EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113199/2019 (V)

Final Hearing held by Kinly (CVP) on 24 – 26 June and 14 August 2020

Employment Judge A Kemp

Mrs E Farnell	**Claimant Represented by Ms J Forrest - Solicitor**
Oakminster Healthcare Ltd	**Respondent Represented by Mr R White - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant was unfairly dismissed by the respondent and she is awarded the sum of **ONE THOUSAND EIGHT HUNDRED AND FORTY-SEVEN POUNDS THIRTY FOUR PENCE (£1,847.34)** against the respondent.

REASONS

Introduction

1. This was a Final Hearing into a claim for unfair dismissal. The parties were each represented, the claimant by Ms Forrest and the respondent by Mr White.

2. The hearing took place by cloud video platform (CVP) remotely in accordance with the orders made at the Preliminary Hearing. The hearing itself was conducted successfully, with all parties, representatives and witnesses attending and being able to be seen and heard, as well as being able themselves to see and hear. I had both a paper copy of the Bundle of Documents, and one sent electronically. There were occasions when the audio quality was poor, but it was adequate to hear the question and answer. There were a number of breaks taken during the evidence. I was satisfied that the arrangements for that hearing had been conducted in

accordance with the Practice Direction dated 11 June 2020, and ascertained that the appropriate notice as to that hearing was on the cause list. I was satisfied that the hearing had been conducted in a fair and appropriate manner such that a decision could be made on the basis of the evidence before me.

3. The respondent sought an order under Rule 50 in relation to a resident of the care home at which the claimant worked who was mentioned in the Bundle of Documents and in evidence. That person is elderly, and vulnerable in that she does not have legal capacity. The application was not opposed by the claimant. I considered that it was appropriate to grant it, having regard to the terms of that Rule including the principle of open justice. It is limited to a small part of the evidence. I have referred to the resident as B, and to family members involved as MT and AM. The Order under Rule 50 is granted separately to this Judgment.

The evidence

4. The respondent led in evidence Ms Nicola Ferguson the investigating officer, Ms Kathleen McAdams the dismissing officer and Ms Meghan Allan the appeal officer. The claimant gave evidence herself. The witnesses spoke to a Bundle of Documents that had been prepared by the parties. The parties had also helpfully agreed a Statement of Agreed Facts.

5. On 16 July 2020 Mr White for the respondent wrote to the Tribunal and attached copies of documents that had been referred to in evidence but not produced in the Bundle. He stated that he took a neutral position in relation to them but wished to ensure that he complied with what he referred to as the duty of disclosure. Ms Forrest for the claimant objected to their receipt within the Bundle of documents by email of 27 July 2020. At the continued hearing on 14 August 2020 Mr White confirmed that he did not seek to introduce the documents into the Bundle and did not intend to refer to them in his cross examination of the claimant. I indicated that in light of that I did not propose to look at the documentation attached to his email, and both Mr White and Ms Forrest confirmed that they were content that matters proceed on that basis. I would add that Mr White was acting perfectly properly in acting as he did, in that he acted out of concern to

ensure that he fulfilled his ethical duties to the Tribunal, although a duty in relation to disclosure may relate purely to English procedures under the Civil Procedure Rules, as explained in ***Scott v Inland Revenue Commissioners [2004] IRLR 713,*** rather than Scots law and practice.

The facts

6. The claimant is Ms Elizabeth Farnell. Her date of birth is 11 August 1966.

7. She was employed by Oakminster Healthcare Limited, the respondent, from 15 September 2015 to 30 June 2019, latterly as a Deputy Manager.

8. The claimant is registered with the Scottish Social Services Council ("SSSC").

9. The respondent has five care homes under its management: Chester Park Care Home, Cumbrae House Care Home, Florence House Care Home, Oakbridge Care Home and Oakview Manor Care Home, all located within Glasgow. It has about 330 employees.

10. The claimant started employment with the respondent as a Senior Care Assistant. She was then promoted to Care and Support Lead in or around May 2016 within Oakview Manor Care Home. From 1 November 2017, the claimant carried out the role of Acting Manager until a New Manager was appointed on 9 April 2018. At this point, the claimant's job title was changed to Deputy Manager. The new manager left on 13 January 2019, when the claimant resumed the role of Acting Manager until a date (not given in evidence) in February 2019 when she returned to her Deputy Manager post upon the appointment of Ms Nicola Ferguson as the new Home Manager.

11. Aa Deputy Manager the claimant worked at Oakview Manor Care Home. Oakview Manor is made up of two units, the Caledonia Unit, and the Rannoch Unit. The Caledonia Unit carries out a mixture of nursing and residential services whereas the Rannoch Unit is entirely residential. The two units are about a three minute walk apart, connected by a corridor.

12. As Deputy Manager, the claimant worked 40 hours per week. Her shift pattern was 8am – 4pm, Monday to Friday. When she had been Acting Manager she worked across both Rannoch and Caledonia units, spending

about half of her time in each of the two units. As Deputy Manager she had some contact with those working at Caledonia unit both there and if staff there attended Rannoch unit. Her primary role was in the Rannoch unit, where she often worked with one other care staff member.

13. At the time of the claimant's dismissal the respondent's management structure was as follows:

    (i) Nicola Ferguson was Home Manager.

    (ii) Iain Ballantyne was Operations Manager.

    (iii) Lissa Ameur was Chief Operations Officer; and

    (iv) Sunita Podar was Director of the Company.

14. The claimant's initial contract of employment was dated 14 September 2015. It referred to Discipline as follows, "Any disciplinary action will be taken in accordance with the Sherbrooke Lodge disciplinary policy", that being a reference to the name of what was later the Oakview Manor Care Home. It was varied on 5 December 2017 when the claimant was appointed to the role of Acting Manager at the Oakview Manor Care Home.

15. The disciplinary policy relevant to her included in a list of examples of gross misconduct - "harassment or bullying". Under the heading of "investigation stage" was stated:

> *"The purpose of an investigation is for the company to establish a fair and balanced view of the facts relating to any disciplinary allegations against the employee before deciding whether to proceed with a disciplinary hearing……"*

16. Under the heading "Notification of Disciplinary Hearing" was stated:

> *"….The company will inform an employee in writing of the allegations against them……The company will also include the following where appropriate*
>
> - *A summary of relevant information gathered during the investigation*

- *A copy of any relevant documents which will be used at the disciplinary hearing*

- *A copy of any relevant witness statements, except where a witness's identity is to be kept confidential, in which case the company will give an employee as much information as possible while maintaining confidentiality."*

17. Under the heading "Procedure at Disciplinary Hearings, Time limit on trade union representation" the following was included

> *"At the disciplinary hearing the company will go through the allegations against the employee and the evidence that has been gathered. The employee will be able to respond and present any evidence…….If a further investigation after the disciplinary hearing reveals additional evidence that may be relevant to the disciplining officer's decision, the employee shall be given an opportunity to comment on the additional evidence prior to a decision being made."*

18. On 10 February 2019 Ms Marina Morton, an employee of the respondent, wrote to Iain Ballantyne then the Operations Manager of the respondent with a letter of complaint about the claimant, stating "you have no idea what Liz Farnell put me through". She had tendered her resignation on 24 January 2019, with effect from 20 February 2019. Mr Ballantyne did not commence any formal investigation into the allegation.

19. On 27 February 2019 Mr Paul Smith a care assistant employed by the respondent wrote a letter with complaints about work, but did not allege bullying or other inappropriate conduct by the claimant.

20. On 22 March 2019 the Scottish Social Services Council sent an email to Ms Nicola Ferguson, the Home Manager of the respondent, stating that a member of the public, whose name was not provided, had alleged concerns in relation to the claimant, in particular that she had "behaved in a bullying manner towards others over an eighteen month period", and more specifically that she "bullied Marina Morton in front of other staff and service users", which "included swearing and using the F word a lot".

Ms Ferguson did not commence a formal investigation into that allegation at that time.

21. On 3 April 2019 a meeting was held by Ms Ferguson with the daughter, MT, of a resident, B, which had been arranged in light of concerns raised by MT. The meeting was minuted by Ms Nadia Ameur, the daughter of MS Lissa Ameur. The meeting included allegations that the claimant had lied in court in a matter concerning a Power of Attorney granted to the two daughters of B, MT and AM, which the local authority was seeking to replace with an Order from the court appointing the local authority as guardian. MT also made the following allegation:

> *"Liz also said that she has witnessed me shouting which is a lie. In fact, I actually witnessed Liz shouting at a staff member, middle aged with blond hair in a pony tail. I would like to raise an official complaint about this."*

22. On 8 April 2019 an anonymous complaint was sent to the Care Inspectorate, which was then passed by them to the respondent. A transcript of the complaint was provided to the respondent, but not the accompanying message sending it. It described the care home at which the person's parent was resident, but did not say which one. It alleged racist treatment of some staff, and referred to an "Assistant Matron" having been spoken to about the complaints and stated "but she is unprofessional, swears like a trooper in front of the relatives and residents. I did witness the assistant matron shouting at the nurse in front of everyone. A carer – assistant matron – what wrong with this company?". Some residents and family members have described a deputy manager as Assistant Matron.

23. Ms Ferguson brought that complaint to the attention of the claimant on or around that day, but did not take further action on it at that time.

24. On 9 April 2019 Ms Ferguson met Mr Paul Smith, an employee of the respondent who was about to leave their employment, he was very upset, and alleged that the claimant had sworn at him. Ms Ferguson did not take action on that issue at that time.

25. On 12 April 2019 Lissa Ameur of the respondent was informed by telephone of a further complaint made in relation to the claimant to the Care Inspectorate. Ms Ameur contacted Ms Ferguson and instructed her to suspend the claimant. After the claimant had left work that day at about 4pm she was informed by telephone by Nicola Ferguson that she was suspended on full pay pending an investigation into a complaint that had been made.

26. That suspension was confirmed by letter of that date, sent on 13 April 2019, which stated that the allegations "include complaints of bullying, using foul language in front of resident, and relatives, and shouting at staff in front of others".

27. On 15 April 2019 Ms Ferguson commenced an investigation into the allegations. She chose members of staff from those present at the two units at random. She interviewed 21 witnesses. She chose not to interview two members of staff being a staff nurse Fiona Miller and a Team Leader Alan MacMillan, as she considered that they were friendly with the claimant and likely to support her.

28. Her interviews of staff members generally followed the same structure. It commenced with an outline that she was conducting a fact finding investigation regarding staff members bullying other members of staff including shouting at staff and swearing. Confidentiality was stressed. She then asked questions to the following effect:

    (i) Is there anything you can tell me about this?

    (ii) Have you ever suffered from any of these things?

    (iii) Have you ever witnessed any of these things taking place?

    (iv) Has anyone ever confided to you that it has happened to them?

    (v) Of several recent complaints one name keeps cropping up as being responsible, would you know who this is?

    (vi) It has been reported to me that there is normally one main instigator or protagonist. Would you be able to tell me who this could be?

    (vii) Have you ever witnessed any staff member shout at anyone?

(viii) Have you ever witnessed any staff behaving in a manner which could be considered to be bullying?

(ix) Have you ever witnessed any staff member shout at anyone?

(x) Have you ever witnessed any staff member swear at anyone?

(xi) Has any staff ever done any of these things to you?

(xii) Is there any reason why you would not report this type of behaviour?

(xiii) Do you feel confident that the company would support you if you reported this type of incident?

(xiv) Is there anything at all you would like to tell me about these allegations?

29. Where a question was answered in the affirmative, further details as to date, place, context and witnesses were not specifically sought. Witness statements were transcribed, and generally signed by the person providing them.

30. Ms Ferguson also obtained the letter from Ms Morton dated 10 February 2019, the transcript of the meeting with MT, the email from the SSSC dated 22 March 2019, a transcript of the anonymous complaint made to the Care Inspectorate on 8 April 2019 and a written record of the complaint made to the Care Inspectorate.

31. The claimant was not interviewed as a part of that investigation by Ms Ferguson at that point.

32. Ms Ferguson compiled an Investigation Report which attached those 21 statements, a record of two complaints made to the Care Inspectorate on 8 and 12 April 2019, a record of the complaint made to the SSSC on 22 March 2019, the letter from Marina Morton and the disciplinary policy.

33. She sent that report to Ms Lissa Ameur in about late April 2019. In it she provided details of the roles undertaken by the witness in the Home, made comments about the evidence, including what she said were some inconsistencies, and that some witnesses had become upset when

speaking to her, and made the decision that the matter should proceed to a disciplinary hearing into allegations of gross misconduct.

34. By letter bearing the date 14 April 2019 but which was in fact sent on 5 May 2019, Ms Ameur wrote to the claimant informing her of allegations against her which were to be considered at a disciplinary hearing on 9 May 2019. The allegations were:

- *"Bullying and harassment of staff, including shouting and swearing at individual staff members*
- *Unprofessional conduct including use of foul language in front of residents and relatives*
- *Allowing racism towards staff members to take place."*

35. The letter referred to a "breach of the SSSC Codes of Practice for Social Service Workers" and of the respondent's disciplinary policy. The SSSC Codes of Practice being referred to were not attached or otherwise specified, nor attached to the letter. The claimant was informed that the allegations may constitute gross misconduct and that dismissal without notice was a potential outcome. The letter had as attachments the letter from Ms Morton, the email from SSSC, the record of the meeting with MT, a copy of an anonymous complaint received from the Care Inspectorate dated 8 April 2019, and 11 witness statements, together with the respondent's disciplinary policy. The witness statements attached to the letter were from Sana al Kadar, Janis Kavanagh, Jemma Scouler, Gillian Kennedy, Shyvon Hurley, Shehan Fernando, Sunita Kemlo, Gillian Murphy, Nicky Duncan, and Anne Findlay. 10 further witness statements taken by Ms Ferguson were not attached, nor was the record of the complaint made by the Care Inspectorate on 12 April 2019.

36. At some point during the investigation, on a date not given in evidence, a list of staff was placed on the noticeboard at the Oakview Manor Care Home by Ms Nadia Ameur which had against the claimant's name that she was suspended. That detail as to suspension had been included in error.

37. The claimant was referred to the SSSC by the respondent on 29 April 2019. An investigation was commenced by them. That investigation is not yet concluded.

38. The claimant involved her union in regard to the disciplinary hearing, and they made representations to the respondent to the effect that it was unfair that no investigatory meeting with the claimant had been held. The respondent agreed to do so.

39. On 10 May 2019 the claimant was invited to attend an investigation meeting with the respondent by letter of that date, with the meeting to be held on 15 May 2019.

40. An investigation meeting between the respondent and claimant took place on 15 May 2019. It was held with Nicola Ferguson the investigating officer, and a person to take the minutes. The claimant was accompanied by a work colleague, John Simpson.

41. Ms Ferguson then amended her investigation report in light of that meeting, but doing so did not change her view that the matter should proceed to a disciplinary hearing. The amended investigation report was not sent to the claimant.

42. By letter of 23 May 2019 the disciplinary meeting was re-scheduled for 27 May 2019, and the claimant was sent a copy of the minutes of the investigation meeting she had attended. The disciplinary meeting was then re-arranged again to accommodate her trade union representative, and was fixed for 3 June 2019 by letter dated 24 May 2019. The claimant sent a list of proposed amendments to the minutes of the investigation meeting.

43. The disciplinary meeting took place on 3 June 2019. The claimant attended with her representative Mr Kevin Bye of the Royal College of Nursing. He had not been the representative she had initially consulted, but the respondent required the meeting to take place that day and her original representative could not attend. The respondent was represented by Kathleen Ann McAdams, an external consultant it instructed, and a person to take minutes. The minutes are a reasonably accurate record of that meeting, as amended by the claimant who proposed revisals to it by

email dated 28 June 2019. At the meeting the claimant tendered six written statements to support her, which were in the nature of character references, and were from Christine Bolesworth, Wendy Baird, Alan McMillan, Fiona Miller, Veronica McLaughlin (also called McTaggart) and Gillian McKay. The meeting lasted from 4pm to 7.55pm.

44. Following the meeting Ms McAdams requested Ms Ferguson to carry out further investigation. She sent Ms Ferguson a list of 33 questions to address. Ms Ferguson interviewed witnesses, some of whom she had interviewed before, and some not. She prepared, on 17 June 2019, a note of a meeting she had held on 9 April 2019 with Mr Paul Smith a former employee of the respondent who had left their employment shortly after that meeting. She did not speak to Mr Iain Ballantyne.

45. On 7 June 2019 the claimant obtained a statement from Susan High. She passed that together with other supporting evidence being photographs of the condition of residents' rooms as the Home to the respondent.

46. A meeting was arranged between Ms Ferguson, Ms Lissa Ameur and Ms McAdams on 21 June 2019. At that meeting Ms McAdams was provided with the document setting out the 33 questions, some of which had been completed in writing with answers. The matters were all discussed, and Ms McAdams wrote on the document the answers that she was given, some of which were in respect of what was said to be the position of Mr Ballantyne who Ms Ameur said she had spoken to. He remained an employee of the respondent at that time. Four witness statements were provided to Ms McAdams together with a note prepared by Ms Ferguson as to her earlier meeting with Mr Smith.

47. The claimant had no disciplinary record with the respondent. She had not been placed on any formal performance management process at any stage.

48. On 30 June 2019 Ms McAdams emailed the claimant a letter with the outcome of the disciplinary process, which email included the following, "I have also attached five additional statements which were taken from employees as a result of questions which I had for Nicola Ferguson, Investigating Manager." The statements she referred to were from Gillian

Murphy, Gillian Kennedy, Hayley Edgar, William Young, together with a handwritten note from Paul Smith and the note from Ms Ferguson. She did not send her the document containing the answers Ms Ferguson and Ms Lissa Ameur gave to the questions she had asked. She did not give the claimant an opportunity to comment on the statements she had attached to the decision letter before reaching her decision.

49. The letter stated that initially Ms McAdams was to chair the meeting and make a recommendation but latterly she had been asked to be the decision maker. That request had been made shortly after the meeting on 3 June 2019 when Ms McAdams sought clarification of whether she was to make a recommendation, as she had assumed, or a decision. Ms Ameur asked her to make a decision. She referred to a misunderstanding on her part about a list of questions and answers, which she said that there were two separate processes taking place, one of which was a survey of all staff, independently of Ms Ferguson's investigation. There was separately a survey of some staff that the Care Inspectorate had requested be undertaken. Neither survey was part of the documentation provided to Ms McAdams.

50. The allegations against the claimant were held to have been established, with the exception of the third in relation to allowing racism. Ms McAdams believed that the evidence was sufficient to conclude that the claimant had been guilty of bullying and harassment of staff, both by shouting and swearing, over a lengthy period. She considered that the breadth of the allegations from a number of separate sources led to that conclusion. She considered that what had happened amounted to gross misconduct. She considered (although did not state so in the letter) whether the penalty should be dismissal or action short of dismissal, but concluded in the circumstances that continued employment was not appropriate and the decision was taken to dismiss the claimant summarily. The claimant was informed of the right to appeal.

51. On 5 July 2019 the claimant sent an appeal by email. The claimant requested documents from the respondent when doing so. That included her personnel file some of which was sent to her on 18 July 2019. She also sought additional documentation by email of 21 July 2019, including

supervision records with her former manager Jackie Fenn, and training certificates.

52. Following her dismissal, the claimant was sent her P45 which she received prior to the appeal being determined.

53. An appeal meeting took place on 20 September 2019. It was conducted by Ms Megan Allan the respondent's Operations Manager, with a person to take the minutes. The documents that the claimant had requested were not produced to her as they could not be found by Ms Allan, although she conducted a detailed search for them. Emails had been exchanged with regard to that issue between the claimant, her union representative, and Ms Allan and to arrange an appeal hearing in the period from the appeal being intimated and it taking place.

54. The claimant attended the appeal hearing with her union representative Kirsty Harper, who had tendered a written note of the arguments being made in the appeal prior to it taking place. The minute is a reasonably accurate record of that meeting.

55. By letter dated 29 October 2019 Ms Allan rejected the appeal. The letter stated "Having taken your appeal points into account I have concluded that the original disciplinary decision was correct and should stand". She addressed each of the points made in the email of appeal, and the document providing detail of the appeal points. Ms Allan was not aware that the Investigation Report had not been provided to the claimant, that the claimant had not been provided with all 21 statements taken by Ms Ferguson, the written note of the Care Inspectorate complaint dated on or around 12 April 2019, or the document in relation to the answers to the 33 questions Ms McAdams sought answers to.

56. The claimant had a gross annual salary with the respondent of £32,500. Her gross weekly pay was £625.00 and net weekly pay was £494.15. The employer pension contribution was £59.64 per week.

57. The claimant commenced new employment on 16 August 2019. She worked for 33 hours per week at the rate of £10 per hour. Her net weekly pay was £289.86. There was no employer pension contribution. That employment ended on 5 November 2019. The claimant started new

employment on 19 November 2019 at a gross annual salary of £19,404. Her net weekly pay was £366.42 and there was employer pension contribution of £52.53 per week. The claimant did not receive any State benefits after the dismissal.

58. The claimant commenced Early Conciliation on 23 September 2019. The Certificate as to that was issued on 23 October 2019. The claimant presented her Claim Form to the Tribunal on 21 November 2019.

Respondent's submission

59. The following is a brief summary of the submission Mr White made. He adopted the terms of the Response Form. He argued that the respondent had proved that the reason for dismissal was gross misconduct, and that was potentially a fair reason under section 98(2) of the Employment Rights Act 1996. He argued that the dismissal was fair under section 98(4) and addressed the elements of the ***Burchell*** test referred to further below.

60. He argued that the trigger for the investigation was a complaint to the SSSC, that there had been a reasonable investigation, that the procedures had been fair, and that the belief that the claimant was guilty of gross misconduct was reasonable. He argued that the penalty of dismissal was within the band of reasonable responses, and that the Claim should be dismissed.

61. If the Tribunal was against him, he argued for a deduction under the ***Polkey*** principle of 100%, and separately for the claimant's contribution to dismissal under section 123(6) of the Act, under reference to ***Norton.***

Claimant's submission

62. The following is also a brief summary of the submission by Ms Forrest. She argued that the dismissal was unfair and also referred to the 1996 Act and the ***Burchell*** test. She argued that the investigation had not been reasonable, as it was not balanced and fair as referred to in the case of ***A v B.*** She set out in detail the elements of why the investigation had not been adequate, including the initial failure to hold an investigation meeting, an error in the Statement of Agreed Facts on when the claimant was promoted to deputy manager, flaws in the investigation by Ms Ferguson,

the documentation not provided to the claimant, the failure to obtain witness statements from those the claimant suggested including Mr Ballantyne, and then similar failures by Ms McAdams. She argued that the respondent did not have reasonable grounds for belief in gross misconduct, and referred to the case of ***Sandwell.*** She submitted that the ***Burchell*** test was not met, but that even if it was the penalty of dismissal was not within the band of reasonable responses, under reference to ***Britto-Babapulle***. There were mitigating factors from the claimant's career progression, and alternatives such as performance management or moving to another Home were open. She argued that there was clearly a poor culture at the Home and that a strong management style did not mean that there had been bullying by the claimant. She further argued that the appeal did not cure the defects.

63. She argued that the respondent was in breach of the ACAS Code of Practice, and that the breaches were unreasonable. They included that the decision was not taken promptly, and that there had been delay in concluding the appeal.

64. On remedy she argued for a basic and compensatory award as set out in the Schedule of Loss, and also referred to ***Norton.*** She argued against any reductions from the award, but that if a reduction was considered it should not be 100% as that was not just and equitable. In that regard she criticised the evidence against the claimant, with many witnesses not working with her or giving hearsay evidence, and that the claimant had been promoting good practice.

The law

The reason

65. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act"). If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law. Conduct is a potentially fair reason for dismissal.

Fairness

66. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the Act which states that it

> *"depends on whether in the circumstances…..the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."*

67. That section was examined by the Supreme Court in ***Reilly v Sandwell Metropolitan Borough Council [2018] UKSC 16***. In particular the Supreme Court considered whether the test laid down in ***BHS v Burchell [1978] IRLR 379*** remained applicable. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case, although it had not concerned that provision. He concluded that the test was consistent with the statutory provision. Lady Hale concluded that that case was not the one to review that line of authority, and that Tribunals remained bound by it.

68. The ***Burchell*** test remains authoritative guidance for cases of dismissal on the ground of conduct in circumstances such as the present. It has three elements:

(i) Did the respondent have in fact a belief as to conduct?

(ii) Was that belief reasonable?

(i) Was it based on a reasonable investigation?

69. It is supplemented by ***Iceland Frozen Foods Ltd v Jones [1982] ICR 432*** which included the following summary:

> *"in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer……. the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a*

reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

70. The manner in which the Employment Tribunal should approach the determination of the fairness or otherwise of a dismissal under s 98(4) was considered and the law summarised by the Court of Appeal in ***Tayeh v Barchester Healthcare Ltd [2013] IRLR 387***.

71. Lord Bridge in ***Polkey v AE Dayton Services [1988] ICR 142***, a House of Lords decision, said this after referring to the employer establishing potentially fair reasons for dismissal, including that of misconduct:

"in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

72. The requirement of a fair investigation may include a requirement to be even-handed, taking fully into account evidence that could be in the employee's favour: ***A v B [2003] IRLR 405, EAT, Leach v OFCOM [2012] IRLR 839).***

73. Guidance on the extent of an investigation was given by the EAT in ***ILEA v Gravett 1988 IRLR 497***, that "at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase."

74. The focus is on the evidence before the employer at the time of the decision to dismiss, rather than on the evidence before the Tribunal. In ***London Ambulance Service v Small [2009] IRLR 563*** Lord Justice Mummery in the Court of Appeal said this;

"It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable

determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

75. The band of reasonable responses has also been held in ***Sainsburys plc v Hitt [2003] IRLR 223*** to apply to all aspects of the disciplinary procedure.

76. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness.

77. The Tribunal is required to take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures. It is not bound by it. The following provisions may be relevant:

"5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing…..

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification…

23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence…."

78. The Code of Practice is supplemented by a Guide on Discipline and Grievances at Work, which is not a document that the Tribunal is required

to take into account but which gives some further assistance in considering the terms of the Code of Practice. Under the heading "Investigating Cases" the following is stated "When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against. It is not always necessary to hold an investigatory meeting….." Under the heading of "Preparing for the meeting", which is a reference to a disciplinary meeting, is included "Copies of any relevant papers and witness statements should be made available to the employee in advance."

79. The extent of documentation that should be placed before an employee depends on all the circumstances. It has been addressed in ***Spink v Express 1990 IRLR 320*** and ***Louies v Coventry 1990 IRLR 324***, in which what was provided by the employer was held to be inadequate, and ***Fullers v Lloyds Bank 1991 IRLR 326*** where a summary of the evidence was held to be adequate. The extent of the investigation required similarly depends on all the circumstances, as addressed in ***Shrestha v Genesis Housing Association Ltd [2015] IRLR 399.***

80. Whether or not a matter might be regarded as one of gross misconduct has been the subject of authority. It must be an act which is repudiatory conduct ***Wilson v Racher [1974] ICR 428***. The question is whether it was reasonable for the employer to have regarded the acts as amounting to gross misconduct – ***Eastman Homes Partnership Ltd v Cunningham EAT/0272/13***. If the employer's view was that the conduct was serious enough to be regarded as gross misconduct, and if that was objectively justifiable, that was a circumstance to consider in assessing whether or not it was reasonable for the employer to have treated the conduct as a sufficient reason to dismiss.

81. In ***Sandwell v West Birmingham Hospitals NHS Trust UKEAT/0039/09*** the following was stated:

'`It is not clear to us what the breach of Trust policy actually was. The conduct complained of was taking the patient outside. Assuming that is a breach of Trust policy, it still remains to be asked – how serious a breach is that? Is it so serious that it amounts to gross misconduct? In our judgment that is not a question always confined simply to the reasonableness of the employer's belief. We think two things need to be distinguished. Firstly the conduct alleged must be capable of amounting to gross misconduct. Secondly the employer must have a reasonable belief that the employee has committed such misconduct. In many cases the first will not arise. For example, many misconduct cases involve the theft of goods or money. That gives rise to no issue so far as the character of the misconduct is concerned. Stealing is gross misconduct. What is usually in issue in such cases is the reasonableness of the belief that the employee has committed the theft."

82. A finding that there was gross misconduct does not lead inevitably to a fair dismissal. In ***Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854*** the Tribunal suggested that where gross misconduct was found that is determinative, but the EAT held that that was in error, as it gave no scope for consideration of whether mitigating factors rendered the dismissal unfair, such as long service, the consequences of dismissal, and a previous unblemished record.

83. An appeal is a part of the process for considering the fairness of dismissal – ***West Midlands Co-operative Society Ltd v Tipton [1986] ICR 192*** in which it was held that employers must act fairly in relation to the whole of the dismissal procedures. The importance of an appeal in the context of fairness was referred to in ***Taylor v OCS Group [2006] ICR 1602*** in which it was held that a fairly conducted appeal can cure defects at the stage of dismissal such as to render the dismissal fair overall. That case also emphasised that procedure is not looked at in a vacuum, but that the fairness of a dismissal is looked at in the round having regard to all the circumstances, as was reiterated in ***Sharkey v Lloyds Bank plc UKEAT/005/15.***

Remedy

84. In the event of a finding of unfair dismissal, the tribunal requires to consider whether to make an order for re-instatement under section 113 of the Employment Rights Act 1996. The matter is further considered under section 116.

85. The tribunal requires also to consider a basic and compensatory award which may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal. In respect of the latter it may be appropriate to make a deduction under the principle derived from the case of ***Polkey,*** if it is held that the dismissal was procedurally unfair but a fair dismissal would have taken place had the procedure followed been fair. That was considered in ***Silifant v Powell 1983 IRLR 91***, and in ***Software 2000 Ltd v Andrews 2007 IRLR 568,*** although the latter case was decided on the statutory dismissal procedures that were later repealed.

86. The amount of the compensatory award is determined under section 123 and 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". The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant. Guidance on the amount of compensation was given in ***Norton Tool Co Ltd v Tewson [1972] IRLR 86.*** In ***Nelson v BBC (No. 2) [1979] IRLR 346*** it was held that in order for there to be contribution the conduct required to be culpable or blameworthy and included "perverse, foolish or if I may use a colloquialism, bloody minded as well as some, but not all, sorts of unreasonable conduct." Guidance on the assessment of contribution was also given by the Court of Appeal in ***Hollier v Plysu Ltd [1983] IRLR 260***, which referred to taking a broad, common sense view of the situation, in deciding what part the claimant's conduct played in the dismissal. At the EAT level the Tribunal proposed contribution levels of 100%, 75%, 50% and 25%. That was not however specifically endorsed by the Court of Appeal. Guidance on the process to follow was given in ***Steen v ASP***

Packaging Ltd UKEAT/023/13. A Tribunal should consider whether there is an overlap between the ***Polkey*** principle and the issue of contribution (***Lenlyn UK Ltd v Kular UKEAT/0108/16****).*

Observations on the evidence

87. I considered that all of the witnesses for the respondent were generally seeking to give honest evidence. They spoke clearly and candidly in answer to the questions asked of them. I considered that Ms Allan was a particularly impressive witness. She was new to the business, and took great care to investigate the documentation that there was and which had been requested by the claimant. She went through the points raised at the appeal carefully and considerately. She accepted that had she known of the documents which were not provided to her she may have handled matters differently. Her evidence that the view she had formed that the claimant was not a person she wished the organisation to employ given the weight of all of the evidence that there was I considered to be, in the context of her evidence as a whole, persuasive.

88. There are however some matters that require comment. Firstly, the claimant was not interviewed initially in the investigation and Ms Ferguson said that that was an oversight. Ms McAdams however said that she had asked about that, and been told that legal advice had been taken which Ms Ferguson had followed, which was that doing so was not necessary because of the weight of the other evidence. Secondly, there were a number of documents that the respondent chose not to send to the claimant, and were not before the Tribunal, They were the Investigation Report, the amended Investigation Report following the investigation meeting with the claimant, the written record of the complaint made on or around 12 April 2019 from the Care Inspectorate, the questions sent to Ms Ferguson by Ms McAdams after the disciplinary hearing, the initial responses in writing to that, and the notes kept of the further answers given by Ms Ferguson and Ms McAdams at a meeting on 21 June 2019. That was a substantial body of evidence that was potentially at least relevant to the issues in dispute both at the disciplinary hearing, and before the Tribunal. That it was not disclosed was a concern, particularly as the letter of decision referred to the position taken by Mr Ballantyne

who the claimant had asked to be interviewed. Thirdly, there was it appears a decision taken to exclude from the documents sent to the claimant about 9 witness statements, and the written record of the complaint on or around 12 April 2019. That appears to have been taken by Ms Lissa Ameur, who did not give evidence. It was also Ms Ameur who appears to have decided on suspension. That was explained both as they did not name the claimant, or that they did but also named other persons, or that they were generally not considered relevant. What is relevant however depends on the content, and the investigation if fair and balanced should both seek evidence that the claimant may argue is relevant, and show that to her to allow her to do so. Fourthly, the respondent did not send to Ms Allan the documents the claimant tabled at the disciplinary hearing. That was not explained at all. In addition, Ms Allan did not know that there had been an investigation report at all, and was not aware of there being at least a second Care Inspectorate complaint, in circumstances where the evidence of Ms Ferguson was that there were three or four.

89. There was no witness statement taken from a number of witnesses suggested by the claimant, one of whom was Iain Ballantyne. It is reported that answers to questions were given by him, but Ms Ferguson had not spoken to him. One can only assume that Ms Ameur had done so. What those answers were in detail was not however confirmed by any written document. The treatment of that issue was also not consistent, in that if what was reported was accurate Mr Ballantyne had not made any written record of conversations with the claimant about her manner with staff, but that was taken into account by Ms McAdams. She did not however take into account the allegation by the claimant that she had been performance managing some of the staff who complained about her, on the basis that no written record of that was found in the personnel files. That inconsistency was rather striking.

90. The claimant's evidence was I consider somewhat inconsistent. She said that she had not been spoken to about her manner, but then accepted that she had been spoken to twice, once by Mr Ballantyne and once by him and Ms Ameur together, and that at one of those Mr Ballantyne had said she should be more "pink and fluffy". However informal and vague that

phrase, it does indicate that he was raising a concern at her style of interaction. She was not entirely unaware of that issue. She also said that she spoke directly, had a strong management style and appears to have said so in response to his remark. I concluded from both that evidence and her demeanour in giving evidence that she is not fully aware of how she is perceived by others.

91. Her suggestion that she was not in the Caledonia unit as she worked in Rannoch was at best an exaggeration. She did attend Caledonia and would do so to an extent as deputy manager of the Home, and more so during the periods when in the role of the acting manager of the Home. Ms Forrest attempted to argue that there was an error as to dates in the Statement of Agreed Facts, but that document is what it says, and I consider that it should be accepted as it stands.

92. The claimant's evidence that she never shouted or swore at anyone at work I did not accept. It is contradicted by the evidence I shall describe more fully below, and I do not consider it likely that those she had performance issues with, some entirely understandably, would all therefore make up untrue allegations in the terms that they did. She was surprised at the evidence of some, such as Ms Hurley, and did not really have an explanation for all of the allegations made against her.

93. One of the explanations she did try to give was that Ms Ferguson had prompted MT to make allegations against her in the way that she did. Firstly, that was not put to Ms Ferguson, which I doubt is the fault of Ms Forrest, but the timing is also entirely against that being correct. That meeting was on 3 April 2019. Ms Ferguson had not started the investigation at that stage, and did not do so until Ms Ameur told her to nine days later. Ms Ferguson could have initiated it earlier had she had a mindset against the claimant, when a further complaint was made, but did not. That she did not indicates that she was not taking a stance against the interest of the claimant, in fact the opposite. She was a relatively new manager at the respondent at that time. I reject the claimant's evidence on that point, and consider that it does make the reliability of her evidence all the less.

94. The claimant alleged collusion between all of those who gave witness statements, at least as disclosed to her. There are certainly points that can be raised as criticism of the statements, but there are many statements, and some at least include specific matters as I shall come to. I do not consider that collusion is likely to be the accurate explanation for them collectively.

Discussion

95. I was readily satisfied that the reason for dismissal had been established by the respondent, and that it was conduct.

96. I then considered whether the dismissal was fair or unfair having regard to the law as set out above. I was satisfied that the respondent did have a belief that there had been gross misconduct by the claimant, and that that was genuinely held.

97. The assessment focussed on whether there had been a reasonable investigation, and whether the belief in the claimant's guilt was reasonable, in both cases assessed against the band of reasonable responses, together with the issue of whether the procedure followed had been one a reasonable employer could have followed, taking into account the ACAS Code of Practice. I shall deal with each issue in turn.

98. I have concluded that the investigation was not one conducted within the band of reasonable responses. There are a number of reasons for that, with none determinative of itself. Firstly, there was a deliberate decision to exclude some witnesses on the basis that they might help the claimant. I consider that to be indicative of an investigation that did not properly seek evidence that may exculpate in a fair and balanced way. The weight to be given to evidence can be considered after it is obtained, but to exclude evidence that might exculpate the claimant merely because it is from those who had been thought to be friendly towards her is I consider not the act a reasonable employer could take. It is not consistent with the terms of the ACAS Guide, which whilst of less status than the Code of Practice is informative of what a reasonable investigation may be.

99. Secondly, the statements taken were very general ones. There was little if any enquiry into what had been said, when, who was present, or the

context. There was a lack of specification which meant that the claimant was not aware of what specifically she had been alleged to have done. The questions asked were at a generic level, and were not followed up, although some of those who gave evidence did add some detail as to time or circumstances in particular. It would have been straightforward to have asked something like "Can you give me an example of that" to obtain the details as to date, place, who else if anyone was present, and what had happened, for all of those interviewed. What is left in many instances is the most general of allegations, that is very difficult for someone to respond to. There are however in the statements some details given, as discussed below.

100. Thirdly, although 21 statements were taken in total by Ms Ferguson, and were attached to her Investigation Report, only 11 were disclosed to the claimant. Ms Ferguson understood that those which did not mention the claimant were excluded. The decision was not taken by her, and no evidence as to that was led by the respondent. The inference from all the evidence was that it was taken by Ms Lissa Ameur who wrote the letter to call the claimant to the disciplinary hearing. That deliberate omission of evidence means that the claimant was denied the opportunity of referring to that evidence which she might have argued exculpated her. The respondent's own disciplinary policy states that the investigation should be "balanced". There is reference to the evidence that is "relevant" being disclosed for the disciplinary hearing. That must include evidence which the claimant can argue is of assistance to her, and that can include what a statement omits as well as what it contains. Similar provisions are in the ACAS Guide. Almost half of the witness statements were not included in the documentation. Those 10 statements were not disclosed in the Bundle. The ACAS Code of Practice refers to "any" written evidence. I consider that the selective provision of some of the written evidence was not in accordance with that Code.

101. What was also removed from the attachments to the Investigation Report and not then sent to the claimant (or in the evidence before the Tribunal) was a written record of the second Care Inspectorate complaint on 12 April 2019, which Ms Ferguson stated she had sent with the Report. Further, what was added to the allegations was reference to the SSSC Codes of

Practice, which Ms Ferguson said her Report did not refer to. I infer that that addition had been made by Ms Ameur, and I note from the Statement of Agreed Facts that by this stage the claimant had been referred to the SSSC for investigation. The letter did not however include the Codes of Practice referred to or specify in what respect there had allegedly been a breach of them.

102. Fourthly, no disciplinary action was taken by the respondent in relation to the claimant until 12 April 2019. Mr Ballantyne took no formal action on the letter from Ms Morton. Ms Ferguson took no formal action at the time when there was an email from SSSC, or after the meeting with MT about her parent or an anonymous complaint made to the Care Inspectorate on 8 April 2019, or after she met Mr Smith the following day yet they are all said to relate to the claimant. That absence of action at that point was surprising. No attempt was made to follow up on detail on those matters at the time. Ms Morton referred in her letter to her having raised a grievance, but what that was about was not ascertained, and that grievance was not sent to the claimant or before the Tribunal. It was not possible to know what precisely the allegation was about the claimant, if at all in which event the claimant could make an argument in relation to that. No attempt was made to identify the nurse referred to in the anonymous complaint though a name of “Sue” was given. That complaint itself did not identify which of the five care homes was involved, and it was assumed that the reference to an assistant matron was to the claimant as she was the deputy manager. But she had acted up as manager, and no date of the incident was given.

103. The written note later provided by Ms Ferguson for a meeting held over two months earlier with Mr Paul Smith is also surprising. That note indicated that Mr Smith was very upset, and crying, and alleged what amounted to bullying conduct by the claimant. Yet at that time Ms Ferguson did not appear to have done anything, as it was only on 12 April 2019 when Ms Ameur instructed suspension following a complaint to the Care Inspectorate that that step was taken. That does I consider call into question the full accuracy of the recollection of Ms Ferguson in writing that note after the disciplinary hearing was held over two months later, but also the extent to which the investigation was “fair and balanced”.

The impression gained is that following this the focus of the investigation undertaken was to seek evidence of guilt, with little attempt to find evidence referred to by the claimant which may support her.

104. Ms Ferguson quite properly prepared an Investigation Report. In that she explained in her evidence she had referred to the evidence she had obtained and what said were some inconsistencies in it, that some of the witnesses had been upset, and set out her decision that there was a sufficient case to answer to proceed to disciplinary action. Neither that Report, nor one later amended, was disclosed to the claimant, nor was it before the Tribunal. It was however sent to Ms McAdams who decided dismissal, and its importance was stressed by Ms McAdams in her evidence when she said in answer to points of detail on a number of occasions that to answer she would need to refer to that report. She could not as it was not in the documents before the Tribunal. The respondent's own disciplinary procedure provides for there normally being a summary of relevant information gathered, that was done, but not then produced.

105. This was a case where a reasonable employer would I consider raise the allegations with the employee against whom they are made at an early stage, both to ascertain the response and to see if that directs part of the further investigations required before considering whether to proceed to disciplinary action. The ACAS Code refers to doing so in some cases, and in my judgment all reasonable employers would consider this to be such a case. The respondent did hold an investigatory meeting, but that was done only after the Investigation Report had been concluded and a decision taken to proceed to disciplinary hearing. The decision was not changed following the investigation meeting. This case I consider did require an investigation hearing before the decision to hold a disciplinary hearing was taken if the process was to be fair, not least as there was no history of earlier disciplinary action against the claimant, or performance management of matters in relation to her interaction with colleagues. The explanation for that investigation not taking place was inconsistent, as referred to below. It is however relevant that there was an investigation meeting held before the disciplinary hearing, and that Ms McAdams had the detail of that when addressing matters. That ameliorates the absence of that at the earlier stage significantly.

106. Ms McAdams held the disciplinary hearing, and then sought additional information. That was entirely appropriate. She asked Ms Ferguson to undertake further investigations, and again that is entirely appropriate. She asked 33 questions and had answers to each and additional statements from Ms Ferguson and Ms Ameur. In light of that, I consider that the ACAS Code of Practice indicates that the claimant should be given the opportunity of seeing that written evidence and commenting on it. In addition, the respondent's own procedure states that if in such a situation there is additional evidence that may be relevant to the disciplining officer's decision the employee "shall" be given the opportunity to comment on it before the decision is taken. The additional information did inform the decision both as to gross misconduct having taken place, and the penalty of dismissal. The comments attributed to Mr Ballantyne for example were accepted at face value, although as I said above they were not documented, and that treatment was inconsistent with treatment of matters raised by the claimant as to her supervision of staff, which was discounted as there was no written evidence found. But the more important point is that the claimant did not have an opportunity to know of this large body of material evidence, and to comment on that, in breach of the respondent's own procedures.

107. A further matter emerged from the evidence of Ms Allan. She had not been provided with the statements in support that the claimant had tendered at the disciplinary hearing. The first she knew of them was when the Bundle of Documents was sent to her. She accepted that had she been aware of them, in particular that from Ms Miller, she would have conducted further investigations. She also accepted that had she been sent the Investigation Report, with the full set of 21 statements, and in addition the document responding to the 33 questions asked by Ms McAdams, her view may have been different. She also accepted that if dates and times are not provided in witness statements it can be difficult for the person against whom the allegations are made to respond.

108. Taking these matters in the round, and collectively, it appeared to me that there were serious failures in the investigation overall, such as to lead me to conclude that it was outwith the band of responses open to a reasonable employer.

109. I then considered whether the belief held by the respondent was reasonable. Whilst I acknowledge that there was a series of complaints and allegations made, which included a relative of a resident at least to an extent, that does not of itself mean that it follows that they must be justified. That appeared however to be the position adopted by Ms McAdams. What concerned me was the absence of details as to what the claimant is alleged to have done, when and in what circumstances. It included shouting at staff, but what was done when was in many instances missing. It included allegations of swearing, and using the F word, but when and in what context, and who was present, was not clear. The claimant denied acting as alleged. She said that there was a lot of gossip or bickering within the staff, and that appears to have been borne out by other evidence. She said that she had performance managed some staff, and that they did not like that, but the matter was only partly investigated, and sources of information that might have helped the claimant, such as Mr Ballantyne, were not followed up in writing at least adequately, as there was no written evidence on that before the Tribunal or which had been sent to the claimant at any stage. Written records were looked for by Ms Ferguson, and later Ms Allan, but it was not clear why records which may at one point have existed were not capable of being found. In the absence of allowing the claimant to comment on the additional evidence found following the disciplinary hearing, which can only have been part of the decision to dismiss otherwise that would have been taken at the disciplinary meeting or shortly afterward without that additional investigation, the belief held was not I consider one a reasonable employer could have held. I came to the conclusion that in light particularly of the lack of reasonable investigation the belief held in the claimant's guilt was not one a reasonable employer could have held.

110. The procedures followed were also I consider not ones a reasonable employer could have followed, for very similar reasons. They were outside the band of reasonableness as the claimant was not provided with all evidence obtained, in particular the 10 statements referred to above, the Investigation Report which was seen and considered by Ms McAdams, evidence she had sought was not adequately followed up (such as in relation to Mr Ballantyne), and additional evidence obtained after the first

disciplinary meeting was not given to her to allow her to comment further before the decision was made. In addition, the documentation she submitted in support was not provided to Ms Allan at the appeal stage. There was I consider a failure to follow the ACAS Code of Practice as set out above.

111. I then considered whether the appeal may have remedied the issues I had identified. I concluded that it did not. The claimant still had not been aware of the statements not disclosed, or the terms of the original or amended Investigation Reports, or the answers to the 33 questions Ms McAdams had asked. These were I considered material failings that were never remedied, and indeed that evidence was not before the Tribunal but in the possession of the respondent. What was also relevant in this context is, as stated above, that Ms Allan had not been sent the documents that the claimant produced at the disciplinary hearing, which included one for example from Ms Miller, which Ms Allan said in evidence she would have followed up. Through no fault of her own, the appeal process was itself materially defective, such that that too rendered the dismissal unfair.

112. I did not however consider that the arguments made on behalf of the claimant as to the timing of the process were justified. They were explained in evidence by the respondent's witnesses, and were within the band of reasonable responses given all the circumstances. Whilst it did take time for both the disciplinary process, and particularly the appeal, to be held and concluded, there were documents to seek or additional material to follow up on, there was a need to arrange a date to suit the claimant and her trade union representative, and overall, I did not consider that any delay was undue.

113. As the case law referred to above makes clear, issues of procedure are not looked at in a vacuum. The respondent is not a very large employer, but does have reasonable resources, including the advice from Ms McAdams as an HR Consultant externally.

114. I considered all the evidence as a whole, and concluded that the dismissal was unfair under the terms of section 98(4) of the Employment Rights Act 1996.

Remedy

115. The issue of remedy is not straightforward. The assessment of matters of the extent of loss, and contribution, are made more difficult by the nature of the evidence before me, including those documents not before me referred to above. When it became clear that that was the case I raised with Ms Forrest whether she had any application to make in relation to their production, and she did not. That was a matter for her. These documents had been in the hands of the respondent, and it was their decision not to provide them either to the claimant or to the Tribunal.

116. The claimant's evidence as to her losses as set out in the Schedule of Loss was not seriously disputed. Subject to the question of deduction for contribution the basic award is £2,362.50. The compensatory award is considered firstly subject to the loss sustained as a result of the dismissal, and there are secondly two separate matters to consider, (a) whether there would have been a fair dismissal by a different procedure, under reference to ***Polkey***, and (b) whether the claimant caused or contributed to her dismissal.

Loss

117. In the period from dismissal to 16 August 2019 the loss is for seven weeks, of net salary of £494.15 per week, a total of £3,459.05. There was also a loss of pension contributions by the respondent for that period totalling £417.48. In the period from 16 August 2019 to 19 November 2019 the loss is the difference from the respondent's earnings and those then received, in the total sum of £2,663.57. In the period from 19 November 2019 to the date of the Tribunal hearing the loss was the differential between the respondent's earnings and those with the new employer, a period of 31 weeks with the differential £127.73 per week, a total of £3,959.63 together with loss of pension contributions of £220.41. The Schedule of Loss then seeks a further six months for future losses. In all the circumstances I consider that that period is reasonable. The loss of earnings for the 26 weeks is £3,775.98, and loss of pension contributions £184.86. A sum of £500 is sought for loss of statutory rights, which I consider to be reasonable.

118. The total of those sums is £15,180.98.

Polkey

119. I require to consider the extent to which there may have been a fair dismissal had there been different procedures followed by the respondent. That is no easy task. The respondent chose not to provide in evidence the original or amended Investigation Reports, 10 of the witness statements taken, the text of the complaint from the Care Inspectorate on 12 April 2019, or the document with the questions asked by Ms McAdams which was answered in writing in part by Ms Ferguson and then by Ms McAdams' own notes at the meeting on 21 June 2019. The lack of detail as to date and circumstance within the witness statements is a further complicating factor.

120. Set against that is the evidence within the documentation which was produced in the Bundle. I shall address each part of that evidence in turn, as I consider that that is the only way properly to assess the matter.

(a) The letter from **Marina Morton** is the only evidence from her. She made a grievance, but that was not examined as part of the investigation and was not before the Tribunal. She did have a number of matters she wished to complain about, but one was directed to the claimant and knocking her self-confidence. She said that "you have no idea what Liz Farnell put me through", but she did not particularise the allegation. I consider that very little weight can be given to this document. It was not serious enough for Mr Ballantyne the line manager to do anything at the time. It is not however entirely to be discounted.

(b) The complaint sent by **SSSC** on 22 March 2019 was likely but not certain to have been made by Ms Morton. It alleged bullying of staff over 18 months, including of Ms Morton in front of other staff and service users, and swearing. It did not allege shouting specifically. It was not immediately investigated. I consider that little weight can be given to it, but not that it should be discounted entirely.

(c) The note of the meeting with **MT** on 3 April 2019 has allegations that the claimant swore at a member of staff, and that the claimant had

raised her voice at MT. Whilst the context was a very difficult situation which did involve the claimant in conflict with the family as the family were not in agreement with the social worker, and that led in due course to a court decision which the family members appear to have been unhappy about, the fact remains that there was an allegation against the claimant. I consider that little evidence can be attached to it, given the lack of information, and the fact that there was not an investigation directed to the claimant conducted at that time, but not that it can be entirely discounted, and it is noteworthy that it alleges shouting at other staff before the witness statements about that were taken.

(d) The **anonymous complaint** dated 8 April 2019 I consider should be discounted. Whilst the respondent considered that it was directed to the claimant, there was a failure to act on it immediately, and if it was clearly the claimant then given the other issue that had been raised by then that was very surprising. No attempt was made to identify the nurse “Sue” mentioned. The reference was to a visit in late evening, but the claimant worked until 4pm and hardly ever worked beyond that. It is not I consider sufficiently clear that the reference is to the claimant, and I consider that this should be discounted entirely.

(e) **Sana al Kadar** gave very little real evidence beyond that she felt intimidated by the claimant, and it was accepted that the claimant carried out her induction. She did also say that she witnessed the claimant swear at Paul when they were having an argument. The only Paul spoken of in evidence was Mr Smith. She also referred to the claimant’s attitude towards her when she started, but no details were given. There is a little that can be taken from this statement, but essentially that the claimant had sworn at another staff member, and that she herself had felt intimidated initially.

(f) **Janis Kavanagh** identified the claimant as the perpetrator of bullying and harassment, and said that she had witnessed her shouting at Gillian Murphy on occasions, and “Billy” telling him to go over to Rannoch and pointing at him. These are not specified more fully, but

do allege incidents of shouting and two staff members who are named. She also said that she would feel intimidated if reporting bullying.

(g) **Jemma Scouler** said that there had been bullying and gave an example of the claimant speaking to her about Billy, telling her she had too much to say and to keep her mouth shut. She later said that Ms Scouler's opinion did not matter, and that later the claimant was growling at her. These are not dated, but detail of some kind is given, and what is alleged could amount to bullying.

(h) **Gillian Kennedy** alleged bulllying but it is not clear that that was directed to the claimant or someone else. She did say that she had witnessed the claimant shouting and swearing at night shift, and at Hayley and Gillian (surname not given) who were in tears. Dates are not provided, but some detail is given of what may amount to bullying.

(i) **Shyvon Hurley** worked with the claimant to a reasonable large extent, and the claimant said that she was in effect training her. The claimant thought that she was friendly with Ms Hurley, and she is in my judgment a significant witness in light of that. Ms Hurley stated that the claimant and another staff member both shouted and swore at staff. The next day Ms Hurley spoke again with Ms Ferguson and added that she was finding it difficult, asking what would happen if the claimant found out, adding that the claimant had "a quick tongue". She did not wish to add more but there is a clear inference that she found the claimant intimidating.

(j) **Shehan Fernando** at one point denied witnessing anything, but later said that he had witnessed the claimant and another behaving in a manner that could be bullying. There is however inconsistency in the statement, and it is not I consider one that can be relied upon.

(k) **Sunita Kemlo** said that the claimant "can be really bad, she has shouted and screamed at me". She then adds "I think that January was about the last time". There is therefore a date and detail of some kind provided. She then recounted an occasion when the claimant shouted at her, and said that she did not know how to do her job, and was lazy. Ms Kemlo said that she was in tears. She said that the claimant said

that she would report it to Mr Ballantyne, and that she, Ms Kemlo, would be "out". She further alleged that the claimant shouts at care staff. There is detail within these allegations that is I consider particularly relevant. The claimant accepted that she had spoken to Ms Kemlo about the state of a resident's room, which state was clearly wholly unacceptable, and had taken photographs. The issue is about how the claimant acted and whether or not that was management within the range of how a reasonable manager could act, or beyond that and bullying. The detail given as to date and detail is I consider important.

(l) **Gillian Murphy** alleged that the claimant shouted and swore at staff, but did so less since Ms Ferguson started. She says that there were a few times when the claimant shouted in her face, and was growling at her. She alleged that the claimant had said that she was not a good carer, and had said the same to Hayley, who was in tears. She also made allegations against other staff. Some detail is therefore provided.

(m) **Nicky Duncan** said that details had been heard but second hand, but did say that he had witnessed the claimant shouting at staff, not named. Little weight can be placed on that, but it is not to be entirely discounted.

(n) **Anne Findlay** alleged that the claimant had backed her into a corner and intimidated her, once outside the laundry door and the second time on the first floor outside the sluice. Although dates were not given, locations and specifics were. She also alleged that the claimant banged her fist on the table when an employee called Connie was present, and was shouting and swearing. She also alleged that the claimant had sworn at residents. She also made allegations as to bullying by another staff member. She alleged that the claimant shouted at staff at meetings at the café, and that the claimant had shouted and sworn at Marina, a reference to Ms Morton. She further alleged that the claimant swore at staff and residents. These allegations are more specific albeit not as detailed as to dates as they could have been, and this is I consider evidence of some importance in light of that.

(o) **Gillian Murphy** made a second statement confirming that the claimant had shouted at Hayley and her, and she (Ms Murphy) was in tears. She was asked when that happened, and said that she could not remember because it had happened so many times.

(p) **Gillian Kennedy** made a second statement alleging that the claimant had shouted at her in the laundry, and was pointing at her. She said that she had emailed Mr Ballantyne about it, but that email was not produced.

(q) **Hayley Edgar** gave a statement. It appears likely that she had given an initial statement but it was not one of those sent to the claimant for the disciplinary hearing. She confirmed that the claimant had shouted at Gillian Murphy and her, and that Gillian was in tears afterwards and that that had happened "a few times".

(r) **Ms Ferguson** produced a statement she had prepared from recollection of a meeting with **Paul Smith** on 9 April 2019, referred to above. It is not consistent with the letter he wrote on 27 February 2019 however, which does not mention any bullying or other inappropriate conduct by the claimant. It is not impossible that that letter dealt with one specific matter rather than an issue with the claimant, and the discussion on 9 April 2019 was several weeks after that letter. Whilst the full accuracy of the document prepared by Ms Ferguson is doubted, I consider it likely that she did meet him on 9 April 2019 and he was very upset, and did allege that the claimant had sworn at him. Whilst the evidence from those documents is not entirely clear, there is some evidence against the claimant from this document that I consider is not to be entirely discounted.

121. Against that is placed the denials by the claimant, and the material she provided in support of her position. The statement from Ms Miller is particularly supportive, and from a staff nurse of the respondent. But it does not establish that the allegations made are untrue. It is entirely possible that the conduct alleged took place outwith the presence of others such as Ms Miller. The claimant had by the time of these statements seen those given to her by the respondent, and was aware of the questions asked. She did not replicate that in the statements she provided, although

she had assistance from her union, and said that she took legal advice. She did not appear to have asked them to address particular points in those statements, or to comment on the statements that the respondent did disclose. She did not for example have those who might have been able to comment about supervision of other staff, and Veronica McLaughlin or McTaggart was said to have been present at least some, address that. Her supporting statements were at least partly more in the nature of testimonials. They did not support the claimant's position other than to a general extent, although the claimant had the time at least to ask them to address such issues in detail.

122. The claimant had further requested documentation to support her position, which she said existed both as to her own position and her supervision of others. Its absence from the files was not fully explained, but I am satisfied that Ms Allan did conduct a thorough search and could not find them. They may have existed and again I note that no document order was sought by the claimant. I do not consider that there is any evidence of a deliberate attempt to hide evidence.

123. What is of greater concern I consider is that the respondent did not provide to the claimant or in the Bundle (although it did email after the first three days to tender documents as I have described) the investigation report both original and amended, the balance of the witness statements taken amounting to 10 in total, and the document in relation to the questions raised after the disciplinary hearing. Documents such as Ms Morton's grievance, or in relation to the anonymous complaint of 8 April 2019, were not followed up at the time, or included in the Bundle. The complaint of 12 April 2019 was in the investigation report but omitted from the documents sent to the claimant, or provided to the Tribunal. These are matters that had at least the potential to be significant in the assessment of the evidence.

124. The evidence before me was therefore far from complete. The responsibility for that lay almost entirely with the respondent as to documents, but none of those who gave written statements either to the respondent or the claimant was called to give evidence before me. The evidence in the witness statements was nevertheless spoken to by

Ms Ferguson, and at least some of the witness statements were signed. Hearsay evidence is admissible, but is less strong than direct evidence from the person concerned. I should add that although the claimant could have called witnesses herself, such as Ms Miller, or sought at the time of the disciplinary hearing a full statement in response to the allegations made in other witness statements, she did not do so. The claimant suggested in her evidence that it would have been wrong to do so but I do not agree. The claimant also had the support of her union at that time, and said that she had taken legal advice. Separately the claimant could have sought orders for documents under Rule 31 but did not do so.

125. For the reasons given above I do not accept the claimant's evidence that Ms Ferguson prompted MT, nor that the explanation for all the witness evidence from statements is collusion from staff she had managed for performance or other reasons. Whilst there were some who had performance matters, that did not apply by any means to all. It is true that few worked ordinarily in Rannoch, but that does not I consider mean that the evidence given in those statements does not record what happened. The claimant did on occasion attend Caledonia, and have contact with those staff however limited, both when she was the Deputy Manager but also more obviously when acting Manager.

126. I require to address the evidence as it was before me, and make a decision. I consider that there is a reasonably large body of evidence which individually is limited, but which collectively does establish on the balance of probabilities a pattern of conduct by the claimant of shouting and swearing at staff at the least, which led on a number of occasions to some of them being so upset that they were crying.

127. There are I consider three witnesses in particular whose evidence is either detailed sufficiently as to alleged events of bullying, or come in the case of Ms Hurley who worked closely with the claimant and was thought to be friendly with her, which provide direct support for the allegation. The first is Ms Hurley, who worked most closely with the claimant, was thought of by the claimant as being friendly, but gave a statement that supported the allegation to an extent. In addition to Ms Hurley they are Ms Kemlo and Ms Findlay as set out above. I add to that the evidence of MT, who made

an allegation that the claimant swore at one of the staff on 3 April 2019, and at a time before the claimant was suspended and an investigation had taken place. MT could not have known of such allegations at that stage, and it is support for the allegation from a source outwith the employees of the respondent, even if there was a dispute involving the care of the family member. There is separately a body of evidence around allegations that the claimant bullied Mr Smith to an extent that he was crying, from a number of sources, and whilst that is not without its limitations, including as it was not mentioned in the letter he wrote albeit that that was prior to the meeting with Ms Ferguson on 9 April 2019, it again supports the allegations.

128. In addition to that particular evidence is the generality of a reasonably large number of staff and one former staff member identifying the claimant as the person, or at least one of those, who bullied staff in some way. Some are very general, but others say who they say was bullied, or what the effect was, or provide at least some detail of their own experience. Clearly the claimant is right in that the detail in many cases could have been followed up and was not, but what there was is relevant for the breadth of the evidence from such a diverse number of sources, save where it is to be discounted as I have indicated above.

129. I do not accept the claimant's evidence that all were motivated to lie, or are just acting on hearsay. It appears to me to be very unlikely that the information that was given, limited though it was, was wholly wrong and unreliable on the basis suggested by the claimant. It is true that a notice about the claimant's suspension was wrongly placed on the staff notice board, but that does not I consider mean that so many staff said what they did. The claimant accepted that she had what she termed a strong management style. She claimed both that she did not work with many of those who gave statements, but then accepted that she had acted, for a limited set of two periods, as Acting Manager when she had spent about half of her time in each of the two units. In such a Home as this it appeared to me to be unrealistic to suggest, as the claimant did, that she did not have contact with staff working in the Caledonia unit. There may have been less of it, but I consider that the evidence was that there was at least some. It is also not easy to square the claimant's assertion that she was

performance managing staff as one reason for their statements, with her position that she did not have contact with most of them as they worked in Caledonia and she worked in Rannoch. Her role latterly was Deputy Manager, and that meant that she had some general management responsibilities. The suggestion that MT was prompted to give evidence against the claimant by Ms Ferguson has been dealt with above, and is I consider clearly wrong.

130. These are all factors which lead me to conclude that the claimant is not likely to be reliable in her evidence. I have concluded that she does not have full insight into the effect of some of her behaviours. I accept that she does honestly believe that her management style is simply strong, that she did not act as alleged and that she was justified in seeking to raise standards.

131. I also take into account that the role of a manager can be to be critical of staff, and that at the very least for the issue of a room the state of which was wholly unacceptable steps to correct that, and address it, were required. There are however ways to do so that are appropriate, and ways that are not. Shouting at staff, swearing at them, intimidating them or threatening them in some way can amount to bullying in this context. I did take account in that assessment of the limitations in evidence as described above, and the lack of documentation which may have assisted the claimant. I also take into account that at an earlier stage some form of complaints appear to have been made by some of the staff, but it appears that the respondent did nothing save at best an informal word with the claimant on two occasions, which was not recorded in writing.

132. I consider that the weight of evidence before me is that the claimant did on occasion shout at staff, swear at them, and say things towards them that were inappropriate, including that they were not good at their job or would be dismissed, or acting in a manner that they found intimidating such as backing them into a corner, that that led to some of them being upset and crying, and that that can amount to bullying. It is within the band of reasonable responses to dismiss for that level of bullying conduct.

133. I must weigh in the balance the failures in the investigation and process generally, and the evidence that might have been provided in the Bundle but which was not.

134. These are all difficult issues to address in the circumstances. I have concluded from all of the material that the possibility of a fair dismissal had there been a fair procedure is assessed at 75%.

Contribution

135. I turn to the contribution of the claimant to her dismissal. I do so having regard to the finding made above as to the likelihood of a fair dismissal. The onus of establishing contribution lies on the respondent.

136. I consider that the claimant did contribute to her dismissal, and did so to a material extent. It is permissible but unusual for there to be a 100% contribution to a dismissal (***Steen***). In all the circumstances I did seriously consider making such a 100% deduction. I have concluded that in all the circumstances including in particular the finding made above under the ***Polkey*** principle, which requires to be taken into account in this matter, that the level of contribution is properly assessed at 75%, and that that level of contribution should apply both to the basic award and compensatory awards, where the statutory provisions are different.

ACAS Code

137. I have found above that the ACAS Code of Practice referred to has been breached for the reasons given above. Under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 the Tribunal has a discretion on whether or not to increase the compensation awarded by up to 25%, if it considers it just and equitable to do so, if it appears to the tribunal that the employer has unreasonably failed to comply with the relevant code of practice. In my judgment the respondent did unreasonably fail to comply with the Code of Practice in the respects set out above, it appeared to me from the evidence that that was material, in that it ought to have been obvious to the respondent that fairness required the disclosure of all witness statements, the investigation report, and the answers to the additional questions that Ms McAdam sought after the disciplinary hearing, together with the provision to Ms Allan of the

documentation that the claimant had provided in her support. I do not consider that there was unreasonable delay at any stage, including the appeal. The delays were explained by Ms Allan wishing to ascertain the position, conducting searches for documents, and in finalising arrangements for the appeal. I should also state that although there ought to have been an investigation meeting prior to deciding on taking disciplinary action it did take place at a later stage, and did not affect the outcome. I did not consider that that in isolation was a factor that ought to lead to any increase. In all the circumstances I consider it just and equitable to award an increase of 20% under that provision

Awards

138. The awards are therefore calculated as follows:

(a) Basic Award	£2,362.50	
less contribution of 75%	(£1,771.87)	
Sub-total		£590.63
(b) Compensatory Award –	£15,180.98	
Less Polkey deduction of 75%	(£11,385.73)	
Sub-total	£3,795.25	
Less contribution of 75%	£2,846.43	
Sub-total		£948.82
(c) Total of basic and compensatory awards		£1,539.45
(d) Add increase re Code of Practice of 20%		£307.89
Total award		**£1,847.34**

Conclusion

139. I have found that the claimant was unfairly dismissed, and I award the total sum of £1,847.34.

140. I would wish to record my thanks to both representatives for the helpful and professional way in which the hearing was conducted by each of them.

Employment Judge: A Kemp
Date of Judgment: 18 August 2020
Entered in register: 20 August 2020
And copied to parties