERA. It was recognised by both representatives that the respondent's belief in the first claimant's conduct at the time of the decision to dismiss the first claimant i.e. the conduct which was the reason for the respondent's decision to dismiss the first claimant at the time of that decision, was wider than the conduct of the first claimant being relied upon in respect of contribution.

11. The respondent's revised position was that the conduct of the first claimant which was relied upon in respect of contribution was as follows:

> *'On Sunday 29 July 2018, Ms Kelly allowed a young person (CD) to enter (remain) in the office which is not permitted due to the risk to themselves, staff and due to confidentiality and items within the office that may be used as weapons for self-harm or harm to others. The*

> *CCTV shows Ms Kelly sitting in the office and by her own admission she confirms that CD was in the office and confirms that she knows that they are not permitted in the office at any time. This in particular is by reference to CCTV footage of the event between 14.25 to 14.47.'*

5 Findings in fact then required to be made in respect of that conduct. The above wording is based on the wording of the 'allegations and the management case' set out in the notes of Ms Kelly's Disciplinary Hearing (at [166]), with the last sentence of what was set out at [166] being removed. That last sentence (as set out in the Findings in Fact) describes conduct 10 which at the time of the dismissal the respondent believed the first claimant to be guilty of, and that belief was part of the reason for their decision to dismiss the first claimant.

12. In respect of the second claimant, Ms Irvine, the Respondent conceded the dismissal of Ms Irvine was unfair having regard to the procedural failure to 15 offer an appeal against Ms Dearie's decision to dismiss, and in respect of dismissal for a charge not previously disclosed (*per Strouthos v London Underground* [2004] IRLR 636). During the course of this Tribunal hearing, the respondent's representative set out the respondent's reason for dismissing Ms Irvine as being:

20 > *'The leaving of young person AB, who had recently self-harmed, and another young person MN, unsupervised in the quiet room of the Arran Unit on 29 July 2018, where AB had not been searched after having disclosed that she had self-harmed.'*

That reason had not been set out to the second claimant or articulated to the 25 Tribunal previously.

Issues

13. It was conceded by the respondent that each claimant's dismissal was an unfair dismissal (both procedurally and substantively) in terms of the Employment Rights Act 1998 ('ERA') section 98. It was agreed that the 30 reason for dismissal of each claimant was conduct.

14. I required to determine what award should be made to each claimant in respect of any basic award and any compensatory award. In so determining, I required to consider what was just and equitable to award each claimant, taking into account the provisions of section 122 and section 123 ERA, and in particular whether there should be any reduction in any award to reflect any element of contribution by that claimant to her dismissal, and if so to what extent.

15. I also required to consider to what extent (if any) either Claimant is entitled to an uplift in award in respect of any unreasonable failure in compliance with the ACAS Code on Discipline and Grievances (Code 1)

16. These are the issues which I have determined.

Findings in Fact

17. In relation to those determined issues, the following material facts were not in dispute or were found by me to be proven:-

18. The respondent provides secure residential care and education for up to 24 young people, with an additional 3 respite beds. The young people who are in the care of the respondent present a risk of harm to themselves and / or others. Young people come to the respondent's care through the Children's Panel system or the Criminal Justice System. The young people may be placed within the respondent's care on court order or on remand. The young people within the care of the respondent are teenagers aged up to age 18. On reaching age 18, some young people within the care of the respondent may be transferred to continue their custodial sentence in secure custody in Polmont Young Offenders Institution. The respondent's facility is the largest secure unit for young people in Scotland, in terms of both capacity and footprint. The disciplinary process in respect of both claimants was managed by Ms Sanderson, a trained HR professional.

19. There are five secure residential units at St Mary's Kenmure, each with the same layout. One of those secure residential unit is used for 3 respite beds, with additional offices in rooms used as bedrooms in the other 4 units. One of those other 4 units is the Arran unit. The Arran unit is a multi-purpose unit,

which can provide residential secure care for young people who are highly traumatised. The nature of the respondent's facility and the background of the young people who are resident there means that steps require to be taken by the respondent to minimise the risk of a resident young person inflicting harm on themselves or others within the facility.

20. Each residential unit is separately secured, all within the 'secure envelope' of the respondent's facility. The secure front door to each residential unit leads into that unit's central living area. Adjoining this central living area is an office base for staff ('the office'), a 'quiet room' (used e.g. when a young person has a visit from a family member) and a unit kitchen / dining area ('the unit kitchen'). Most of the meals are made in the respondent's centralised kitchen facility. The unit kitchen in each unit has in it cutlery, including knives and forks. This cutlery is counted and checked 4 times each day. At the weekends the young people may be allowed to use the unit kitchen and have access to the cutlery e.g. to make toast. CCTV cameras capture footage from a number of vantage points within the secure residential units. This includes a camera mounted on the wall above the quiet room, which is directed at the office door.

21. Fob locking mechanisms are fitted on many doors in the respondent's facility. Doors fitted with fob locking mechanisms require to be so secured because of the nature of the respondent's secure facility and because of the risk and acknowledged vulnerability of the young people within the respondent's secure care. The young people within the respondent's secure care present with a risk of harming themselves or others. The young people within the respondent's secure care may present with behaviour including aggression towards workers and others, self-harming and suicide risk. The behaviour of a young person within the respondent's secure care may '*flare up*' quickly. The respondent's workers may require to use physical restraint techniques on a young person with the respondent's secure care.

22. The door from the central living area to the quiet room is secured by a fob locking mechanism. The door from the central living area to the office is secured by a fob locking mechanism. The door to the office in each secure

residential unit is so secured because that office contains items which are not suitable for the young people to access. The office contains paperwork with sensitive and / or confidential data about the young people within the respondent's secure care. Medication is kept in a locked cabinet within that
5 office. An especially sharp knife for use to cut a ligature in an emergency situation is kept in each office. Items are kept in the office which are considered by the respondent as presenting a risk of being used by a young person for harm to themselves or others, including TV remote controls and DVDs. The young people with the respondent's secure care can use
10 ingenious ways to obtain, fashion and sharpen an implement of harm from household objects, such as the case of a DVD, a CD, a ruler etc. Examples of this are shown in the pictures at [381] – [392]. Household items such as DVDs are kept in the office rather than being in general circulation, in recognition of the risk of them being used by a young person to harm
15 themselves or another.

23. There are two corridors leading from the central living area in each of the secure residential units. The door to each corridor from the central living area is secured by a fob locking mechanism. Each corridor has 3 bedrooms leading off it. Each bedroom door from the corridor is secured by a fob locking
20 mechanism. One of the corridors in each residential unit has a room which is known as the computer room / games room or break out room (the computer room'). The door to that room is secured by a fob locking mechanism. That 'computer room' in the Arran unit used to have in it a games consul and TV, with associated cabling and games. Following an incident, that equipment
25 was removed. As at 29 July 2018, the only item in the computer room in the Arran unit was a corner shaped sofa.

24. There is an Assistant Manager assigned to each secure residential unit and 2 peripatetic Assistant Manager positions. Each team of workers on shift in each secure residential unit should normally comprise an Assistant Manager,
30 a Unit Manager, a Peripatetic Unit Manager and Social Care Workers, on the basis of a ratio of 1 worker to 2 young people. At the weekends, when the young people are not spending part of their days in the respondent's secure

education facility, the ratio normally operated is 4 members of staff per 6 young people.

25. The respondent has in place a 'PIT' (Personal Infrared Transmitter) alarm system. The purpose of the PIT alarm is for a worker to summon assistance from a response team. Activating the PIT alarm causes a loud noise and a light to flash where the PIT alarm has been activated. The response team comprises individuals who have been allocated to be 'responders' for that particular shift. Those responders are notified of the alarm though a paging system and then go to provide support to the worker who has activated the PIT alarm. On each shift, the Duty Officer and another allocated worker in each unit are normally appointed as an allocated responder. Activating the PIT alarm would normally result in a rapid response from a number of individuals responding to the alarm call.

26. During the time of their employment with the respondent the claimants were each registered with the Scottish Social Services Council ('SSSC'). This registration requires adherence to the SSSC Code of Practice for Social Service Workers [118 – 132].

27. The respondent's employees are also required to adhere to St Mary's Standard Operating Procedures 'SOPs'. Procedure 54 of these SOPs refers to locking systems. This is relevant to fob locking mechanisms within the respondent's premises. This SOP ('the door locking SOP') includes the following statement [132]:-

> *"No door may be left unsecured unless prior permission of a senior member of staff has been sought or a decision to leave a particular door open has been made by the senior management team and all relevant staff must be informed.*
>
> *All doors must be locked and proved locked each time they are used.*
>
> *The member of staff who opens a door is responsible for locking it again afterwards.*

All rooms not in use must be kept locked.

Offices must never be left open."

28. That SOP applies to all doors within the respondent's secure unit which have a fob locking mechanism, including the office door within the Arran unit. That SOP in respect of locking doors was not always strictly adhered to within the respondent's secure facility. Following Ms Dearie's commencement as Director of Services, she sought to put in place steps for strict adherence to that SOP. That message was not effectively communicated to the claimants. Young people used to be allowed to access the office. The change to not allow their access to the office, and the consequences of staff not taking steps to adhere to that change were not effectively communicated to the claimants. The Notice of Decision from the SSSC hearing which followed Ms Kelly's dismissal (at [291] – [301d]) it was noted that it was the position of a witness for the respondent that '*…in the past, young persons had been allowed to access the office to use the internet with the consent of a previous manager, but he had stopped that practice about 6 months previously.'* And that '*On questioning…..he accepted that could have been clearer in communicating that decision in writing to staff members',* and that there was an acceptance from a witness for the respondent that '*his decision to exclude young persons from the office could have been more effectively communicated'*.

29. The respondent's Discipline at Work Policy (effective as at the time of each claimant's dismissal) [160 – 164] ('the Code') sets out the procedure to be followed when a potential disciplinary issue arises. The Code lists conduct which may be regarded as gross misconduct. The Code does not include breach of the door locking SOP as an example of gross misconduct.

30. Young people in the respondent's secure care are allowed to shave with razors in certain limited circumstances. Dependent upon particular reasons and assessment of risk of harm at a particular time, that use may not be allowed or may be limited to being a supervised shave. The young people in the respondent's secure care are not allowed unlimited access to a razor. A record should be kept when a razor is signed out to a particular young person, and returned.

31. The first claimant, Mrs Kelly, was employed by the respondent from 3 January 2011 until 1 November 2018. For part of that time, Mrs Kelly was employed by the respondent as a Senior Practitioner. Following a restructure in 2018, Mrs Kelly was employed as a Residential Child Care Worker.

32. The second claimant, Ms Irvine, was employed by the respondent as a Residential Care Worker from 1 December 2006 until 28 January 2019.

33. On Sunday 29 July 2018, Mrs Kelly was due to finish her shift at 2pm, having started that morning. Ms Kelly had finished her shift the night before late because she was dealing with an incident and so required to stay on after her due finishing time. On 29 July 2019, Mrs Kelly continued working after her due finishing time of 2pm because she was completing paperwork in respect of the shift and because she knew that there was an ongoing incident which she may require to become involved in, in her capacity as a first aider.

34. Ms Irvine began her shift with the respondent at 2pm on 29 July 2018. Ms Irvine did not normally work in the respondent's Arran unit. From 2pm on that day there were four members of staff scheduled to be working in Arran Unit, being Ms Irvine, Richard Grady (Senior Practitioner), Paul Brannan (an agency worker) and Heather Reid (a sessional worker). Brian Quinn, the Assistant Unit Manager, was also working but he was also covering other units.

35. On 29 July Paul Brannan had informed Ms Irvine that AB might require her assistance. Ms Irvine took AB into the quiet room in the Arran Unit. There AB disclosed to Ms Irvine that she had self-harmed. AB had cuts on her arm. Ms Irvine took steps to deal with the situation. AB handed Ms Irvine shards of glass. Ms Irvine understood that it was those shards of glass which AB had used to cut herself. Ms Irvine advised Richard Grady (Senior Practitioner) of this and informed him that a search might be necessary. Ms Irvine did not have the authority to authorise a search herself. Ms Irvine went to the office to try to get first aid items. Mrs Kelly was seated behind the desk in the office. Ms Irvine informed Mrs Kelly of the situation she was dealing with with AB. Mrs Kelly was aware that, as a qualified fist aider, she may have to assist Ms Irvine in dealing with the situation. There were no steri-strips in the office.

The quiet room has a glass front and AB wanted more privacy, so Ms Irvine took AB into the computer room in the Arran Unit. AB asked if MN (another resident) could join them. Ms Irvine agreed because she was of the view that MN was a positive influence on AB. Ms Irvine cleaned AB's wound and concluded that it required the assistance of a first aid qualified member of staff. Ms Irvine was not first aid trained and so required the assistance of Mrs Kelly, who was. AB had initially not wanted another member of staff to deal with her wounds. On obtaining AB's agreement to be treated by the first aider (Mrs Kelly), Ms Irvine left AB and MN in the computer room. Mrs Irvine left AB and MN unsupervised in the computer room for approximately 30 seconds while she went to be in sight of the office to signal to Ms Kelly to come to assist with the wound. Ms Irvine did this on the basis of her own 'imminent risk assessment'. Ms Irvine did not activate a PIT alarm because she assessed that activating this alarm, and in particular the resultant flashing light and loud alarm and the arrival of a response team 9probably made up of a number of males), would heighten AB's distress and make her a further danger to herself. Later on 29 July 2018, AB was taken from the respondent's premises to a hospital Accident & Emergency ('A & E') Department for treatment of her cuts.

36. On the morning of Monday 30 July 2018, there was a manager's meeting. At that meeting it was discussed that AB had attended hospital A & E for treatment for cuts. An investigation required to be carried out on what had happened. At that time, it was discussed that it was believed that AB might have used a razor to self-harm. Willie McKeown (Assistant Director of Services) appointed Alasdair Crawford (Unit Manager) to investigate. Mr Crawford did not find evidence of a razor having been signed out. During the course of the investigations, CCTV footage was viewed showing activity around the Arran unit's office door. When Mr Crawford and Mr McKeown viewed that footage, they were concerned that the CCTV footage during the time period 14.25 – 14.47 ("the material time"), showed young people accessing what should be the secure and locked office area. At that time it was erroneously thought by Mr McKeown that a razor or similar item had been removed from the office area during that material time, and that that item had

later been used by a young person in the respondent's establishment for self-harming purposes, and that this had occurred as a result of both claimants' failure to remove young people from the office. This erroneous initial suspicion was the basis of disciplinary action being taken against both the first and the second claimant.

37. On 3 August 2018 both claimants were suspended on full pay and an investigation was carried out by Chris Millar (Unit Manager). On 3 August 2018, William McKeown sent a letter to Ms Kelly, informing her that she was in a period of precautionary suspension, with full pay, while investigation were carried out in respect of allegations made against her. That letter did not set out what those allegations were.

38. On 16 August 2018 Ms Kelly attended an interview with Mr Millar in which she was shown the CCTV footage. Two allegations were put to her, only one of which was relied upon in her subsequent dismissal. During the course of those investigations, Ms Kelly confirmed to the Chris Millar that she was registered with the SSSC and was aware of the Codes of Conduct for Social Service Workers and the respondent's Standard Operating Procedures, including re. security of the office and confidentiality.

39. Letters were sent to Ms Kelly extending the period of her precautionary suspension on full pay, '*while the fact finding continued'*, being extensions until 31 August 2018, then 14 September, then 28 September, then 12 October, then 26 October 2018. Mr Millar's Fact Finding report summary is dated 13 October 2018 and is at [78] – [83]. In that Fact finding Report, the first allegation against Ms Kelly is stated to relate to:-

> *"… an incident in Arran unit on the 29th July at the start of the late shift where young people were allowed to enter the staff office and a young person was able to remove an item from the office."*

40. This report notes the following under the heading '*Mitigating Circumstances/ Concerns*":-

> *"…Mary stated that she took no action to address the young people in the office because she was busy completing the young people's*

personal records and it hadn't been her who had let them into the office. Mary indicated it was past her finishing time"

41. On 16 October 2018, Willie McKeown (Deputy Head of Service – Care) wrote to Ms Kelly, inviting her to attend a disciplinary hearing on 25 October 2018.
5 That letter (at [76]) set out that that disciplinary hearing was in respect of:-

"...the recent fact findings into the following allegations:

1. *You were negligent in your duty of care and professional responsibility towards the 'Safe Care' and 'Supervision' of the young people in their unit on Sunday 29 July 2018.*

10 2. *You were remiss in your duty of care and professional responsibility in the 'Administration of Medication' to a young person in their unit 29 July 2018."*

And that:-

"The hearing will provide an opportunity for you to respond to
15 *the allegations listed above and all evidence collected as part of the fact finding process has been copied and included with this letter. I must highlight that disciplinary action may be taken following the conclusion of the hearing which could include or lead to dismissal"*

20 42. The documents sent to Ms Kelly with that letter are those at [78] – [165]. Those documents included Chris Millar's findings from the investigation stage which were set out in a 'Fact Finding Reporting Form' (at [78] – [83]) and records of the statements taken during that investigation. That fact finding was in respect of allegations that Ms Kelly and Ms Irvine:-

25 *"…were negligent in their duty of care and professional responsibility towards the 'Safe Care' and 'Supervision' of the young people in their unit on Sunday, 29 July 2018."*

43. The fact finding reports in relation to the first and the second claimant do not make any findings in respect of certain matters which are material and

relevant to the disciplinary proceedings and which could have been investigated at the time of the disciplinary proceedings against the claimants. These failures to make findings in fact are in respect of:-

5

- Medical evidence on the nature of the self- harm inflicted by AB on 29 July (which was discussed at the management meeting on Monday 30 July)
- There having been incidents of self-harm by more than one young person within the respondent's secure facility on 29 July 2018.
- That a young person handed a razor to a staff member after using it to self-harm on 29 July.

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- That AB handed shards of glass to Ms Irvine.
- The extent and dates of training received by either claimant in respect of dealing with incidents of self harm.
- The extent and dates of the claimants training or guidance on the appropriate use of the PIT alarm system and the circumstances when that should be activated.

15

- What the other staff on shift in the Arran unit were doing at the material time.
- Whether a member of staff had stood with his foot in the threshold of the office doorway in the Arran unit at or around the material time.

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- That there had been three incidents of self harm by young people within the respondent's premises on 29 July 2018, being two incidents of self-harm by the young person here identified as AB, and one incident of self-harm by the young person here identified as JL.

25

- That after the incident of self harm by JL, a razor was handed over to staff, which was the implement used by JL to self-harm.
- That no razor was recorded in the log as having being signed out on 29 July 2018.

- Whether any searches were carried out, or any reason why they were not carried out, after each incident of self-harm on 29 July 2018.

44. These matters were material to the investigation and the disciplinary proceedings against the claimants and could have been investigated at the time. The fact finding reports did not make material findings in fact on all relevant and available matters.

45. On 25 October 2018 Ms Kelly attended a disciplinary hearing. The respondent's note of that Disciplinary Hearing is at [166] – [174]. Ms Kelly was accompanied and represented at that Disciplinary Hearing by a Trade Union representative. Initially, the Disciplinary Hearing was heard by a panel, including Mr McKeown, Mr Gerry McGinty (Board Member) and Ms Bernie Sanderson (HR). Mr McKeown presented the management case at that hearing. The allegation Ms Kelly faced at that Disciplinary Hearing is set out at [166] and was as follows:-

> '*On Sunday 29 July 2018, Mary Kelly who is a long standing member of staff, allowed young people to enter the office which is not permitted due to the risk to themselves, staff and due to confidentiality and items within the office that may be used as weapons for self-harm or harm to others. The CCTV shows Mary sitting in the office and by her own admission she confirms that she was aware they were in the office and she confirms also that she knows that they are not permitted in the office at any time. It was discovered later that the young person had removed an item from the office however Mary confirms that she was not aware of that at the time."*

46. Those notes of the Disciplinary Hearing do not record it being Ms Kelly's position then that she explained that, at the material time, she was attempting verbally to get CD to leave the entrance of the office because Ms Kelly was CD's keyworker, with an awareness of her behaviours, and she elected not to get up and physically remove CD from the office entrance because she was showing signs of becoming a risk to herself and others and, as a result, Ms Kelly was attempting to de-escalate the situation. The Disciplinary Hearing Note does not record any discussion about whether the PIT alarm system

should have been activated in that circumstance. Those notes do record discussion on young people being allowed in the office to access the computer for clothes purchases (at [169]). Those Disciplinary Hearing notes do record (at [170]) it being put by Ms Kelly's representative that "….*it wasn't that (Ms Kelly) ignored that they were there she did ask them to leave.".* The Disciplinary Hearing Notes record (at [171]) the following:-

> *"GMCK asked MK is she would have done anything different that day The decision out with staff relations and viewing the CCTV.*
>
> *MK replied that she should have got up and closed the door however when you are under pressure it's difficult.*
>
> *GMCK noted that a lot of this could have been avoided if people just locked doors.*
>
> *MK stated that she 100% agreed with him, and that as a Union rep and Health and Safety member she is regularly trained and advocated for locked doors."*

47. During the course of the disciplinary hearing, objections were made by Mrs Kelly's trade union representative. She claimed that Mr McKeown was not impartial. As a result of the trade union representative's objections, Mr McKeown was removed from the panel who made the decision at the disciplinary hearing. The respondent's note of Ms Kelly's disciplinary hearing concludes as follows:-

> "(Bernie Sanderson) *asked if at the end of the hearing* (Ms Kelly*) felt she had a fair hearing.* (Trade Union Representative) *noted that she felt that* (Ms Kelly) *had a fair hearing."*

48. The decision to dismiss Mrs Kelly was made by Gerry McGinty (Board Member). A significant factor in that decision to dismiss was the erroneous belief that an object later used for self-harm was removed from the office during the material time. On the basis of that that erroneous belief, it was believed that Mrs Kelly was partly responsible for an incident of self harm on 29 July 2018. That erroneous belief was based on an investigation which was

flawed because it did not make material findings in fact on relevant and available matters. That erroneous belief was part of the grounds on which the decision to dismiss Mrs Kelly was made. Mrs Kelly was dismissed on 1 November 2018.

5 49. On 7 November 2018 Mrs Kelly appealed that decision. Her letter of appeal is at [176]. Mrs Kelly was assisted in that appeal by her trade union representative (Louise Brown). The grounds for appeal are stated in that letter as being:

> "1.*The severity of the penalty*
>
> 10 *2. Inconsistencies in the charge*
>
> *3. Breach of process*
>
> *4. Inconsistencies in the application of the 'Locking Systems' policy*"

50. Ms Kelly's Appeal Hearing took place on 24 January 2019. Mrs Kelly attended that appeal hearing with her trade union representative. The Appeal 15 Hearing was heard by Ms Dearie (Director of Services). The notes pre-prepared by Mrs Kelly's Trade Union representative and passed to the respondent at that Appeal Hearing are at [181c] – [181f]. Those notes record that the allegation against Mrs Kelly was:-

> "*That you were negligent in your duty of care and professional* 20 *responsibility towards the 'Safe Care and Supervision' of young people in their unit on Sunday, 29 July 2018'*

And (at [181d]) that this allegation was considered to be gross misconduct.

51. The appeal hearing minutes record (at [181c]) that Mrs Kelly's position at that hearing was that

> 25 "*… it was a common occurrence for young people to be at the entrance to the unit office, or indeed to be inside the office, whether that be to use the computer to select clothing or to request something from a staff member."*

and

"Mary understood that the policy stated that if any doors were to be left open, prior authorisation was required from a manager. However, Mary does not recall any authorisation being sought in order for a young person to be in or around the office throughout her employment at St Mary's."

52. The appeal point issue in respect of 'Breach of Process' is set out in those notes (at [181e]) as being in respect of the respondent's failure to specify in their policies that allowing a young person to be in or around the entrance to the office door could / would be considered gross misconduct leading to dismissal. The appeal point issue in respect of 'Inconsistencies in the Application of Policies' is set out in those notes (at [181e]) as being in respect of the respondent's failure to take any disciplinary action against the staff member shown in the CCTV at the material time *'… holding the door wide open with his foot whilst the young person approaches the doorway and have a conversation with him."* The appeal hearing notes do not record it being Mrs Kelly's position at the Appeal Hearing that in her dealings with CD she was seeking not to escalate the situation or risk moving CD to a crisis point. During the course of the disciplinary and appeal proceedings that was not offered as an explanation for Mrs Kelly having remained sitting at the material time.

53. Mrs Kelly and Ms Irvine both understood that young people were not permitted in the office. Neither claimant was made aware prior to their dismissals that permitting young people to enter the office could result in an employee being dismissed. There were other incidences of young people being at or in the doorway to a unit office. No disciplinary action had been taken by the respondent previously in respect of that.

54. Mrs Kelly attended a Fitness to Practice Hearing at her regulatory body, the Scottish Social Service Council ('SSSC'). The decision following that hearing is recorded as being 'To dismiss the case' [291].

55. On 16 August 2018 Ms Irvine attended an investigation meeting with Chris Millar. Mr Millar's Fact-Finding report summary re Ms Irvine is dated 13 October 2018 and is at [188] – [191]. The allegation set out against Ms Irvine in that fact finding was :-

5 *"You were negligent in your duty of care and professional responsibility towards the 'Safe Care' and 'Supervision' of the young people in their unit on Sunday, 29 July 2018."*

56. In that Fact finding Report, the allegation against Ms Irvine is also stated to relate to:-

10 *"… an incident in Arran unit on the 29th July at the start of the late shift where young people were allowed to enter the staff office and a young person was able to remove an item from the office."*

57. This summary notes the following re Ms Irvine under the heading '*Mitigating Circumstances/ Concerns*":-

15 *"Jacqui Irvine indicated that although she knew young people were not allowed in the office, the situation she was dealing with was more important. Jacqui was dealing with a young person who had self-harmed and required items from the medical box, Jacqui indicated that there was a staff member in the office and staff in the sitting room."*

20 58. Ms Irvine was suspended while the respondent carried out investigations into this allegation. Letters were sent to Ms Irvine extending the period of her precautionary suspension on full pay, '*while the fact finding continued*, being extensions until 31 August 2018, then 14 September, then 28 September, then 12 October, then 26 October 2018. It was Ms Irvine's position throughout
25 the disciplinary proceedings against her that at the material time she was dealing with a young person who had self-harmed.

59. On 16 October 2018, Willie McKeown (Deputy Head of Service – Care) wrote to Ms Irvine, inviting her to attend a disciplinary hearing on 25 October 2018. That letter (at [186]) set out that that disciplinary hearing was in respect of:-

30

"...the recent fact findings into the following allegations:

> 1. *You were negligent in your duty of care and professional responsibility towards the 'Safe Care' and 'Supervision' of the young people in their unit on Sunday 29 July 2018."*

And that:-

> *"The hearing will provide an opportunity for you to respond to the allegations listed above and all evidence collected as part of the fact finding process has been copied and included with this letter. I must highlight that disciplinary action may be taken following the conclusion of the hearing which could include or lead to dismissal"*

60. The documents sent to Ms Irvine with that letter are those at [188] – [211]. Those documents included Chris Millar's findings from the investigation stage which were set out in a 'Fact Finding Reporting Form' (at [188] – [191]) and records of the statements taken during that investigation.

61. On 25 October 2018 Ms Irvine attended a disciplinary hearing. The respondent's notes of that Disciplinary Hearing are at [240] – [244]. During the course of that disciplinary hearing, Ms Irvine said that she had left AB with another young person MN. That admission was known by the respondent from the date of that disciplinary hearing. It is recorded in the respondent's notes of that hearing at [241] and [243]. Those notes include it being recorded that it was Ms Irvine's position that "…*it was not an incident that required a PIT to be pulled*".

62. No action was then taken by the respondent in respect of that admission following the disciplinary hearing. Ms Irvine was not advised at that time that the respondent had any particular concern about the conduct that she had disclosed by that admission. Ms Irvine was not advised that any investigation was being carried out by the respondent in respect of that conduct. Ms Irvine was not suspended as a result of having made that admission. Ms Irvine was

not advised that any disciplinary proceedings would be taken against her in respect of that admitted conduct.

63. On 1 November 2018 Ms Irvine received the outcome of her disciplinary hearing (at [184]). A Final Written Warning was issued to her which would remain on her record for 12 months, with any further misconduct resulting in more serious disciplinary action which could include dismissal. The decision letter states:-

> *"In line with the Discipline at Work Policy within St Mary's Kenmure, I can confirm that the decision of the panel is to issue you with a Final Written Warning in response to the allegation that you were negligent in your duty of care and professional responsibility towards the "Safe Care" and "Supervision" of the young people in their unit on Sunday 29 July 2018.*
>
> *This warning has been issued following a review of the notes from the Fact Finding Hearing, the Disciplinary Hearing, and CCTV footage, we have also taken account of your mitigating circumstances.*
>
> *This warning will remain live on your personal record for 12 months, and any further misconduct may result in more serious disciplinary action being taken which could include dismissal"*

64. That letter does not detail the particular conduct in respect of which this Final Written Warning was issued to Ms Irvine. This Final Written Warning was issued to Ms Irvine because the respondent believed at that time that by Ms Irvine's conduct at the material time she was 'permitting young persons to enter the office'. The conduct which Ms Irvine was issued a final written warning for was in respect of her conduct in dealing with young people accessing the office. In making that decision it was recognised that at the material time Ms Irvine was '*doing her best*' in dealing with AB who had self-harmed and that she had physically removed a young person from the office doorway. At the time that Final Written Warning was issued to the second claimant, Ms Irvine had told the respondent that she had left AB in the computer room with MN.

65. On 6 November 2019 Ms Irvine returned to work. Ms. Irvine worked in her role for the respondent without any suggestion of restriction in her duties from her return to work on 6 November 2018 until she was dismissed. On her return to work, Ms Irvine had a meeting with Bernie Sanderson. At that meeting Ms Sanderson said to Ms Irvine the following (or to the effect of) :-

> "*A wee bit of advice for you. Moving forward, the Board, and Carole for that matter, thought the penalty should have been more severe, given some of the things that came to light in your disciplinary hearing.*"

That conversation related to Ms Irvine's admission at her Disciplinary Hearing that she had left AB in the quiet room with another young person. Ms Irvine told her Trade Union representative (Louise Brown) what Ms Sanderson had said to her re this at that meeting. Ms Brown raised that with Ms Sanderson. Ms Brown's email to Ms Sanderson sent on 27 November 2018 (at [250]) sets out what Ms Irvine told Ms Brown re this, which is the wording set out above. Ms Sanderson replied to Ms Brown by mail of 27 November 2018. Ms Sanderson refuted that she had said those words to Ms Irvine, as follows:-

> *"I totally refute that, I did say I would give her advice that at appeal the decision can be changed, and there were things that came to light that may be highlighted once the board got the papers. I did say I was shocked at the response to the question, but I absolutely did not bring Carole or the board into the conversation. I am aware of who the appeal board are and this would not have been appropriate.*
>
> *Our current policy states that the decision of the disciplinary hearing can be overturned at any appeal hearing.*
>
> *I am clear on the boundaries I must adhere to."*

66. On 12 November 2018, Ms Irvine appealed the issued Final Written Warning. The letter of appeal was acknowledged by Mr McKeown in his letter to Ms Irvin of 14 November 2018 [254]. That letter notes the grounds for Ms Irvine's appeal being:-

> *"1. The severity of the penalty*

> 2. *Breach of process*
>
> 3. *Inconsistencies in the application of the 'Locking Systems' policy."*

67. There was email correspondence between Louise Brown and Bernie Sanderson in relation to Ms Irvine's appeal (at [246] – [253]). On 27 November 2018 Ms Brown raised concern that the Director of Services was part of the appeal panel, given the comments which it was alleged Ms Sanderson had said re. '*a more severe sanction*' [252].

68. On 24 January 2019 Ms Irvine attended an appeal hearing. At that hearing Louise Brown represented Ms Irvine and relied upon what is set out at [255a – 255g]. The appeal hearing focused on Ms Irvine's conduct in having left AB unsupervised with another young person in the computer room during the material time. Ms Irvine was dismissed. Ms Dearie made the decision to dismiss Ms Irvine. The reason Ms Dearie made the decision to dismiss Ms Irvine was because Ms Irvine had left AB unsupervised with another person in the computer room during part of the material time. That conduct was known at the time of Ms Irvine's disciplinary hearing. That conduct is separate to the conduct in respect of which the Final Written Warning was issued. That conduct was not 'further misconduct' to the conduct in respect of which the Final Written Warning had been issued. That conduct was known of by the respondent at the time of issue of the Final Written Warning. Ms Irvine had not received any notice that this separate allegation would be addressed at the appeal hearing. The claimant was notified of this outcome by letter dated 28 January 2019 [182]. That letter includes the following:-

> *"Following the case put forward by yourself and Louise Brown, Unison at the meeting of 24 January 219, I wish to advise you that I have taken the decision not to uphold the appeal.*
>
> *When coming to this decision we reviewed your case, statements and CCTV footage. We also took into consideration your own admission of further breaches to our safe care policies therefore we have made the decision to increase the sanction given to you on 01 November*

2019 and dismiss you from your post with immediate effect. This is in line with our policy which states "At the appeal hearing any disciplinary penalty imposed may be reviewed and may be increased or decreased as a result of the Appeal Hearing."

We consider your actions to be one of gross misconduct and you put our young people at risk. You will be summarily dismissed with immediate effect."

69. Ms Irvine was not afforded an avenue of appeal from Ms Dearie's decision to dismiss, on the basis that the decision to dismiss was made following her appeal of the issue of a Final Written Warning. Ms Irvine stated that she wished to appeal the decision to dismiss her in email to Ms Sanderson on 3 April [255h]. Ms Sanderson's position in her reply email of 4 April 2019 was that Ms Irvine had '*exercised your right to appeal*' [255h]. The failure to allow an appeal from the decision to dismiss was not in compliance with the ACAS Code of Practice of Diciplinary and Grievance Procedures. A Service Director at one of the other secure residential facilities within the respondent's group structure could have heard the dismissal appeal.

70. Mrs Kelly's date of birth is 23/12/1971. Her employment with the respondent was from 3/1/2011 until 1/11/2018. At the time of termination of employment her net weekly pay with the respondent was £412.58. Her gross weekly pay was £551.81. Mrs Kelly's schedule of loss is set out at [302] – [305]. This includes pension loss. Mrs Kelly has taken reasonable steps to mitigate her loss. The fact that she was under investigation by SSSC affected her ability to obtain alternative employment after her dismissal. Mrs Kelly received Job Seekers Allowance in the period from 15/11/2018 – 16/05/2019. Mrs Kelly took appropriate steps to seek alternative employment. She made job applications from 13/11/2019 [327]. Mrs Kelly made multiple applications for jobs in the social care field and joined multiple job agencies to try and find work. Mrs Kelly secured agency work on 17 May 2019. On 28 October 2019 she secured employment as a Senior Residential Childcare Worker. Her pay there was less than that with the respondent, as set out in her Schedule of Loss. Mrs Kelly obtained alternative employment from 17 May 2019. Her

pay in that employment is more than her pay was in her employment with the respondent.

71. Ms Irvine's date of birth is 09/02/1960. Her employment with the respondent was from 01/12/2006 until 28/01/2019. At the time of termination of employment her net weekly pay with the respondent was £226.35. Her gross weekly pay was £253.38. Ms Irvine's schedule of loss is set out at [361] – [364]. This includes pension loss. Ms Irvine has taken reasonable steps to mitigate her loss. Ms Irvine received Job Seekers Allowance in the period from 14/04/2019 – 26/09/2019. Ms Irvine began receiving Employment Support Allowance of £73.10 per week from 26 September 2019. Ms Irvine has not obtained employment since her dismissal. Ms Irvine has been certified as unfit for work. Med 3 form at [371] certifies Ms Irvine as unfit for work for 2 weeks from 31/01/2019 because of 'stress and anxiety'. Med 3 form at [375] certifies Ms Irvine as unfit for work for 4 weeks from 28/08/2019 because of 'anxiety with depression'. Ms Irvine was deeply affected by her dismissal and was signed off sick by her GP immediately after she was dismissed. She has remained signed off sick and is currently in receipt of Employment Support Allowance. Her anxiety has exacerbated a pre-existing condition, ulcer colitis. The SSSC investigation, which began because of Ms Irvine's dismissal, was not concluded at the time of this Tribunal hearing.

Relevant Law

72. The law relating to unfair dismissal is set out in the Employment Rights Act 1996 ('the ERA'), in particular Section 98 with regard to the fairness of the dismissal and Sections 118 – 122 with regard to compensation. Where the Tribunal makes a finding of unfair dismissal (or where that is conceded) it can order reinstatement or in the alternative award compensation. In this case each claimant seeks compensation. This is made up of a basic award and a compensatory award.

73. The basic award is calculated as set out in the ERA Section 119, with reference to the employee's number of complete years of service with the employer, their gross weekly wage and the appropriate amount with reference to the employee's age. Section 227 sets out the maximum amount of a week's

pay to be used in this calculation. There is a statutory cap on the amount of weekly pay which can be used in this calculation. The basic award may be reduced in circumstances where the Tribunal considers that such a reduction would be just and equitable, in light of the claimant's conduct (ERA Section 122 (2)).

74. In terms of the ERA Section 123(1) the compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. Section 123(6) of the Employment Rights Act 1996 states that:-

> *'Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.'*

75. The application of s123 was considered by LJ Brandon in the Court of Appeal authority *Nelson v BBC (No.2) 1980 ICR 110, CA -:*

> *"An award of contribution to a successful complainant can only be reduced on the ground that he contributed to his dismissal by his own conduct if the conduct on his part relied on for this purpose was culpable or blameworthy. This conclusion can be arrived at in various ways. First, it can be said that the epithet "culpable" or "blameworthy" should be implied before the word "action". Or secondly it can be said that the expression "caused or contributed" impliedly incorporates the concept of culpability or blameworthiness. Or thirdly it can be said that, in any case, it could never be just or equitable to reduce a successful complainant's compensation unless the conduct on his part was relied on as contributory was culpable or blameworthy. For my part, I prefer the third way of arriving at the conclusion to either the first or second and would approach the application of paragraph 19(3) on that basis.*
>
> *It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does*

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

It follows from what I've said that it was necessary for the industrial tribunal in this case, in order to justify the reduction of Mr Nelson's compensation which they made, to make three findings as follows. First, a finding that there was conduct of Mr Nelson in connection with his unfair dismissal which was culpable or blameworthy in the sense which I have explained. Secondly, that the unfair dismissal was caused or contributed to some extent by that conduct. Thirdly that it was just and equitable, having regard to the first and economic findings, to reduce the assessment of Mr Nelson's loss by 60 per cent."

76. There are circumstances where an 'uplift' may be applied in respect of failure to follow the ACAS Code of Practice ('the ACAS uplift'). Section 207A(2) TULR(C)A (the relevant law in respect of the ACAS Uplift) provides that:-

'If, in any proceedings to which this section applies, it appears to the employment tribunal that – (a) the claim to which the proceedings relate concerns a mater to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the Employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more so than 25 per cent.'

Submissions

77. Both parties' representatives spoke to their own substantive written submissions. The claimant's representative helpfully set out proposed findings in fact. The respondent's representative helpfully set out which of those proposed findings were agreed and, if not, the extent to which there was disagreement. There was no dispute in respect of the majority of the claimants' representatives' proposed findings in fact, including those in respect of what had 'erroneously been determined' by the respondent. There was agreement on the relevant substantive law.

78. In respect of the first claimant (Mrs Kelly), the basic award was agreed to be per Mrs Kelly's Schedule of Loss (at [393] – [396]). The respondent made no submissions in respect of failure to mitigate loss and accordingly the calculation of losses to the point of attaining new employment in October 2019 were agreed. It was submitted on behalf of the respondent that in respect of the first claimant there was not failure to follow the ACAS Code. Reliance was placed on there having been investigation, disciplinary and appeal hearings (exceeding the Code) in respect of matters.

79. It was the respondent's ultimate position in respect of the first claimant that it was conceded that her dismissal was an unfair dismissal. That concession was that the first claimant's dismissal was both substantively and procedurally unfair. That concession was made in recognition that the reason for the first claimant's dismissal at the time of that dismissal was made on the basis of there being a connection between the access of a young person (CD) in the office and an instance of self-harm that occurred later on 29 July 2018. It was recognised that, at the time of the decision to dismiss, that was a material factor in the decision that dismissal was an appropriate sanction for Mrs Kelly's conduct in not getting up from her chair in the office at the material time. It was accepted by the respondent's representative that that connection was not sustained on reasonable grounds.

80. In respect of the application of s123(6) ERA to the first claimant's position, the respondent's representative relied upon the first claimant having remained seated (and, it was submitted, thus having failed to respond appropriately) when CD was present in the office in the Arran Unit. That conduct by the first claimant was relied upon as being culpable or blameworthy conduct.

81. It was submitted by the respondent's representative that the purpose of the ACAS Code is not to provide a prescriptive standard of investigation, which is intensely fact sensitive. It was the respondent's representative's position that if that were so, virtually every case where the *Burchell* test was not met would demand an ACAS uplift. It was submitted that the ACAS Code is concerned with the provision of a process, not an examination qualitatively of what is done within that process.

82. In respect of their submissions on any uplift in terms of section 207A TULR(C)A, the respondent relied upon guidance found in *Lawless v Print Plus Ltd* (2010) UKEAT/0333/09 *per* Underhill P at paragraphs [10]-[11].

83. It was submitted on behalf of the respondent that both claimants' dismissals were caused or contributed to by a substantial extent by action of the Claimants. In his submissions on contribution, the respondent's representative relied upon the following propositions and factors:

- The focus is on the employee's own conduct, not conduct of others.

  (Parker Foundry v Slack [1992] ICR 302 at 307A-D)

- The Tribunal is to form its own assessment of the degree of culpability on the evidence when arriving at the figure by which proportionately to reduce.

- 'Culpable or blameworthy' conduct can include that conduct that was 'perverse or foolish', 'bloody-minded' or 'unreasonable in the circumstances'

  (BBC v Nelson (No 2) [1980] ICR 110)

- Assessment of culpability is broad, and generally suggested at wholly to blame (100 per cent); largely to blame (75 per cent); employer and employee equally to blame (50 per cent); slightly to blame (25 per cent)

5 (*Hollier v Plysu Ltd* [1983] IRLR 260)

- The first claimant's conduct was, if not a direct breach, inconsistent with the provisions of the Locking Systems Policy [132] in which offices are explicitly mentioned.

- The first claimant's status as a regulated Social Service Worker
10 subject to a professional Code [118] – [131].

- The highly secured nature of the Respondent's facility

- The nature of the young people present within the facility and in particular their increased propensity to harm, and the extraordinary lengths to which such young people can acquire, conceal and
15 fashion implements capable of causing harm justifying a particularly heightened requirement of vigilance. (Reliance was placed on Ms Dearie's position in evidence that "*We are one bad decision away from a fatal accident inquiry*")

- The nature of material present in the office that could be lying
20 around and then capable of being acquired. Whilst certain matters are further secured within the office, the very fact the office is itself secured

- Ms Dearie's evidence that young people were no longer permitted internet access.

25 - The potential for sight of materials of a sensitive nature relating to other young people

- It being confirmed as known that young people are not permitted within the office by Mrs Kelly and all others interviewed by Mr Miller during his investigation (see [pp84-104])

- Ms Irvine's evidence and view about the appropriateness of CD being in the office which in her view necessitated an intervention both verbal and physical.

5
- An unconvincing, and after the event, justification of 'de-escalation' and Mrs Kelly's position in evidence at the Tribunal that a risk wasn't an actual risk if it was a potential risk.

- The nature of paperwork required of Claimant not being onerous.

- The availability of a resource – the PIT – to call for assistance which was not tested by Mrs Kelly.

10 84. It was submitted on behalf of the respondent that, notwithstanding their concession of unfairness, these factors point to a substantial degree of contribution in Mrs Kelly's actions that caused or contributed to her dismissal. The respondent relied upon it being this behaviour that led to the disciplinary proceedings against the first claimant. It was submitted that the fact that the
15 SSSC took a particular view of these matters by reference to their own particular considerations of professional regulation is of limited assistance, given the particularly secure nature of the respondent's facility and that the regulatory scheme within the SSSC embraces all manner of facilities and care provision. The respondent's representative submitted that the first claimant's
20 conduct showed a substantial degree of culpability. He submitted that there should then be a reduction of between 50% and 75% (at least 50%) to the first claimant's compensatory award to reflect her contribution. He submitted that the considerations relied upon applied equally to a similar reduction to the first claimant's basic award. It was accepted that a different test applied
25 on application of s122 ERA. It was the respondent's representative's position that the same percentage deduction should be applied to both the basic and compensatory awards to the first claimant.

85. In respect of the second claimant (Ms Irvine), the basic award was agreed as calculated in the Claimant's Schedule of Loss [361]. The respondent agreed
30 the gross and net weeks' pay detailed in the Schedule. The respondent did not argue that the second claimant had failed to mitigate her loss. It was the

respondent's position that the period in respect of which loss is claimed by the second claimant is excessive. Reliance was placed on Ms Irvine having been unwell and for certain periods having been signed off as unfit for work (which was not contested). The respondent placed reliance on the lack of any medical evidence linking the reason for unfitness (being noted in the Med 3 forms as 'stress and anxiety' or 'work stress') and there being no connection made medically as between incapacity to work and the decision to dismiss. It was submitted that such a connection would place the matter quite squarely within the Johnston exclusion zone. Reliance was placed on the second claimant having sought employment for the period between April and September 2019, and there being no medical vouching for that period, albeit she maintains she would not have been able to work. It was the respondent's position that there is a difficulty with the second claimant's losses being asserted as being connected with dismissal for a period from end of January 2019 to April 2020. It was submitted on behalf of the respondent that given the paucity of medical evidence, and in particular the prospects of recovery and anticipated timescales, such an asserted period of loss is too remote. It was the respondent's representative's position that given the uncertainties in the evidence the matter can only be approached broadly, and in the respondent's submission a broad measure of total loss of earnings would be for a period of 9 months from the date of dismissal, which would be 39 weeks. That would result in net wage loss of £8,827.65 and pension contributions of £1,836.15, being a compensatory award of £10,663.80 prior to any adjustments. It was submitted by the respondent's representative that this approach would be preferable to an exercise in speculating as to when and for how long Ms Irvine might have been sick whilst employed had she not been dismissed, whether on full pay for a period (6 months) and thereafter half pay (6 months).

86. In respect of the question of application of s203A to the second claimant's circumstances, it was explicitly acknowledged by the respondent's representative that, a substantive decision to dismiss having been made for the first time on appeal from a Final Written Warning, Ms Irvine was not afforded an avenue of appeal from that decision of Ms Dearie's and that that

was not in compliance with the ACAS Code. The respondent's representative recognised that the evidence from Ms Sanders indicated that it could potentially have been possible to have offered an appeal to a Service Director at one of the facilities within the group structure of which the Respondent forms part. The respondent's representative recognised that the circumstances re. the second claimant are in the ambit of an uplift under section 207A TULR(C)A. The respondent's representative submitted that, having consideration to the factors in *Lawless* and having regard to the totality of the circumstances, that uplift should not be considered at the most severe end. It was submitted that there had been a process that had been undertaken in respect of the facts and circumstances of the events of 29 July 2018, which fact finding had involved the interviewing of witnesses and the viewing of CCTV evidence. The respondent's representative made it clear that the respondent was not relying on the size of their organisation in respect of application of the Code. It was noted (without great reliance being put) that once it became apparent that the appeal hearing was focusing on a different 'charge' in respect of events that day, Ms Irvine's union representative did not attempt to pause proceedings. The respondent's representative submitted that in all the circumstances an uplift of not more than 10% was reasonable in respect of the second claimant.

87. In respect of the second claimant and the issue of any contribution by her to her dismissal, the respondent's representative relied upon Ms Irvine having left unsupervised AB and MN in the quiet room. That was contended to be culpable or blameworthy conduct for the following reasons:

- Ms Irvine's status as a regulated Social Service Worker, dealing with complex individuals and subject to a professional Code [118] – [131].
- The highly secure nature of the Respondent's facility
- The nature of the young people present within the facility and in particular an increased propensity to harm, and the extraordinary lengths to which such young people can acquire, conceal and fashion implements capable of causing harm justifying a particularly

heightened requirement of vigilance. (Reliance was placed on Ms Dearie's position in evidence that "*We are one bad decision away from a fatal accident inquiry*")

- The nature of the route by which young people require to reside in the respondent's facility
- The lack of visibility into the quiet room in comparison with other rooms in the Unit
- The acceptance that a search is appropriate when a young person has disclosed self-harm for the purpose of ensuring that the young person does not have on their person any further implement with which to cause further harm
- It being known that whilst AB had handed over some sharp objects, she had not yet been searched and there remained the possibility of some other object having been retained by AB
- The length of time left unsupervised being not insubstantial given the special considerations of the respondent's facility.
- There appearing to have been alternatives in potentially dispatching MN, having both MN and AB accompany Ms Irvine, or pulling the PIT,(on the basis of Ms Dearie's evidence that use of the PIT is not as limited as suggested by Ms Irvine or Ms Kelly, and preferring the evidence of Ms Dearie on this point)

88. It was submitted by the respondent's representative that, notwithstanding the concession of unfairness made by the Respondent, these factors point to a substantial degree of contribution in Ms Irvine's actions that caused or contributed to her dismissal. It was submitted that it was this behaviour that led to Ms Dearie's decision to dismiss the second claimant (although not to the initial disciplinary proceedings brought against the second claimant). It was recognised by the respondent's representative that Ms Irvine was dealing with a situation of self-harm of a young person and doing what she could to attend to that effectively. It was submitted that the degree of culpability of the

second claimant, given all the above, is substantial and in the respondent's submissions sits between the 25% to 50% brackets. The respondent's representative submitted that given the particularly acute considerations of the respondent's facility, these should be considered as being towards the higher end of proportion of that range. For these reasons, the respondent's representative invited the Tribunal to reduce the compensation payable to Ms Irvine from the figures sought in the Schedule of Loss, and to make a similar reduction of 25% to 50% to the basic award.

89. For both claimants, Ms Flannigan relied upon the guidance given by the Court of Appeal in *Nelson v BBC (No.2) 1980 ICR 110, CA.* The claimants' representative submitted that in order for a deduction to be made there must be a causal link between the employee's conduct and the dismissal. She relied on *Hutchinson v Enfield Rolling Mills Ltd 1981 IRLR 318, EAT* in her submission that the Tribunal cannot simply point to some bad behaviour of the employee and say that by reason of that matter, they are going to reduce compensation. Reliance was also placed by the claimants' representative on *Nejjary v Aramark Ltd EAT 0054/12,* where the Employment Appeal Tribunal overturned the Tribunal's decision in respect of both the fairness of the dismissal and the 100% contribution which the Tribunal said they would have awarded if the claimant was successful. The claimants' representative particularly relied upon para. 32 of the EAT's decision, as follows:

> *"For the reasons we have given in relation to ground 1, the Employment Tribunal cannot properly have treated the issues or matters that led to verbal and written warnings as conduct which casually contributed in any way to the dismissal. That is because in this case the Respondent has explicitly "distanced" the dismissal from those earlier matters. The Claimant, having been dismissed by reason of a single instance of misconduct, cannot have been said to have contributed to his dismissal by reason of other matters of conduct which were not at play in the employer's decision to dismiss at all… The major difficulty is that the tribunal did not exercise the restraint required by s.123(6) of confining themselves only to matters of conduct which had caused or contributed to the dismissal."*

90. The claimants' representative also relied upon *Cornwall County Council and anor v McCabe EAT 147/97,* where the EAT set aside a 20% deduction for contributory fault as there was nothing in the Tribunal's decision to show what misconduct M had actually committed:

5 *"[at para. 13]Having regard to the inherent and uncured defect in the procedures; to the absence of any testing of the complainant's evidence, despite their age by July 1996; and to the great caution which the Industrial Tribunal, understandably, viewed their evidence, we are at a loss, like Mr McCabe, to know what is established against*
10 *Mr McCabe to support the 20% contribution. A "no smoke without fire" approach."*

91. In respect of both the first and the second claimant, their representative submitted that no finding of contributory fault should be made, and therefore no reduction to any award on that basis.

15 92. The claimants' representative sought an uplift in respect of each claimant on application of Section 207A(2) TULR(C)A. The claimants' representative noted that the Employment Tribunal may only consider adjusting the compensatory award once it has made an express finding that a failure to follow the Code was unreasonable (*Kuehne and Nagel Ltd v Cosgrove EAT*
20 *0165/13).* The claimants' representative relied upon *Lawless v Print Plus UKEAT/0333/09/JOJ,* where LJ Underhill acknowledged that the relevant circumstances to be taken into account by tribunals considering uplifts would vary from case to case *but* should always include the following:

"[at para. 10(4)] The circumstances which will be relevant will inevitably
25 *vary from case to case and cannot be itemised, but they will certainly include: a) whether the procedures were ignored altogether or applied to some extent (see Virgin Media Ltd v Seddington & Eland UKEAT/0539/08, at para. 20); b) whether the failure to comply with the procedures was deliberate or inadvertent; and c) whether there are*
30 *circumstances which may mitigate the blameworthiness of the failure. Those factors are sometimes embraced under the labels of the "culpability" or "seriousness" of the failure."*

93. The claimants' representative invited the Tribunal to make finds in fact in respect of the following, which were relied upon as factors relied upon the following as factors for the purposes of assessing issues of ACAS Uplift:

In respect of Mrs Kelly:

5

- The disciplinary process was managed by Ms Sanderson a trained HR professional who had qualifications in employment law.
- The respondent is a relatively large employer running four house units and the organisation carries out highly sensitive work complying with various aspects of social work and criminal justice legislation.

10

- Ms Kelly was not informed at any point by the respondent that breaching the door policy would be considered gross misconduct. This was not outlined in the policies or in the custom of the workplace.

In respect of Ms Irvine:

- The disciplinary process was managed by Ms Sanderson a trained HR professional who had qualifications in employment law.

15

- The respondent is a relatively large employer running four house units and the organisation carries out highly sensitive work complying with various aspects of social work and criminal justice legislation.

20

- Ms Irvine was not informed that there was a separate allegation against her concerning leaving AB and MN unaccompanied being considered at the appeal hearing of her final written warning. She was as a result unable to prepare for this charge or adequately engage with it at the hearing. Ms Dearie, the decision maker, confirmed that this alone was the reason she elected to dismiss Ms Irvine as this amounted to gross misconduct.

25

- Ms Irvine appealed the decision to dismiss her by email on 3 April 2019. Ms Sanderson replied on 4 April 2019 advising that she had

already exercised her right to appeal. Accordingly, Ms Irvine was deprived of the opportunity to appeal.

- Ms Kelly was not informed at any point by the respondent that breaching the door policy would be considered gross misconduct. This was not outlined in the policies or in the custom of the workplace.

94. The claimants' representative submitted that in respect of Mrs Kelly, the respondent had unreasonably failed to comply with section 24 of the ACAS Code:

> '*Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct. These may vary according to the nature of the organisation and what it does, but might include things such as theft or fraud, physical violence, gross negligence or serious insubordination.'*

95. In respect of Ms Irvine, the claimants' representative submitted that the respondent unreasonably failed to comply with sections 9 & 26 of the ACAS Code:-

> *'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 Code of practice on disciplinary and grievance procedures disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.*
>
> *26. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.'*

96. The respondent's representative having conceded the position in respect of mitigation, there was no need for the claimants' representative to rely on her written submissions in respect of the claimants having each mitigated their losses. Those submissions included reliance on *Beijing Ton Ren Tang (UK) Ltd v Wang UKEAT/0024/09/DA,* that the effect of the dismissal on the individual employee may well be a relevant matter in determining whether there has been a failure to mitigate (*Beijing Ton Ren Tang (UK) Ltd v Wang UKEAT/0024/09/DA).* Such circumstances were considered by the Court of Appeal in *Abbey National plc and anor v Chagger 2010 ICR 397.* The claimants' representative relied on *Chagger* in her submission that the circumstances of the dismissal were relevant to the period of loss. She submitted that where an employee has been traumatically dismissed and feels unable to contemplate returning to a work environment for a substantial period, that is relevant for the purposes of determining failure to mitigate. Reliance was placed on the Court of Appeal's decision in *Chagger* that the EAT had erred in law in concluding that Mr Chagger's future loss was limited to the period during which Mr Chagger would have remained with Abbey, had he not been the subject of unlawful discrimination, because that approach failed to have regard to the extent to which the discriminatory dismissal affected Mr Chagger's career prospects. The claimants' representative also relied upon *Chagger* in respect of the second claimant with regard to the Court of Appeal's finding that the EAT had erred in finding that Abbey could not be liable for the losses resulting from the fact – to the extent that it was a fact – that Mr Chagger was unlawfully stigmatised. The claimants' representative did not seek stigma damages in respect of either claimant. Her position was that the second claimant has been unfit for work because of the way in which she was dismissed. She accepted that an issue arose from the lack of medical evidence upon which that proposition was made.

97. In respect of Ms Kelly's mitigation of her loss, the claimants' representative relied upon the evidence of Ms Kelly having claimed Job Seekers Allowance from 15 November 2018 and having begun job seeking immediately after her dismissal, as evidenced in the Bundle, and having made multiple applications to jobs in the social care field and joined multiple job agencies to try and find

work. It was submitted that Ms Kelly's attempts to find work were thwarted by the fact she had been dismissed for gross misconduct and because of her duty to inform potential employers that she was under investigation with the SSSC. Losses were claimed until the time of commencement of her new employment, as a Senior Residential Childcare Worker, on 28 October 2019.

98. In respect of Ms Irvine's, the claimants' representative submitted that Ms Irvine was deeply affected by her dismissal. Reliance was placed on Ms Irvine having been and was signed off sick by her GP immediately after she was dismissed, having remained signed off sick and being in receipt of Employment Support Allowance. It was submitted that the anxiety and stress is as a result of her dismissal and this has exacerbated a pre-existing condition, ulcerative colitis. It was submitted that the claimant remains unfit for work and that the SSSC investigation, which began because of her dismissal, has not yet been concluded and remains a source of anxiety.

99. The claimants' representative sought awards for each claimant as per their respective prepared Schedule of Losses.

Comments on evidence

100. The respondent's case against both claimants was heard first. For the respondent, the order of witnesses was Mr McEwan, Ms Sanderson and then Ms Dearie. The decision to dismiss the first claimant was made by Mr McGinty following the disciplinary hearing, which was chaired by him and at which he was assisted by Ms Sanderson. I did not have the benefit of hearing evidence from Mr McGinty. That was of particular significance in respect of the first claimant's case, where the decision to dismiss was made at the disciplinary hearing. Ms Sanderson could only speak to what she had witnessed at the disciplinary hearing and the discussions that she had had with the decision maker in respect of the rationale for coming to the decisions. Ms Sanderson was clear in her evidence that Mr McGinty had taken into account all factors, including what he had seen in the CCTV in respect of young people accessing the office area and acting in a way which led him to believe that something had been removed from the office area; the notes from the investigation which were in *'the pack';* the fact that a young person

had self-harmed after the material time shown on the viewed CCTV; that that incident of self-harm was serious and had required that young person to attend hospital A & E. It was clear from Ms Sanderson's evidence that her position was that Mr McGinty had concluded that he had a reasonable belief that the CCTV footage showed that something was picked up and removed from the office by a young person who had had inappropriate access to the office and that Mr McGinty believed that that item was later used by another young person to self-harm. It was only at the end of the respondent's case, during Ms Dearie's evidence that it transpired that there had been more than one incident of self harm by resident young people around the material time. It was only in Ms Irvine's evidence that it became clear that shards of glass had been handed to her by young person AB.

101. It was very surprising that three very significant matters were first mentioned in evidence towards the end of Ms Dearie's evidence, during some questions asked by myself for the purposes of clarification, after examination in chief and cross examination. I took into account the credibility and reliability of Ms Dearie and made findings in fact in respect of these matters. These were:-

- there had been three incidents of self harm by young people within the respondent's premises on 29 July 2018, being two incidents of self-harm by the young person here identified as AB, and one incident of self-harm by the young person here identified as JL.

- After the incident of self harm by JL, a razor was handed over to staff, which was the implement used by JL to self-harm.

- That no razor was recorded in the log as having being signed out on 29 July.

102. It was very surprising that no evidence had been heard on those matters prior to that stage. Clearly those matters had not been taken into account at the stage of the Disciplinary Hearings because they had not been part of the evidence of Ms Sanderson or Mr McKeown. It appeared that neither representative was aware of these matters prior to Ms Dearie's position in her

evidence before the Tribunal. I allowed both representatives the opportunity to ask questions of Ms Dearie in respect of these matters. I considered Ms Dearie to be entirely credible and reliable in her evidence. It was clear that Mrs Dearie's position was that it was the three incidents of self harm, and the fact that a razor had been handed to staff by JL, that prompted the investigation which had resulted in these dismissals. After instructing that the investigation be conducted, Ms Dearie had then had no part until the Appeal Hearing stage. The investigation papers before me did not mention or make any findings that there had been three incidents of self harm on 29 July 2018, or that a razor had been handed to staff by JL (or any other). It was clear that those facts were taken into account by Ms Dearie in her decision to uphold the first claimant's dismissal and in her decision to dismiss the second claimant at the stage of her appeal of the final written warning. Considering all the evidence, including the evidence of the claimants and the credibility and reliability of the witnesses who were before me, I have made findings in fact that there were three incidents of self harm within the Respondent's Kenmure premises on 29 July 2018 and that a razor had been handed to staff on that day by JL. Those facts are not identified in the fact finding report, or in any of the papers used at or minuting either claimant's investigatory meetings, disciplinary hearing or appeal hearing. These and other significant facts which are material and could have been investigated at the time and are not identified in the fact finding reports, are set out in the Findings in Fact section above.

103. There is no evidence of it being put to either claimant as part of the investigation or disciplinary process there had been three incidents of self harm on 29 July 2018, or that a razor had been handed to staff by JL (or any other). From the fact that Ms Dearie was aware of these matters from the time of her instigation of the investigatory process, I concluded that it ought to have been reasonable for the respondent to have collected information in respect of those matters at the investigation stage. It appeared from the investigation report that the investigating officer had not considered the log records in respect of razors, which would have been easily accessible. I concluded from the unexplained failure to include in the investigation report any mention of

allegations in respect of these aspects, or of steps taken to investigate those aspects, that the investigation was not reasonable in the circumstances. This was particularly relevant in respect of the first claimant because the first claimant was dismissed at her Disciplinary Hearing. At that stage (in terms of the analysis from *BHS v Burchell*, being at the time when the respondent formed the belief that the claimant was guilty of misconduct), I concluded that the respondent had not carried out as much investigation as was reasonable in the circumstances. There was no evidence before me from which I could conclude that Mr McGinty took into account those matters at the time he made the decision to dismiss. In any event those matters were not included in the Investigation Report and were not put to either claimant. Ms Dearie was aware of those additional facts when she made the decision to dismiss the Second Claimant, at the Second Claimant's Appeal Hearing. However, there was no evidence that those matters had been put to the Second Claimant or of her having the opportunity to comment to the respondent about those matters.

104. It was conceded by that each claimant's dismissal was both substantively and procedurally unfair. Had I required to make a determination on unfair dismissal, I would have concluded that each claimant's dismissal was an unfair dismissal. Taking into account the content of the investigation 'fact finding;' papers, in respect of each claimant's case, I would have concluded that at the separate times when the respondent formed the belief that each claimant was guilty of gross misconduct justifying summary dismissal the respondent had not carried out as much investigation into the matter as was reasonable in the circumstances, because of the extent and nature of the material matters on which no findings were made.

105. The consideration of whether any deduction should be made for contribution requires to be considered on the basis of what was the respondent's reason for dismissal at the time of the decision in respect of each claimant. I required to consider in respect of each claimant whether their conduct was blameworthy in respect of what was the reason for the dismissal, and the conduct which the respondent at the time of the dismissal believed the claimant was guilty of. What was believed at the time of the dismissal to have

been a consequence of that conduct is a factor. It is then a factor that it was accepted before me in respect of the first claimant that what was believed at the time of the dismissal to have been a consequence of that dismissal (self-harm using an item which was removed from the office) was not the case. I considered that to be a material factor in consideration of whether, and if so to what extent, there should be a deduction for contribution in respect of the first claimant's conduct. I required to take into account the potential for harmful consequences from the blameworthy conduct in respect of what was the reason for dismissal.

106. In respect of the first claimant the blameworthy conduct was her not getting up out of her seat in the office when young people were accessing the office area. Ms Kelly's position at this Tribunal hearing was that she was CD's keyworker and she elected not to get up and physically remove CD from the office entrance because she was showing signs of becoming a risk to herself and others and, as a result, by remaining siting, Ms Kelly was attempting to de-escalate the situation. That position was put to the respondent's witnesses. I attached significant weight to the fact that although before me it was the first claimant's position that she took a decision to remain seated because she considered that to be appropriate so as not to escalate the situation with young person CD, that was not the first claimant's position during the internal process, where she had trade union representation. I took into account that issues were raised by the trade union representative where she felt there was a concern. I attached significant weight to the fact that at no time during the internal diciplinary proceedings, was it the position of Mrs Kelly or her Trade Union representative that the reason Mrs Kelly remained on her seat at the material time was so that she did not risk escalating the behaviour of CD. Other mitigating factors were relied upon during the disciplinary process against the first claimant. For these reasons I concluded that the first claimant was not entirely credible and that at the time of the incident it had not been her decision to remain seated so as not to escalate the behaviour of CD. In assessing the blameworthiness of the first claimant's conduct in remaining seated while young people were in or around the office

area at the material time, I took into account the mitigating factors put forward on behalf of the first claimant during the internal process.

107. In the months prior to the material time, there had been steps taken by the respondent to change both the SOP door pocking policy. It was the respondent's evidence that additionally, young people were no longer allowed in the office. The respondent's steps for change in respect of both of these matters had not been effectively communicated to the claimants. I took into account the report on the findings of the SSSC. It was the first claimant's consistent position that young people were allowed in the office, and required to do so to access the internet to buy clothes. I found her to be credible in that position. Any change to that position had not been effectively communicated to the claimants. I attached weight to Chris Millar's position as recorded in the respondent's investigatory stage (at [95], response to question 2, where he is recorded as having said:-

> "*I have brought up the issue of young people accessing the office myself. It was discussed at team meetings and at other times where the importance of GDP are was highlighted.*"

108. It was the position of both representatives that Ms Irvine was generally a credible and reliable witness. There was one aspect of her evidence which was disputed. That was in respect of her position on the content of a conversation between Ms Irvine & Ms Sanderson on Ms Irvine's return to work in November 2018. It was Ms Irvine's position that she had a meeting with Bernie Sanderson in which Ms Sanderson advised her that she should not appeal because the Board and Ms Dearie felt the penalty should have been more severe. I took into account and attached significant weight to the terms of the email sent by Ms Irvine's trade union rep in November 2018 setting out what she had been told by Ms Irvine in respect of that conversation. I accepted the claimants' representative's submissions on the consistency of Ms Irvine's position. On that basis, and because I found Ms Irvine to be generally credible and reliable, I accepted Ms Irvine's account over that of Ms Sanderson.

109. There were some holes in the evidence in respect of the respondent's case. There were a number of pieces of correspondence from during the disciplinary and appeal procedures which were not before me, including the letter setting out the reason(s) for Ms Kelly's dismissal and the outcome letter from Mrs Kelly's Appeal Hearing. There was no evidence before me of any policy in place within the respondent's organisation on de-escalation techniques. In respect of Ms Irvine there was no record of any investigation having been done on the matter which was the reason for dismissal (the particular young people having been left unsupervised). Ms Dearie relied on having sent an memo signalling a change in adherence to the locking doors policy. That memo was not before me. It was the position of the respondent at the Tribunal that the PIT alarm should have been activated by Ms Irvine rather than her leaving AB unsupervised with another young person. There was no documentary evidence of this having been put to Ms Irvine at the Appeal Hearing (which was the first time that she knew there was an issue with that conduct). There was no evidence before me of any policy in place within the respondent's organisation on appropriate use of the PIT alarm system. There was a dispute in evidence between Ms Dearie and Ms Irvine in respect of when the PIT alarm system should be used. I took into account Ms Irvine's credible and reliable evidence and her account of making her own risk assessment and her reason for not utilising the PIT alarm to call for assistance and to instead leave AB with the other young person when she did. I took into account what was Ms Irvine's consistent position, including during the internal processes. I accepted her position as credible, reliable and reasonable.

110. It was a feature of this case that the allegations made against the claimants at the outset of the disciplinary process were vague and unspecific, as were the reasons given for dismissal at the time.

Decision

111. I applied the relevant law to the findings in fact. In considering the relevant circumstances and reaching my decision I took into account the nature of the Respondent's organisation, their responsibility for ensuring safeguarding of the young people in their care; the risks of harm to young people, from self-

harm or otherwise from items which may come into those young people's possession and the potential consequences of harm to those young people.

112. The respondent has admitted that each claimant's dismissal is an unfair dismissal, both procedurally and substantively. My consideration of the conduct of each claimant is not in respect of whether their dismissal was an unfair dismissal. In reaching my decision on whether any deduction should be applied for contribution, I require to apply the relevant law, as relied upon by the representatives. My decision requires to be on application of the findings in fact made. I must decide whether by their blameworthy conduct either claimant caused or contributed to their dismissal. I required to consider the blameworthiness of each claimant's behaviour in the context of whether any deduction should be made in respect of contribution.

113. In respect of the first claimant (Mrs Kelly) I accepted the respondent's representative's submission that there was an element of blameworthiness in Mrs Kelly's behaviour which had contributed to her dismissal. I took into account that the conduct which was relied upon at the time of the dismissal as being the reason for dismissal went further than the conduct which was accepted before me as having occurred. This is best displayed by reference to the wording of the 'allegations and the management case' which is set out in the respondent's notes of Mrs Kelly's disciplinary hearing, at [166], which is set out in the findings in fact. I accepted the respondent's position that by remaining seated at the material time the claimant had permitted young people to access the office. I accepted that that access had a least a potential of leading to harm because of what a young person may furtively obtain from the office. I accepted the respondent's reliance on the nature of their facility and the young people. I took into account and attached significant weight to the nature of the respondent's facility and Ms Dearie's evidence of being *'one step away from a Fatal Accident Inquiry'*. I also took into account the evidence before me that other staff permitted young people to enter the office door area, or at least failed to take action to remove them. I took into account the uncontested evidence that at or around the material time an employee had stood with his foot in the office door threshold. I took into account the evidence that the locking door policy had not been strictly adhered to and that

Ms Dearie's steps to change that had not been effectively communicated to the claimants. I took into account that young people had previously been allowed to enter the office and that the change to that had not been effectively communicated to the claimants. I considered those aspects to be relevant in respect of whether at the time the first claimant knew that her conduct in remaining seated was '*perverse or foolish*' '*bloody minded*' or '*unreasonable in the circumstances*' (per *BBC v Nelson* (No 2) [1980] ICR 110). I took into account Mrs Kelly's experience and length of service. I took into account, and considered it to be significant, that the mitigating reason relied upon before me (de-escalation or reliance on the risk of escalating the young person's behaviour) was not relied on during the internal process, when other factors were relied upon as mitigation. For all these reasons, I decided that a deduction should be made to the first claimant's basic and compensatory award because of her blameworthy conduct which had contributed to her dismissal. For all these reasons, I assessed the level of reduction to both awards to the first claimant to be 50% (following the assessment levels in *Hollier v Plysu Ltd* [1983] IRLR 260). I would have decided upon a higher level of contribution (up to 100%) if the evidence had shown that it was known that the locking door policy was strictly and consistently adhered to.

114. In respect of the second claimant, I did not accept that there was an element of blameworthiness which had contributed to her dismissal. I considered it to be significant that there was no evidence of a policy on use of the PIT alarm system or training provided to the second claimant in respect of the circumstances when that alarm system should be used. I attached weight to Ms Irvine having provided a consistent, credible and reasonable explanation as to why she did not activate that system and having done so throughout the internal disciplinary process. I took into account that Ms Irvine's failure to activate the PIT alarm system was not considered at the initial investigatory or disciplinary stage to be a particular issue. I attached weight to the evidence of Mr McKeown in examination in chief with regard to the PIT system. His evidence was that the circumstances when that PIT alarm would be activated were *'...for emergency assistance when someone is in a compromised position and needs support.'* I took into account and considered it to be very

significant that it was recognised by the respondent's witnesses that Ms Irvine and been doing her best to deal with a difficult situation. For all these reasons, I did not accept that Ms Irvine's conduct in leaving the two young people unsupervised when she did was was blameworthy conduct in respect of which it was appropriate to apply any reduction for contribution to either the basic unfair dismissal award or the compensatory award to her.

115. The claims concerned matters to which the ACAS Code of Practice on Disciplinary and Grievance Procedures ('the ACAS Code') applies. The ACAS Code includes provisions that employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made, and that they should allow an avenue of appeal. With regard to the submissions on an uplift, I accepted the respondent's representative's submission that the consideration should not be on the quality of the process, but rather on whether the process was in place or not. I had regard to the claimants' representative reliance on *Kuehne and Nagel Ltd v Cosgrove EAT 0165/13* and *Lawless v Print Plus UKEAT/0333/09/JOJ.*

116. In respect of the first claimant. I took into account that the respondent's Disciplinary Policy did not set out that breach of the door locking SOP would be likely to be considered to be gross misconduct, although some examples are given. I took into account *Lawless v Print Plus UKEAT/0333/09/JOJ,* where LJ Underhill acknowledged that the relevant circumstances to be taken into account by Tribunals considering uplifts would vary from case to case but should always include the following:

> *"[at para. 10(4)] The circumstances which will be relevant will inevitably vary from case to case and cannot be itemised, but they will certainly include: a) whether the procedures were ignored altogether or applied to some extent (see Virgin Media Ltd v Seddington & Eland UKEAT/0539/08, at para. 20); b) whether the failure to comply with the procedures was deliberate or inadvertent; and c) whether there are circumstances which may mitigate the blameworthiness of the failure.*

Those factors are sometimes embraced under the labels of the "culpability" or "seriousness" of the failure."

117. With regard to the first claimant, the circumstances include the nature of the respondent's secure facility and the potential for harm; that the respondent had the benefit of professional HR advice; that the reason for the first claimant's dismissal as relied upon before me was breach of the door locking SOP; the lack of specification in the allegations against the first claimant and the respondent's failure to make clear in their Disciplinary Policy that breach of the door locking SOP and / or allowing a young person to enter the office would be likely to be considered to be gross misconduct. I considered that in these circumstances there was an unreasonable breach of the Code. I decided that that failure was unreasonable because of the secure nature of the respondent's facility. I accepted the claimant's representative's submissions that an uplift was appropriate for those reasons. I took into account that there was an investigatory stage, disciplinary hearing and appeal hearing in respect of the first claimant. In all the circumstances, I decided that it was appropriate to apply an uplift of 5% in respect of the first claimant.

118. With regard to the submissions on an uplift in respect of the second claimant, I accepted the claimants' representative's submission that the respondent failed to comply with sections 9 & 26 of the Code and that those failures were unreasonable. The respondent had put in place a procedure but then failed to allow an opportunity to appeal when an appeal route could have been available. Additionally, the respondent had failed to specify the allegations against the second claimant which ultimately led to her dismissal. That was unreasonable and affected the second claimant's ability to put her case to the respondent. For those reasons, I decided that an uplift should be applied for unreasonable failure to follow the applicable ACAS Code of Practice. I took into account that there was an investigatory process and disciplinary hearing. For that reason, I did not consider it appropriate to apply an uplift of the maximum 25%. I considered it however to be material that there was no real investigatory process in respect of the conduct which was the reason for the second claimant's dismissal and no appeal allowed in respect of that decision,

although an appeal route was available. For these reasons, I decided to apply an uplift of 20% in respect of the second claimant.

119. On the application of *Digital Equipment Co Ltd -v Clements (No 2) [1998] IRLR 134 CA*, I applied the following approach in my assessment of the financial awards:-

(a) Calculation of the attributable loss sustained (including pension loss)

(b) Consideration of mitigation and adjustment if appropriate.

(c) Application of *Polkey –v- Dayton Services Ltd* 1988 ICR (if any).

(d) Identification of what is '*just and equitable'* in terms of s123(1).

(e) Consideration of s123(6) if '*the dismissal was caused or contributed to by any culpable action of the claimant'*

(f) Application of any uplift in respect of failure to follow the ACAS Code.

120. In respect of both claimants, it was accepted that no deduction should be applied for lack of mitigation. It was not the position of either representative that any reduction should be made in respect of *Polkey.*

121. In respect of the calculation of compensatory award to the second claimant, following *Digital Equipment Co Ltd -v Clements (No 2) [1998] IRLR 134 CA*, I first considered the attributable loss sustained. That required assessment of the appropriate period of loss. That then involved consideration of the periods when the second claimant has been unfit for work, and the reason(s) for her incapacity. I did not accept the respondent's representative's submissions that the period of loss claimed in respect of the second claimant was excessive (being from 29 January 2019 until 22 April 2020). I accepted that I required to take into account that the second claimant had been unfit for work during the period of loss claimed for. I accepted that the lack of medical evidence connecting her incapacity with her dismissal required to be taken into account. I agreed that the Johnson exclusion zone applied. No

claim as made before me for injury. I agreed that the matter should be approached broadly. I accepted the claimant's representative's position that it is appropriate to take into account in mitigation the income which the second claimant has received in respect of Employment and Support Allowance. It is noted that the Recoupment Regulations do not apply to Employment and Support Allowance.

122. On the application of *Digital Equipment Co Ltd -v Clements (No 2) [1998] IRLR 134 CA*, , and in considering the attributable loss sustained, I took into account the periods when Ms Irvine had been unfit for work and the periods when she had taken steps to seek alternative employment. I took into account that there was no medical evidence before me linking the reason for Ms Irvine's incapacity to her dismissal. I proceeded on the basis that there were periods of time when Ms Irvine was certified as unfit for work. Because there was no medical evidence before me linking that incapacity to the dismissal, I did not proceed on the basis of that incapacity being as a result of the respondent's actions in dismissing the second claimant. I attached weight to the fact that the second claimant has been medically certified as unfit for work and in receipt of Employment Support Allowance rather than Job Seekers Allowance. I placed weight on the second claimant's credible and reliable evidence on her fitness for work and attempts at times to obtain alternative employment. I took into account that the investigation by the SSSC is likely to have an effect on the second claimant's ability to find alternative employment in the care sector. On the basis of the evidence before me I accepted that the second claimant has not been fit for work since her dismissal. I accepted as credible the claimant's evidence that she hoped to be able to look for work in the future. I accepted the claimant's representative's position that it was appropriate to take into account the second claimant's income at the rate of £73.10 per week from Employment Support Allowance as mitigation of loss. In all the circumstances, I accepted the period of loss sought by the claimants' representative in respect of the second claimant as reasonable. For all these reasons I assessed the attributable loss sustained by the second claimant as a result of her unfair dismissal (including pension loss) on the basis of the calculations set out in

the second claimant's schedule of loss (at [361] to [364]). In assessing that attributable loss, I took into account the evidence that the claimant had not previously been unfit for work as a result of her pre-existing colitis.

123. I noted the comments of Phillips J in *Fougere -v- Phoenix Motor Co Ltd [1976] IRLR 259*, as quoted in *Mrs Mercy Devine -v- Designer Flowers Wholesale Florist Sundries Ltd 1993 WL 963706.* I took into account and applied Ld. Coulsfield's comments in *Mrs Mercy Devine -v- Designer Flowers Wholesale Florist Sundries Ltd 1993 WL 963706,* as follows:-

> "*The case envisaged by Phillips J towards the end of that paragraph is similar to the circumstances of the present case. It is, in our view, clear that Phillips J did not intend to suggest that, in such a case, the employee should receive no compensation for loss of earnings. The question in regard to which he reserved his opinion was whether the employee could recover loss of earnings for the extended period of unemployment resulting from the nervous breakdown. There is no reason whatever why such an employee should not be entitled, at least, to compensation for loss of earnings for a reasonable period following the dismissal, until she might have reasonably been expected to find other employment. Further, since the question is one of assessing the loss sustained by the individual employee who has been dismissed, there is, in our view, no reason why the personal circumstances of that employee, including the effect of the dismissal on her health, should not be taken into account in asserting the appropriate amount of compensation. That does not mean that if the employee becomes unfit for work, wholly or partly as a result of the dismissal, she is necessarily entitled to compensation for loss of earnings for the whole period of such unfitness. The Industrial Tribunal has to have regard to that loss, consider how far it is attributable to action taken by the employer, and arrive at a sum which it considers just and equitable. In a case of this kind, there may well be a question as to how far prolonged unfitness for work can properly be regarded as attributable to the actions of the employer. In the end, of course,*

the question what sum is just and equitable is one for the Industrial Tribunal."

And

"As we have said, the fact that unfitness followed upon, and is attributable to, a dismissal does not necessarily imply that the whole period of unfitness following thereupon must be regarded as attributable to the actions of the employer. There may, for example, be questions as to whether the unfitness might have manifested itself in any event. Further, the letter from the appellant's medical practitioner, to which the Industrial Tribunal refer, states, inter alia x, that the appellant is unfit for managerial work, but does not certify that she has been unfit for any form of remunerative employment; and it appears to attribute her condition, in part, to the manner in which the dismissal was brought about. It is well established that the manner of dismissal is not a proper subject of compensation."

124. Sections 123 and 124 of the ERA set out the relevant statutory provisions in respect of calculation of the compensatory award. I applied s123(1) ERA in assessing compensation of '*such amount as the tribunal considered to be just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer'*

125. On application of *Digital Equipment Co Ltd -v Clements (No 2) [1998] IRLR 134 CA*, at the stage of identification of what is 'just and equitable' in terms of s123(1), in all the circumstances of the present case, I considered it to be just and equitable to reduce the figure calculated in respect of the second claimant's attributable loss by 10% to take into account that the claimant has been unfit for work during the period of loss, and may have been unfit for work as a result of her pre-existing medical condition, even if she had not been unfairly dismissed by the respondent. I considered it to be just and equitable to make this deduction to take into account the lack of medical evidence on that matter.

126. On the approaches outlined above, I calculated the compensatory awards and basic awards (with regard to the application of an uplift) to each claimant which I considered to be just and equitable in all the circumstances. I proceeded on the basis of the accepted calculations set out in the claimants' representative's Schedules of Loss. I accepted the figure of £350 as being just and equitable in respect of loss of statutory rights relating to length of service for both claimants. I applied the reduction for contributory conduct to the first claimant's basic and compensatory awards. I applied the uplift elements to both claimants' basic and contributory awards to reflect the unreasonable breach of the ACAS Code in respect of each claimant.

127. The first claimant's unfair dismissal basic award, calculated with reference to the effective date of termination of employment (1 November 2018), the claimant's gross weekly wage of £551.81 (subject to the statutory cap of £508.00) and a multiplier of 9.5 weeks (based on her age as at the date of termination of employment (46) and number of years of continuous service with the respondent (7)) was agreed to be £4,826.00. I applied a reduction of 50% to reflect the first claimant's contributory conduct. That calculated to a basic award of £2,413. I applied an uplift of 5% to that figure (£120.65). That calculates to a basic award to the first claimant of (£2413 + £120.65) £2,533.65.

128. On the basis of the evidence and the claimants' representative's acceptance that there was no financial loss for the first claimant from October 2019, the future loss element set out in the first claimant's schedule of loss [302 – 305] is not included in the compensatory award to the first claimant. The other basis and calculations in that schedule of loss were not disputed. The Schedule of Loss took into account Job Seekers allowance payments received by the first claimant from 15/11/2018 until 16/05/2019 (at [303]. Taking into account the application of the Recoupment Regulations, sums received from Job Seekers Allowance are not included as mitigation. On that basis, the first claimant's total past losses (including pension loss) are the figure shown at [305] of £17,166.93, plus the amount of JSA received (£1,911.04) and an award to reflect loss of statutory rights of £350, that calculates to (£17,166.93 + £1,911.04 + £350) £19,427.97. A reduction of

50% to reflect contributory conduct is applied to that figure (£9,713.99). An uplift of 5% of that figure (£485.70) is applied. That calculates to a compensatory award to the first claimant of (£9,713.99 + £485.70) £10,199.69. The total award to the first claimant is (£2,533.65 + £10,199.69) £12,733.34

129. The first claimant was in receipt of Job Seekers Allowance for part of the period in respect of which the compensatory award relates. To avoid double payment, the relevant government department will seek to recover the amount of benefit or Job Seekers Allowance which the first claimant received during this period. This will be recovered from the respondent before the relevant part of the award is paid to the first claimant. The prescribed element of this award, to which the Recoupment Regulations apply relates to the period from 15 November 2018 until 16 May 2019. The prescribed element in respect of this period is (26.14 weeks x £73.10) £1,911.04. The total monetary award of £12,733.34 exceeds the prescribed element by (£12,733.34- £1,911.04) £10,822.30. The prescribed element of £1,911.04 should not be paid to the first claimant by the respondent until the relevant government department serves a recoupment notice on the respondent advising of the amount of benefit paid to the employee, or notification is given that there will be no recoupment. On service of a recoupment notice, the specified amount will then fall to be paid by the respondent to the relevant government department. Any balance falls to be paid by the respondent to the first claimant once the respondent has received this recoupment notice or notice that there will be no recoupment, a copy of which will be sent to the first claimant.

130. The second claimant's unfair dismissal basic award, calculated with reference to the effective date of termination of employment (28 January 2019), the second claimant's gross weekly wage of £253.38 and a multiplier of 18 weeks (based on her age as at the date of termination of employment (58) and number of years of continuous service with the respondent (12)) was agreed to be £4,560.76. There was no reduction in respect of contributory conduct to the second claimant's awards. An uplift of 20% was applied in respect of unreasonable breach of the ACAS Code (£912.15). That calculates to a basic award to the second claimant of (£4,560.76 + £912.15) £5,472.91.

131. The basis and calculations in the second claimant's schedule of loss [361 – 364] were not disputed. The deduction of 10% was applied to the total financial losses (including pension loss) of £38,503.04, being past loss of £8,638.90 and future loss of £29,864. On application of the 10% deduction in terms of section 123(1) (£3,850.30) that was a figure of (£38,503.04 - £3,850.30) £34,652.74. Added to that is £350 for loss of statutory rights, totaling £35,002.74. I considered that figure to be just and equitable in terms of s123(1). No reduction for contributory conduct was applied to the second claimant's awards. An uplift of 20% was applied to that figure in respect of unreasonable breach of the ACAS Code (£7,000.55). That calculates to a compensatory award to the second claimant of (£35,002.74 + £7,000.55) £42,003.29.

132. The award to the second claimant only is in excess of £30,000, therefore grossing up of that loss is required to be done to compensate for any tax that may be payable on the compensation under section 401 of the Income Tax, Employment and Pensions Act 2003. I followed the approach in *Shove v Downs Surgical Plc* [1984] 1 All ER 7. The combined total of the basic award and compensatory award exceeds £30,000. In these circumstances, as the basic award is calculated using gross pay, no grossing up is made of the basic award element to the second claimant. Using Scotland tax rates for tax year 2019 – 2020, the grossing up of the compensatory award calculation is calculated as follows:-

Compensatory Award		£42,003.29
Personal allowance	0% tax rate	£11,500.00
Starter rate	19%	£2,050.00
Basic rate	20%	£10,395.00
Intermediate Rate	21%	£18,486.00
Higher Rate	40%	£10,038.73
Top rate	46%	-

Gross £52,469.73

133. The total award to the second claimant is (£5,472.91 + £52,469.73) £57,942.64. The Recoupment Regulations do not apply to the second claimant because the second claimant was not in receipt of Job Seekers Allowance and those Regulations do not apply to Employment Support Allowance.

Employment Judge: Claire McManus
Date of Judgment: 18 May 2020
Entered in register: 20 May 2020
and copied to parties