EMPLOYMENT TRIBUNALS

Claimant: Mrs G Ouple

Respondent: Quantum Care Ltd

Heard at: **Watford (by CVP)** **On: 25 and 26 March 2021**

Before: **Employment Judge Reindorf (sitting alone)**

Representation:

Claimant: Mr L Jegede (solicitor)
Respondent: Mr S McHugh (counsel)

RESERVED JUDGMENT

(1) The unfair dismissal claim fails and is dismissed.

(2) The wrongful dismissal claim fails and is dismissed.

REASONS

INTRODUCTION

1. In an ET1 presented on 20 December 2019 the claimant brought a claim of unfair dismissal. She had been summarily dismissed by the respondent from her job as a Relief Care Team Manager with effect from

20 September 2019 after an investigation into allegations of gross misconduct. The allegations related to her conduct towards paramedics attending the respondent's Mayfair Lodge Care Home ("the Home") and her care of a resident in the Home. The respondent denied the claim.

AMENDMENT APPLICATION: WRONGFUL DISMISSAL

2. Shortly before the hearing the claimant applied, through her solicitor, to amend her claim to add a complaint of wrongful dismissal. After hearing submissions from the parties' representatives I allowed the application for the following reasons:

    2.1. The amendment was significantly out of time and had not been made within a reasonable time after the claimant's solicitor had informed the respondent in September 2020 that the claimant intended to make the application. Furthermore the timing and manner of the application was not satisfactory, since it had been made late and without copying in the respondent. No real explanation had been offered for this.

    2.2. Nevertheless, the balance of prejudice weighed in favour of allowing the application. The amendment amounted to a new cause of action, but it would involve no new factual evidence. In substance it amounted to a relabelling of facts already pleaded. It would have made no difference if the application been made earlier, since the respondent had been on notice of the intended application since September 2020 and no new evidence was required to defend it. The respondent had not raised an objection when informed of the claimant's intention in September 2020. There was no real prejudice to the respondent in allowing the application.

THE EVIDENCE AND HEARING

3. The hearing was conducted remotely by video (CVP). The parties did not object to this. A face to face hearing was not held because it was not requested and all issues could be determined in a remote hearing.

4. The hearing took place over two full days.

5. I heard evidence from Mr Iain Edgley (Regional Manager), Ms Treena Massey (Human Resources Manager) and Ms Julie Jones (Policy and Research Lead) for the respondent. The claimant gave evidence on her own behalf. All witnesses produced written witness statements and were subjected to cross-examination. There was an agreed trial bundle consisting of 457 pages. Mr McHugh for the respondent handed up a skeleton argument on the first day of the hearing.

6. There was insufficient time to hear oral closing submissions. A timetable was agreed for the exchange of written closing submissions. Both parties' representatives sent in written submissions before the agreed deadline. However unfortunately these did not reach me until 21 May 2021.

7. Judgment was reserved.

THE ISSUES

8. The parties produced the following list of issues relating to the complaint of unfair dismissal:

LIABILITY: UNFAIR DISMISSAL

1. Was the claimant dismissed by the respondent within the meaning of s.95 ERA 1996?

2. Was the reason for the claimant's dismissal potentially fair, within the meaning of s.98(2) ERA 1996?

3. If the reason for the claimant's dismissal was conduct:

3.1. Did the Dismissing Officer hold a genuine belief that the claimant was guilty of the misconduct alleged?

3.2. If so, was that belief based on reasonable grounds?

3.3. If so, at the time the dismissing officer held that belief, had the respondent carried out a reasonable investigation in all the circumstances?

4. Did the respondent's decision to dismiss the claimant for "gross misconduct" fall within the range of reasonable responses open to a reasonable employer in all the circumstances?

5. Alternatively, was the reason for the claimant's dismissal Some Other Substantial Reason ("SOSR") in that:

5.1. for the reasons set out above, the relationship of trust and confidence between the respondent and the claimant had irretrievably broken down;

5.2. that if the respondent had continued to employ the claimant, it would have continued to place residents at risk; and

5.3. that if the respondent had continued to employ the claimant, it would have been in breach of its own core values.

5.4. that if the respondent had continued to employ the claimant, it would have lost the confidence of its residents and residents' family.

5.5. that if the respondent had continued to employ the claimant, it would have been criticised by the SOVA committee and the respondent Regulator CQC.

The claimant disputes the respondent dismissed her for SOSR.

6. Was the dismissal fair in accordance with s.98(4) ERA?

7. Did the respondent comply with / fail to follow the ACAS Code of Practice on Disciplinary Procedures?

REMEDY: UNFAIR DISMISSAL

8. If the Tribunal finds that the claimant's dismissal was unfair, does Polkey apply?

9. If the Tribunal finds that the claimant's dismissal was unfair, did any of the claimant's conduct contribute to her dismissal, and if so, to what extent should this be reflected in a reduction to any Award made to the claimant?

10. If the Tribunal finds that the claimant's dismissal was unfair, has the claimant attempted to conceal mitigation of losses and or in the alternative has the claimant failed to reasonably mitigate her losses

9. During the hearing I asked Mr Jegede to set out the elements of unfairness alleged by the claimant, which were as follows:

9.1. There had been inadequate investigation in that:

9.1.1. There had been a significant delay in investigating the incident of 11 February 2019.

9.1.2. If there was any restraint of resident RM on 15 June 2019, the investigation and decision did not take into account the necessity and proportionality of that restraint.

9.1.3. The respondent had not tried to retrieve photographs of the incident of 15 June 2019.

9.1.4. The respondent had failed to investigate whether the injury seen on resident RM on 15 June was the same as an injury the resident had been observed to have on 14 June 2019.

9.1.5. The investigation ignored the fact that resident RM was taking medication which should not have been taken with alcohol.

9.1.6. The investigation did not consider the claimant's mitigation as to why the 15 June incident happened as it did.

9.2. As to the decision to dismiss the claimant:

9.2.1. Incorrect reasons had been given in deciding to uphold the allegation in relation to the 11 February 2019 incident.

9.2.2. The 11 February 2019 incident did not and could not amount to gross misconduct.

9.2.3. The decision was based in part on an allegation that the claimant had restrained resident RM, which was not mentioned in the invitation to the disciplinary hearing.

9.2.4. The allegation that the claimant had restrained resident RM was not proven.

9.2.5. There was a disparity in treatment between the claimant and others involved in the incident on 15 June 2019, who had only been given warnings.

9.2.6. The claimant's disciplinary record and length of service were not considered.

9.2.7. It was incorrect that the claimant had not shown any remorse or had not taken responsibility for her actions.

9.2.8. Dismissal was too harsh a sanction.

FINDINGS OF FACT

10. Before she started employment with the respondent, the claimant had worked in a variety of roles in other care settings and had earned NVQ 2 and 3 qualifications in Social Care. She was employed by the respondent in October 2013 and by 2019 was working as a Relief Team Care Manager. The Home had around 62 residents, many of whom were living with dementia. The claimant attended frequent training in safeguarding and manual handling. She was line managed by Jackie Makwangwala (Home Manager). Until 2019 she had a clean disciplinary record.

The respondent's policies and procedures

11. The respondent's Staff Handbook dated November 2018 [57] contains a Disciplinary Procedure [62]. This states at section 6.5 that alleged disciplinary issues will be investigated at the earliest opportunity and in a

proper, prompt and impartial manner. It says that "Gross Misconduct is misconduct of such a serious nature that it destroys the trust between Quantum Care and the member of staff and goes to the root of the relationship". Examples of such conduct are listed. They include "any form of abuse of a resident" and "behaviour … likely to harm the Quantum Care's reputation".

12. The respondent also has a Safeguarding Adults from Abuse Policy ("the Safeguarding Policy") [88]. This policy identifies the statutory obligations to which the Home is subject and provides a definition of abuse as follows:

Abuse can manifest itself in many different forms and on some occasions can be unintentional. A standard definition of Abuse is:

Any action (or lack of action) that causes harm or distress to another. These actions may be deliberate or accidental and include: physical, psychological, neglect, sexual, financial, unnecessary restraint and I or deprivation of liberty or discrimination".

Actions may be the result of an individual, a group of service users or be classed as institutional abuse (the collective failure of employees in an organisation to provide an appropriate and professional service to vulnerable people)…

13. The Safeguarding Policy states that:

Service users … Will not be unnecessarily restrained and any acts that are intended to restrain are proportionate to a risk of harm posed to the service user or another individual.

14. This is known as the "walk away policy", with which the claimant was familiar. The care staff in the Home were not trained in restraint techniques and were trained to walk away if a resident became physically distressed, unless the resident or another person was in imminent danger.

15. The Safeguarding Policy states that members of staff should accurately and transparently report any concerns or incidents of abuse in line with the Safeguarding Adults from Abuse Procedure ("the Safeguarding Procedure") [89]. This states that:

Abuse is any behaviour towards a person that causes him or her harm, endangers life or violates his or her rights…

Abuse might be one or a combination of the following:…

Professional abuse e.g. the misuse of power and abuse of trust by professionals, the failure of professionals to act on suspected abuse/crimes, poor care practice or neglect in services…

Sudden changes in a service user's mood or demeanour or any unexplained marks, bruising or physical symptoms should be reported to the Registered Manager or their Deputy and detailed notes made.

16. The Safeguarding Procedure states that where an early investigation into suspected abuse reveals that a member of staff may be involved in the abuse of a service user it is likely that the member of staff will be suspended from duty while a detailed investigation is carried out.

The incident of 11 February 2019

17. On the claimant's arrival at work on 11 February 2019 Ms Makwangwala asked her to assist Ms Carmen Smith (Care Team Manager) with a resident, Mr RM, who was being attended to by paramedics following a 999 call. Ms Smith was the manager in charge on the shift. RM had previously been diagnosed with a chest infection. The claimant understood that she should take photographs of RM and do his "body mapping", as is usual in these circumstances. While the claimant was undertaking these tasks a discussion was taking place between Ms Smith and the paramedics about whether RM was dehydrated. The claimant felt that the paramedics were putting Ms Smith under pressure. RM's family were present. The claimant felt that it was not appropriate for them to have this discussion in front of relatives.

18. The claimant got involved in the conversation. She said that RM was not dehydrated. She suggested that Ms Smith should show the paramedics RM's food and fluid chart. She was speaking loudly, in a way which could have been regarded as shouting. She is a person who naturally speaks in a loud voice and struggles to speak quietly. She said to the paramedics "this is what you are here for, you can take him to the hospital".

19. The paramedics decided to take RM to the hospital. They brought a stretcher. The claimant suggested that rather than using RM's duvet to lift him on to the stretcher the paramedics should use a slide sheet, which they declined. While they were leaving the room with RM the claimant said to Ms Smith ""is this real?".

20. After this incident the claimant told Ms Makwangwala that she thought the paramedics had behaved unprofessionally. She did not make a formal complaint.

21. On 10 March 2019 the East of England Ambulance Service sent a letter to the respondent complaining about the claimant's conduct on 11 February [107]. This stated:

Went to care home for a patient taken into hospital who was unwell with severe dehydration and chest infection, while there we asked one of the carers how much fluid the patient had consumed today and the carer

stated 600 mls.

She thought we were implying they were not giving the patient water and became very defensive, aggressive and started shouting at us in front of patients family, at this point she was asked to stop shouting as it was unprofessional, she got even louder and stated that Adrian (male crew member) was unprofessional for asking how much fluid the patient had consumed.

The carer proceeded to tell the family that an ambulance was not required, as he, the patient, was just tired as he had been walking today, which, we believe was not the case.

Whilst on scene another member of staff asked this person to calm down, she carried on. One of the managers apologized for this "managers" behaviour. When talking to the family they stated that they had complained about this manager before but nothing had been done it is unknown to whom they complained.

22. The letter was received by Mr Kevin Ujaduglele (Deputy Home Manager). He replied to the Ambulance Service on 5 April 2019 stating that he would investigate the complaint under Stage 1 of the respondent's Complaints Procedure and would respond within ten working days. I was not taken to any documents which indicated that Mr Ujaduglele conducted any investigations or that he brought the letter of complaint to the claimant's attention. He left the respondent's employment shortly after this.

The incident of 15 June 2019

23. On 14 June 2019 the claimant did a body map for resident RM which showed that he had bruising to the inside of both of his forearms [113].

24. On 15 June 2019 the Home held a Father's Day event with lunch for residents. This was attended by RM, who was photographed eating his meal with a glass of wine [114a]. The photograph shows the back of RM's left hand, which does not appear to have any injuries or bruising.

25. The claimant arrived for the evening shift after the Father's Day lunch. She was working as team manager. It was her unchallenged evidence that the team was short staffed. Shortly after she began work, she heard a commotion in the foyer. On investigation she saw that RM was sitting on a chair in the foyer acting in an uncharacteristically aggressive manner towards a member of the care staff. He had soiled himself and was refusing to accept personal care from the staff who wanted to clean him up. The claimant thought that he was drunk and that his behaviour was a result of having taken alcohol with his lunch in combination with his regular medication. However, RM had slept after having the Father's Day lunch, and was unlikely still to be affected by the alcohol.

26. I accept Ms Jones' evidence that a number of residents in the Home are incontinent and so it does happen from time to a time that a resident will soil themselves in a public area. The respondent's usual approach is to try to assist the resident for reasons of dignity, but to step away if the resident does not consent to personal care. This is in line with the "walk away" policy. Ms Jones said that it would be reasonable to go back to check two or three times whether the resident wished to receive personal care before it became a matter of concern that the person was sitting in faeces.

27. On 15 June the claimant tried to persuade RM to accept personal care, but he continued to refuse. He was shouting at the claimant and the other care staff that they should leave him alone. They left him alone for around 15 minutes and then returned to try to persuade him again to accept personal care. The claimant decided that RM should be moved to his room to be cleaned up because the foyer was beginning to smell of faeces and it was close to dinner time for the residents. With the two other care staff the claimant transferred RM into a wheelchair. She lifted him by the back of his trousers to do so.

28. Once the claimant and the two other care staff had returned RM to his room they cleaned him and put him on the bed to change his clothing. Another member of care staff arrived to ask the claimant to assist with a different resident, but the claimant asked her to wait until the situation with RM had been dealt with. This member of staff then also assisted with RM. He continued to be agitated, including hitting out at one of the members of staff. One member of staff restrained his legs to pull his trousers up, another helped to keep his legs still, a third held his arms to stop him from hitting out, and the claimant supported his back to stop him rolling backwards.

29. At this stage there were four members of staff giving RM personal care, despite the fact that he had a Moving and Handling Plan which stated that only one member of staff was required.

30. After RM had been cleaned and changed the claimant noticed some blood on his sheet. On inspection she saw that there were skin tears on his hands. She dressed his hands and took two photographs. There was something wrong with the camera, so at least one of the photographs was not retrievable. The claimant also did a body map, although the manuscript comments on this refer to events of the following day so it appears that, contrary to the claimant's assertion, this was not done at the time of the incident. The body map shows the same bruising on RM's forearms that the claimant had noted on 14 June [113], as well as injuries to the backs of the hands marked as "skin tear old bruise".

31. Both the claimant and one of the other members of care staff who had been present at the incident recorded it in RM's daily record of care [110] [121]. Both of these entries are lacking in detail, and neither mentions

that RM had refused personal care, was moved against his will and was physically restrained.

32. On 16 June RM received a visit from his son, who noticed that RM had bandages on his hands. He lifted the dressings and saw that there were significant injuries to RM's hands. He went to Ms Smith to ask how these injuries had been caused and to request that the District Nurse be called to inspect them [125]. He also raised the incident of 11 February 2019.

33. The claimant witnessed at least part of this discussion, and saw RM in the foyer with the dressings partly removed from his hands. She saw the injuries to his hands. They were significant injuries covering almost the whole of the backs of both hands. They were considerably more extensive than those noted on the body map the claimant had done on 15 June. The claimant denies that these injuries were the same as those she observed on 15 June, and suggests that they must have been caused in the interim. I find that the injuries seen on 16 June were those caused to RM on 15 June during the incident in which the claimant was involved.

34. On 16 June the claimant called the District Nurse. She also added a note to the body map she had done for RM on 14 June, stating that the District Nurse had been called out to see RM's injuries [114].

35. On or about 16 June Ms Smith took statements from the claimant [117] and two of the other members of staff who had been on duty [119] [120]. There is some disparity in the dates on these documents which was not explained. Ms Smith also produced a written statement saying that she had asked RM how he got the injuries to his hands [127]. He said that a carer had "pressed" his hands and that "there were three carers", one of whom was Japanese. Another manager, Andrea Kiss, produced a written statement to the same effect [128].

36. On 17 June photographs were taken of RM's injuries [126A] [126B]. Also on 17 June an Incident Report Form was entered on the respondent's electronic system in the claimant's name. The claimant denies making this entry. Some parts of the report appear to have been completed on 19 June by Ms Makwangwala and Ms Kiss (see [186]). The bulk of it, however, was completed by the claimant. She only made the report after the matter had been brought to the attention of her manager by RM's son. She had not informed management of the incident before this, other than by completing RM's daily record in a way which omitted vital information. I reject the claimant's evidence that the reason she had not completed an incident report on 15 June was because the injuries to RM's hands were merely the reopening of old bruises and this did not require an incident report. I find that the reason she did not complete a timely incident report was because she was hoping to obscure the fact that the incident had occurred and had resulted in significant injury to RM.

Suspension, investigation and disciplinary proceedings

37. On 20 June, Ms Makwangwala suspended the claimant on full pay pending investigation. The suspension was confirmed by letter the following day [146]. The claimant was not told the details of the allegations in this letter on the basis that they "must remain confidential at the present time".

38. At some point during this period Ms Makwangwala looked into the 11 February incident (which had been raised by RM's son on 16 June) and realised that Mr Ujaduglele had not completed his investigation into the matter before his departure from the respondent's employment.

39. In July, Ms Louise Bassett (Quality Manager) appointed Ms Jones to investigate the allegations against the claimant. Ms Jones was an experienced independent consultant who was working with the company on several projects. The HR department provided Ms Jones with the relevant documentation.

40. Ms Jones wrote to the claimant on 26 July [147]. She set out four disciplinary allegations as follows:

    40.1. Suspected abuse relating to a resident who sustained an injury to his hands and arms as a result of an intervention you were involved in.

    40.2. Allegedly displaying inappropriate and unacceptable behaviour towards the paramedic services

    40.3. Allegedly preventing a service user from receiving vital health care from the paramedic service

    40.4. For the aforementioned reasons, conduct that has or potentially could bring the company into disrepute.

41. The letter invited the claimant to an investigation meeting on 29 July. The notes of this meeting [153] record the claimant as saying that she had noticed that RM had had "cracked, bruised and weeping hands". Ms Jones interviewed the claimant again on 12 August [155] and 15 August [173]. She conducted interviews with the other staff who had assisted with RM on 15 June [157] [163] [167] and with Ms Smith [177] and Ms Makwangwala [171].

42. Ms Jones produced an investigation report dated 27 August [178]. At the beginning of the investigation report the allegations were listed as per the suspension letter, along with a fifth allegation: "Allegedly restraining a resident". The report concluded that there was a disciplinary case to answer in respect of all the allegations.

43. In respect of the 11 February incident, Ms Jones found that there was evidence that:

    43.1. the claimant had become involved in an incident that was already being dealt with and had inappropriately questioned the paramedic crew about the issue of RM being dehydrated in front of RM's family;

    43.2. the claimant "spoke in a loud voice to the paramedic crew however it appears that this tends to be GO's normal way of communicating"; and

    43.3. the claimant did not report to her manager that she had concerns about the paramedics transferring RM to the stretcher trolley on his duvet, but did complain about the paramedics' behaviour.

44. In respect of the 15 June incident, Ms Jones found that there was evidence that:

    44.1. the claimant was complicit in coercing RM to have personal care against his wishes whilst he was sitting in the foyer, and she gave instructions to the junior staff to take part;

    44.2. although there was no evidence that the claimant herself restrained RM, there was evidence that the claimant was supporting RM's back whilst he was on the bed which could have restrained him should he have wished to roll backward;

    44.3. the claimant did nothing to stop junior staff employing restraint on RM in order to force him to accept personal care;

    44.4. the claimant used inappropriate moving techniques on RM by holding the back of his trousers to transfer him into the wheelchair;

    44.5. the claimant should have known that the approach by her and the three other staff involved was inappropriate and amounted to abuse;

    44.6. the claimant did not complete the Incident Report until two days later and did not inform management or RM's family about the incident; and

    44.7. there had been a breach of the respondent's Safeguarding Policy and Procedure, Manual Handling Policy and Procedure and Whistleblowing Policy and Procedure.

45. Amongst Ms Jones' findings in relation to the 15 June incident are the following two notes:

    It is strongly advised that people taking [RM's regular medication] limit

alcohol consumption due to the combined effect of the medication and alcohol (e.g., severe drowsiness and affects concentration, agitation, aggression.

There is evidence that the bruising on RM's arms had been reported and body mapped on the 14th June 2019. The injuries noted on the 14th June are entirely consistent with those seen on the 15th June 2019.

46. By letter dated 4 September Mr Edgley invited the claimant to a disciplinary hearing [184]. The letter listed the original four allegations which had appeared on Ms Jones' letter of 26 July [147]. The letter attached Ms Jones' investigation report and supporting evidence.

47. A four hour disciplinary hearing took place on 17 September chaired by Mr Edgley accompanied by Ms Julie Oakley-Reid (Home Manager, Jubilee Court) and Ms Massey (HR Manager) [190]. The claimant was accompanied by Andrea Lacatos. The meeting was recorded and was later transcribed.

48. At the beginning of the hearing Mr Edgley read out the allegations to the claimant. He included the fifth allegation ""Allegedly restraining a resident". He checked with the claimant that she was aware of the allegations and that they were the same allegations that were in her letters and the disciplinary pack, to which she answered "yes". He then took the claimant through both incidents in very careful detail and allowed her to describe them in her own words. She accepted that she had made mistakes and suggested that perhaps she needed more management training. However she gave the impression that she did not regard her mistakes as serious.

49. Towards the end of the hearing Mr Edgley said to the claimant, referring to the use of four staff to handle RM on 15 June:

if you don't think that's a problem then that is something you and I are going to have to disagree on because I am pretty certain that that is a problem. The reasons for it .... the mitigation for it; the explanation as to why it occurred obviously we will take all that into account but the bottom line is this situation should not have occurred. At no time would it have been OK for four members of staff to be giving care to one person.

50. By letter dated 20 September Mr Edgley dismissed the claimant for gross misconduct [280].

51. As to the 11 February incident, Mr Edgley found as follows:

    51.1. the claimant displayed inappropriate and unacceptable behaviour towards the paramedics;

    51.2. in the hearing she had initially completely denied having made

comments to the paramedics, only later accepting that she did make some comments which could have been considered as inappropriate;

51.3. she had argued that the letter from the Ambulance Service did not relate to her, but it was indeed her who had given them cause to complain;

51.4. the allegation that the claimant had prevented RM from receiving vital health care from the paramedic service had not been pursued by Ms Jones and had therefore not formed any part of the disciplinary hearing.

52. As to the incident of 15 June, Mr Edgley found as follows:

52.1. the injuries to RM's hands occurred directly as a result of being restrained and forced to have personal care when he was clearly declining to do so;

52.2. the claimant had 'taken charge' of the situation and was giving instruction to the other staff present who were less experienced and less senior than her;

52.3. she remained actively involved instead of going to help another resident

52.4. RM had excessive levels of staff attending him, leading to him reporting a feeling of being "ganged up on";

52.5. RM was put in a wheelchair using poor manual handling techniques against his express wishes, was pushed to his room and was restrained on his bed;

52.6. the claimant had not accepted that this was poor practice, or abusive, and appeared to be unaware that the incident constituted a matter that should be reported to the Home Manager, Herts Adult Safeguarding Team and the Police;

52.7. the claimant had not reported the incident and because she didn't feel that it was necessary because she did not consider it to be significant;

52.8. the claimant showed little remorse and did not accept any responsibility or accountability for her actions; and

52.9. the claimant's actions were particularly serious given her seniority and experience.

53. Mr Edgley said in his dismissal letter that if the claimant wished to appeal she should do so within ten days of the date of the letter.

54. The claimant did not initially appeal. On receipt of the letter of dismissal she telephoned Ms Massey and said that she did not intend to appeal and that she had decided to spend time with her father, who was unwell.

55. Later in the year the claimant applied for and was offered a job with another care home company, Leonard Cheshire, subject to references. On 12 November the respondent provided a reference which specified that the claimant had been dismissed for gross misconduct, and that she had disputed the allegations but had not appealed. The job offer was withdrawn.

56. The claimant was very upset by this reference. She telephoned the respondent and then wrote a letter received on 29 November which purported to appeal against her dismissal. On 3 December Ms Wanda Spooner (Director of HR and Training) wrote to the claimant stating that it was too late for her to submit an appeal against dismissal, and explaining that the respondent had a duty to give accurate and truthful information for references because it worked in a regulated environment and in line with its values.

57. The other three members of staff who had been involved in the 15 June incident were also suspended and investigated. They were issued with Final Written Warnings following disciplinary hearings.

THE LAW

Unfair dismissal

General principles

1. By section 94 of the Employment Rights Act 1996 ("ERA") an employee has the right not to be unfairly dismissed.

2. In a claim for unfair dismissal, the employer must show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason (s.98(1) ERA). One potentially fair reason is a reason relating to conduct (s.98(2)(b) ERA). Another is "Some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held" (s.98(1)(b) ERA).

3. If the employer has shown that the dismissal was for a potentially fair reason, the Tribunal must determine whether the employer acted reasonably or unreasonably in treating that reason as sufficient reason to dismiss the employee. In determining this question the Tribunal must have regard to the circumstances of the case, including the size and

administrative resources of the employer's undertaking and equity and the substantial merits of the case (s.98(4) ERA).

Misconduct dismissals

4. Guidance as to the correct approach to dismissals for misconduct is given in *British Home Stores Ltd v Burchell* [1980] ICR 303, more recently summarised by Aikens LJ in *Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* [2012] IRLR 759 CA as follows:

   35... once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.

   36 If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice.

5. See also *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 43.

6. The tribunal must only take into account what was known to the employer at the time of the dismissal (*W Devis & Son v Atkins* (1977) AC 931). The band of reasonable responses test applies both to the Tribunal's assessment of whether the decision itself was reasonable, and to the question of whether the process adopted was reasonable (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 CA).

7. Where there is a dispute about whether the misconduct has occurred, the employer must do as much investigation into the matter as is reasonable

in all the circumstances of the case (*Burchell*). That is not to say that each line of defence put forward by the employee must be investigated; the Tribunal should look at the reasonableness of the overall investigation (*Shrestha v Genesis Housing Association Ltd* [2015] IRLR 399 EAT).

8. The gravity of the charges and their potential effect on the employee are relevant factors in assessing whether the investigation was reasonable. Serious allegations of criminal misbehaviour, where disputed, must always be the subject of the most careful and conscientious investigation (*A v B* [2003] IRLR 405 EAT). Where the employee's reputation or ability to work in his chosen field is likely to be affected by a finding of misconduct, employers should take their responsibility to conduct a fair investigation particularly seriously (*Salford Royal NHS Foundation Trust v Roldan* [2010] IRLR CA).

9. In *Strouthos v London Underground Ltd* 2004 IRLR 636 the Court of Appeal held that disciplinary charges should be precisely framed and evidence should be limited to those particulars, because an employee should only be found guilty of the offence with which he has been charged.

10. The issue of what amounts to gross misconduct is a mixed question of law and fact. It must amount to a repudiation of the contract of employment by the employee. It must be a deliberate and wilful contradiction of the contractual terms or very considerable negligence *Sandwell & W Birmingham Hospitals v Westwood* UKEAT/0032/09/LA).

11. In deciding on the appropriate sanction an employer may be faced with a range of possible penalties, each of which might be considered reasonable. Here the Tribunal must be particularly astute to observe the band of reasonable responses test. It should ask whether dismissal was reasonable, rather than whether a lesser sanction would have been reasonable: see *Securicor Ltd v Smith* [1989] IRLR 356.

12. As a matter of principle employers should act consistently in relation to comparable acts of misconduct. However, the allegedly similar situations must be properly comparable: see *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352 EAT per Waterhouse J at paragraph 25, emphasising that the focus should be on the particular circumstances of the individual employee's case and that a "tariff approach" is not appropriate. See also *Paul v East Surrey District Health Authority* [1995] IRLR 305 CA per Beldam LJ, in which it was said that in distinguishing between similar cases an employer is entitled to take account of mitigating personal circumstances and the attitude of the employee to his conduct. See also *Procter v British Gypsum Ltd* [1992] IRLR 7 EAT and *MBNA Ltd v Jones* UKEAT/0120/15/MC. If the employer has consciously distinguished between two cases, the dismissal may only be held to be unfair if there was no rational basis for the distinction: *Securicor Ltd v Smith* [1989]

IRLR 356 CA; *Harrow London Borough v Cunningham* [1996] IRLR 256 EAT.

13. Appeals should be dealt with impartially (ACAS Code paragraph 27). Procedural defects in a disciplinary hearing may be remedied on appeal (*Sartor v P&O European Ferries* [1992] IRLR 271 CA). The process should be considered as a whole (*Taylor v OCS Group Ltd* [2006] IRLR 613 CA; *Sharkey v Lloyds Bank plc* UKEATS/0005/15 (4 August 2015, unreported)).

Dismissals for some other substantial reason

14. An employer may fairly dismiss an employee on the basis of a loss of trust and confidence where the act of the employee has led to the breakdown: *Ezsias v North Glamorgan NHS Trust* [2011] IRLR 550 EAT. In such a case the Tribunal may look into the background to consider the fairness of the dismissal in the light of all the facts: *Governing Body of Tubbenden Primary School v Sylvester* UKEAT/0527/11 (25 April 2012, unreported) EAT.

Polkey

15. The Tribunal may reduce compensation for unfair dismissal on the basis that the employee would have been dismissed even if a fair procedure had been followed (*Polkey v A E Dayton Services Ltd* [1988] ICR 142 HL, *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 EAT).

Contributory fault

16. A reduction to the compensatory award for contributory fault may be made by such amount as the Tribunal considers just and equitable if it finds that the claimant has, by any action, caused or contributed to his dismissal (ERA s.123).

17. The Tribunal may make a deduction if the claimant was “guilty of improper conduct which gave rise to a situation in which he was dismissed and that conduct was blameworthy” (*Gibson v British Transport Docks Board* [1982] IRLR 228). The Tribunal should take “a broad, commonsense view of the situation” in deciding both whether to make a reduction and if so in what amount (*Maris v Rotherham Corpn* [1974] 2 All ER 776, [1974] IRLR 147 NIRC).

Wrongful dismissal

18. The Tribunal has jurisdiction to determine a claim for wrongful dismissal by virtue of the Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994.

19. An employee is wrongfully dismissed if he is summarily dismissed in circumstances where the employer was not entitled to dismiss him without notice. If an employee has been dismissed summarily for gross misconduct, the dismissal is wrongful if he did not in fact commit gross misconduct. The measure of damages is the notice pay to which the employee would have been contractually entitled.

20. The tribunal must decide whether the contract of employment was fundamentally breached by the misconduct, rather than whether the employer acted reasonably in finding there was such a breach and dismissing the employee because of it.

CONCLUSIONS

Unfair dismissal

Was the claimant dismissed by the respondent within the meaning of s.95 ERA 1996?

21. It is not in dispute that the claimant was dismissed by the respondent within the meaning of the legislation.

Was the reason for the claimant's dismissal potentially fair, within the meaning of s.98(2) ERA 1996?

22. The respondent has discharged its burden of showing that the genuine reason for the claimant's dismissal was a reason relating to conduct, namely the claimant's behaviour on 11 February and 15 June 2019.

23. The claimant did not suggest an alternative reason for dismissal and it was in any event conceded on her behalf by Mr Jegede that the reason for the dismissal was a reason relating to conduct.

24. I do not consider it necessary to examine the SOSR reasons advanced by the respondent in any detail. Whilst these various reasons are referred to in the dismissal letter, none of them could reasonably be described as the principal reason for the dismissal.

Did Mr Edgley hold a genuine belief that the claimant was guilty of the misconduct alleged?

25. The evidence given by Mr Edgley in his witness statement and under cross-examination was clear and credible. He considered that the claimant had committed gross misconduct and that was the reason why he decided to dismiss her summarily. I accepted his evidence.

If so, was that belief based on reasonable grounds?

26. Mr Edgley's decision that the claimant was guilty of gross misconduct was based on reasonable grounds.

27. Mr Edgley took account of the careful and detailed investigation report produced by Ms Jones, the documentary evidence attached to it and the answers given the claimant in her four hour disciplinary hearing. His conclusions summarised in paragraphs 51 and 52 above were well within the range of reasonable responses to the evidence before him.

If so, at the time that Mr Edgley held that belief, had the respondent carried out a reasonable investigation in all the circumstances?

Was there a significant delay in investigating the incident of 11 February 2019?

28. The delay between the incident of 11 February and the investigation was around 4.5 months. This is a delay, but not an excessive one. It is explained by the departure from the respondent's business of Mr Ujaduglele. His failure to deal with the complaint made by the Ambulance Service was somewhat unsatisfactory, but not to the extent that it renders the respondent's decision to investigate the matter in June 2019 unreasonable. That is particularly so since the respondent received a fresh complaint about it from RM's son on 16 June, which they were bound to investigate at that time.

29. During the time between the incident and the investigation the claimant was not aware that a complaint had been raised about it. This was not a situation in which she was told that a line had been drawn under it.

30. The claimant had a good recollection of the incident and was able to give detailed evidence about it in the investigation and the disciplinary hearing. She was not unfairly prejudiced by the delay.

If there was any restraint of RM on 15 June 2019, did the investigation and decision take into account the necessity and proportionality of that restraint?

31. I find that in both the investigation and the disciplinary hearing the respondent amply considered the circumstances surrounding the use of restraint on RM on 15 June 2019. This necessarily amounted to an

analysis of whether the use of restraint was necessary and proportionate. It is quite clear that both Ms Jones and Mr Edgley addressed their minds assiduously to this analysis. The decision that the use of restraint was, in effect, neither necessary or proportionate was one which the respondent was entitled to reach.

Did the respondent try to retrieve photographs of the incident of 15 June 2019?

32. It seems that some attempt was made to find out why the photographs taken by the claimant of RM's injuries on 15 June had not been printed. However, the photographs are not relevant to the analysis that Mr Edgley was required to undertake at the disciplinary hearing, since the question of how severe the injuries were was not important. The fact that there were any injuries at all was the key point, and this was not in dispute. The claimant agreed that RM's hands had been bleeding during the incident on 15 June. The only question of relevance was whether these injuries were caused by the restraint of RM on 15 June or not. It was clear from the body map done the day before that RM did not have pre-existing injuries on the backs of his hands, as the claimant suggested. Moreover the injuries shown on his hands on 17 June were consistent with the body map done by the claimant on 15 June.

33. The respondent was therefore entitled to proceed without making extensive efforts to retrieve the photographs. Any failure to do so did not render the investigation unfair.

Did the respondent fail to investigate whether the injury seen on RM on 15 June was the same as an injury the resident had been observed to have on 14 June 2019?

34. There was no failure to investigate in this respect. It was perfectly obvious that the injuries seen on RM on 15 June were not the same as those observed on 14 June, because the claimant's own body maps on the two dates differed. The body map of 14 June showed only bruises to the forearms, whereas that of 15 June showed those bruises along with injuries to the backs of the hands.

35. I find that when Ms Jones noted in her report that the two body maps showed "entirely consistent" injuries, she was referring only to the injuries shown to RM's forearms.

Did the investigation ignore the fact that RM was taking medication which should not have been taken with alcohol?

36. There was disagreement between the parties about the effect of alcohol on people taking RM's regular medication. I find that this was an irrelevant issue which did not require investigation. Whatever the cause of RM's behaviour, the claimant was required to deal with him in a way

which was consistent with her professional obligations and the respondent's policies. The respondent was entitled to investigate how she dealt with him and to take disciplinary action in the event that she had fallen short of the requirements on her.

Did the investigation consider the claimant's mitigation as to why the 15 June incident happened as it did?

37. The claimant alleged that one reason why she had acted as she did on 15 June 2019 was that she was short staffed and extremely busy. This point was explored at length with the claimant in her meeting with Ms Jones on 12 August and in the disciplinary hearing. At the conclusion of the disciplinary hearing Mr Edgley assured the claimant that he would take her mitigation into account. I am satisfied that he did so adequately in reaching the decision to dismiss, albeit that it is not mentioned in the dismissal letter.

Did Mr Edgley's decision to dismiss the claimant for gross misconduct fall within the range of reasonable responses open to a reasonable employer in all the circumstances?

Were incorrect reasons given in deciding to uphold the allegation in relation to the 11 February 2019 incident?

38. Mr Jegede for the claimant argued that the conclusions reached by Mr Edgley about the 11 February incident did not fit logically within the allegations of which the claimant was given notice.

39. This argument appears to be based on the conclusions reached by Ms Jones in her investigation report that the claimant had become involved in an incident that was not her concern and that she had failed to report to her manager that she had concerns about the paramedics transferring RM to the stretcher trolley on his duvet. Mr Jegede submitted that these conclusions did not fit within the allegation that the claimant had shown inappropriate and unacceptable behaviour towards the paramedics.

40. I do not follow this line of argument. Whatever the findings of Ms Jones in the investigation report in relation to this incident, Mr Edgley found only that the claimant had displayed inappropriate and unacceptable behaviour towards the paramedics. This was precisely the allegation of which the claimant had been notified in the letter inviting her to the disciplinary hearing.

41. In any event there was no evidence that the claimant misunderstood the conclusions in Ms Jones' investigation report or the substance of the allegations that was put to her by Mr Edgley.

42. There was no unfairness in the reasons given for deciding to uphold the

allegations in relation to this incident.

Was the 11 February 2019 incident capable of amounting to gross misconduct?

43. I find that this incident was capable of amounting to gross misconduct. The respondent was entitled to regard it as a matter which had or potentially could bring the company into disrepute. The respondent's Disciplinary Policy identifies "behaviour … likely to harm the Quantum Care's reputation" as a potential matter of gross misconduct.

44. I reject Mr Jegede's argument that it was outside the band of reasonable responses for the respondent to discipline the claimant for "speaking loudly" to the paramedics in front of RM's family given that this was her usual way of speaking. It was permissible for the respondent to conclude that the claimant, as an experienced manager, should have moderated her tone and volume when speaking with professional external medical personnel in front of a resident's family in a sensitive and difficult situation.

45. I also reject Mr Jegede's argument that there was a disparity between the wording of the complaint from the Ambulance Service and the way in which the allegation was put to the claimant at the disciplinary hearing. He said that the Ambulance Service's letter had accused the claimant of being defensive and aggressive and of shouting. This letter was included in the documents sent to the claimant with the investigation report and was discussed in the disciplinary hearing (the claimant initially denying that it even referred to her). She understood its contents.

46. In any case it is apparent that the respondent believed that it was not only the volume but also the content of the claimant's interaction with the paramedics which was objectionable, since she had sought to question their medical expertise. This was a reasonable conclusion supported by the evidence and explored more than sufficiently during the disciplinary hearing.

Was the decision based in part on an allegation that the claimant had restrained RM on 15 June, which was not mentioned in the invitation to the disciplinary hearing?

47. It is correct that this allegation was not set out in the invitation to the disciplinary hearing. This was clearly an oversight. However the allegation was stated on the first page of the investigation report. Furthermore the claimant expressly confirmed at the outset of the disciplinary hearing that she was on notice of the allegation. It was not suggested to me that she was taken by surprise by the line of questioning. There was no unfairness in the failure to include this allegation in the letter inviting the claimant to the disciplinary hearing.

Was the allegation that the claimant had restrained RM on 15 June proven?

48. Contrary to Mr Jegede's submission, the respondent does not need to prove that there was restraint of RM during the incident of 15 June 2019 which was done by the Claimant. The Tribunal need only be satisfied that the respondent acted within the range of reasonable responses in concluding that the claimant had restrained RM. I find that the allegation of restraint was proven to that required standard.

49. The respondent's case was that by supporting RM's back the claimant was restraining him. That is the view of professionals in the care industry, and I see no reason to go behind it.

50. Mr Jegede also submitted that Mr Edgley did not expressly find in his dismissal letter that the claimant had restrained RM. I do not consider that to be a reasonable reading of the dismissal letter. Mr Edgley makes clear in that letter that the claimant "took charge" of the situation and gave instruction to the other staff present, that she had "remained active" in the incident, that RM had been put in a wheelchair using poor manual handling techniques against his express wishes (this obviously being a reference to the claimant pulling RM up by his trousers), and that the claimant had "initiated and led" the restraint of RM on his bed.

Was there was a disparity in treatment between the claimant and others involved in the incident on 15 June, who were only given warnings?

51. The other staff involved in the incident were junior. The claimant was the manager in charge on the shift. That alone is sufficient to dispense with the argument that there was an unfair disparity of treatment. In addition, however, the claimant faced allegations about the 11 February incident as well as the 15 June incident. This was not the case in respect of any of the other members of staff who were disciplined. I find that there was no unfair disparity of treatment.

Were the claimant's disciplinary record and length of service considered?

52. I find that Mr Edgley took into account the claimant's employment history. He found in the dismissal letter that her experience and seniority were factors which went against her, in that she should have known and understood that her actions were unacceptable. He was entitled to take that approach.

53. Mr Edgley said in evidence that he took into account the claimant's clean disciplinary record but felt that, given how serious the allegations were, it was not sufficient mitigation. I accept that evidence.

Did the respondent correctly decide that the claimant had not shown any remorse or had not taken responsibility for her actions?

54. Mr Edgley reasonably concluded that the claimant displayed a lack of genuine remorse. It is apparent that although she made some concessions in the disciplinary hearing and expressed some remorse, this was undermined by her flippant tone and failure to appreciate the seriousness of the allegations.

Was dismissal a fair sanction?

55. I find that dismissal was an entirely fair sanction in the circumstances.

ACAS uplift, Polkey and contributory fault

56. It is not necessary for me to consider these points. For completeness, however, if I am wrong that the dismissal was fair, I would have found that the claimant contributed to her dismissal by 100% for the reasons in the section below.

Wrongful dismissal

57. I find that the claimant committed gross misconduct and that accordingly the respondent was entitled to dismiss her summarily.

58. On balance, I find that the incident of 11 February amounted to gross misconduct under the terms of the respondent's Disciplinary Policy. The claimant harmed the respondent's reputation by engaging with external medical professionals in an inappropriate and aggressive manner, questioning their medical judgment and arguing with them about matters which were within their expertise (namely, whether RM was dehydrated and the proper method by which he should be transferred to the stretcher trolley). The fact that she has a naturally loud voice is not a defence. As a senior member of staff with long experience she should have understood how to moderate the tone and content of her communications with the paramedics. She did not do so and her conduct undermined the respondent's reputation.

59. During the incident of 15 June the claimant committed a series of acts which both individually and cumulatively significantly exceeded the threshold for gross misconduct, namely:

    59.1. She failed properly to observe the "walk away" policy, instead manhandling RM against his will by lifting him by his trousers into a wheelchair.

    59.2. She directed, oversaw and took part in the restraint of RM in his room. This directly resulted in serious injuries being caused to

him. For the avoidance of doubt, I find that the injuries shown in the photographs of 17 June were caused to RM during the incident of 15 June and that the claimant was fully aware of their severity.

59.3. She dishonestly attempted to cover her tracks by completing a deficient daily record of care, not filling in an incident report form, not seeking medical care for RM, not informing her manager and not informing RM's family. She only did these things when it became unavoidable because RM's son had seen the injuries caused to RM.

60. The mitigation proposed by the claimant in respect of the incident of 15 June was wholly inadequate to account for or excuse her actions.

61. Accordingly the wrongful dismissal claim fails.

Employment Judge Reindorf

Date 21 June 2021

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.