EMPLOYMENT TRIBUNALS

Claimant: Ms Mary Martins

Respondent: Nightingale Hammerson Trustee Company Limited

Heard at: London South Employment Tribunal (by CVP)
On: 1 April and 2 June 2021

Before: Employment Judge Abbott (sitting alone)

Representation
Claimant: Mr Tom Wilding, barrister, instructed by Stephens Happyman & Co
Respondent: Mr Daniel Brown, barrister, instructed by DWF Law LLP

JUDGMENT

1. The claim for unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. The Claimant, Ms Mary Martins, was employed by the Respondent, Nightingale Hammerson Trustee Company Limited, as a Health Care Assistant at the Respondent's care home Nightingale House in South West London. Her employment with the Respondent began on 30 April 2012 (with continuous service back to 7 December 1994 due to a TUPE transfer), and ended with her being summarily dismissed on 22 January 2020.

2. The Claimant brought a claim for unfair dismissal. The Respondent denied the Claimant's claim.

3. The case came before me for Final Hearing on 1 April 2021. The hearing was held fully remote through the Cloud Video Platform. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

4. Unfortunately, after the Respondent's witnesses had completed their evidence and it came time for the Claimant to give her evidence, she suffered technical problems that meant she was unable to re-join the video hearing. When it became clear that there would not be sufficient time for the Claimant to complete her evidence that day, I adjourned the hearing part-heard. Due to limited counsel availability, the hearing was not able to be resumed until 2 June 2021. I heard the Claimant's evidence and the parties' closing submissions on that day and, after deliberating, delivered an oral judgment dismissing the claim. The Claimant requested written reasons immediately following the delivery of my judgment – these are those written reasons. I apologise to the parties for the delay in these reasons being promulgated, which is as a result of workload constraints.

5. The Claimant was represented by Mr Tom Wilding, barrister, instructed by Stephens Happyman & Co. She provided a witness statement and gave oral evidence. She called no other witnesses. The Respondent was represented by Mr Daniel Brown, barrister, instructed by DWF Law LLP. It called evidence from Mr Nuno Santos Lopes (the investigating officer), Ms Preeti Johal (who had assisted the disciplinary manager, Mr Simon Pedrizi, in chairing the disciplinary hearing) and Ms Helen Simmons (the appeal manager), who each provided witness statements and gave oral evidence. Mr Pedrizi did not give evidence – I was told that he was no longer employed by the Respondent and is now living in Australia and was therefore unwilling to give evidence. I was also provided with a 278-page Bundle of Documents and a draft list of issues.

Issues for determination

6. At the outset of the hearing, I agreed with the parties the issues to be determined. As the hearing progressed it was evident that the parties were not in a position to address remedy issues. The issues to be determined in this judgment are therefore only those relevant to liability. There was no dispute that the Claimant was a qualifying employee and brought her claim in time, that there was a dismissal for the purposes of the Employment Rights Act 1996 (***ERA***), and that the reason for dismissal was a potentially fair one under section 98(2) ERA (conduct). The issues to be determined, therefore, were:

    1. Did the Respondent conduct a reasonable investigation?

    2. Did the Respondent genuinely believe that the Claimant was guilty of the misconduct complained of?

    3. If yes, did the Respondent have reasonable grounds for that belief?

    4. Was dismissal within the range of reasonable responses open to the Respondent?

    5. Was the procedure adopted by the Respondent fair and reasonable in all the circumstances?

Findings of fact

7. The relevant facts are, I find, as follows. Where it has been necessary for me to resolve any conflict of evidence, I indicate how I have done so at the

relevant point. References to "[xx]" are to page numbers in the Bundle of Documents. Only findings of fact relevant to the issues, and those necessary for me to determine, have been referred to in this judgment. I have not referred to every document I have read and/or was taken to in the findings below, but that does not mean such documents were not considered if referred to in the evidence and/or in the course of the hearing.

8. The Claimant began working as a Care Assistant with a predecessor entity to the Respondent on 7 December 1994. At the time of the incident that led to her dismissal, the Claimant was working as a Health Care Assistant at the Respondent's care home, Nightingale House in London SW12 on weekend shifts.

9. During her employment, the Claimant had been the subject of a number of complaints resulting in a written warning being issued in July 1999 ([89]), a verbal warning in April 2005 ([92]), a written warning in March 2010 ([104]) and a verbal warning in July 2013 ([108]). In September 2019 the Claimant was written to regarding unsatisfactory standards of conduct (namely repeatedly raising her voice to her line manager, Florence Avwunu), though this was not a formal disciplinary issue ([111-112]). Despite this written evidence in the bundle, the Claimant in her ET1 and in her witness statement sought to portray herself as having had an unblemished / clean record. I reject the Claimant's evidence in this regard in favour of the documentary evidence.

10. On the night of 9/10 November 2019 the Claimant was on shift with one other member of staff, Nellie Lilagan. One of the patients under the Claimant's care was a 99-year-old lady to whom I will refer as "TC". For a time at around midnight the Claimant and TC were alone together. An incident occurred between the Claimant and TC regarding TC's call bell. I will return to the differing accounts of what happened below.

11. In the course of the following week, three healthcare assistants reported that concerns had been raised by TC regarding her treatment by a member of the night staff. On 13 November 2019 the Respondent's Care Quality Improvement Lead, Mr Nuno Santos Lopes, was appointed to investigate.

12. On 15 November 2019 Mr Lopes wrote to the Claimant ([115]-[116]) informing her that she was being suspended from duty and was under investigation on the following allegations:

    - You were physically aggressive and/or violent in a resident's room in the presence of a resident;
    - You threw an object in a resident's room in the presence of a resident;
    - You did not behave politely to a resident;
    - You did not follow person-centred care when supporting a resident.

13. As part of his fact-finding investigation Mr Lopes interviewed the following

individuals:

13.1 the Claimant;

13.2 TC;

13.3 Nellie Lilagan;

13.4 Ehite Asheber, a Healthcare Assistant who had come on shift on the morning of 10 November 2019;

13.5 Jaccuilyn Morrison, a Senior Healthcare Assistant who had come on shift on the morning of 10 November 2019;

13.6 Maxine Rhodes, a Healthcare Assistant who had come on shift on the morning of 10 November 2019;

13.7 Rosemarie Clarke, a Healthcare Assistant who was on shift on 12 November 2019;

13.8 Beatrice Ofori-Asante, a Healthcare Assistant who was on shift on 12 November 2019; and

13.9 Florence Avwunu, a Team Leader who was on shift on 12 November 2019.

The notes of these interviews are at [124-149].

14. Ms Clarke, Ms Ofori-Asante and Ms Avwunu each gave an account of a conversation with TC on 12 November 2019 in which TC said that a member of night staff called Mary was “horrible” and had thrown a call bell. TC had added that she did not want this person in her room. Each described TC as having been anxious, short of breath and/or shaking, albeit Mr Lopes’ questions were leading in that regard.

15. Ms Asheber, Ms Morrison and Ms Rhodes each confirmed that they had not observed anything out of the ordinary on 10 November 2019 and that TC had not said anything to them regarding an incident the previous night.

16. Ms Lilagan described that the Claimant had come out of TC’s room to call her for assistance with tying TC’s call bell on the handle near to TC’s bed. Ms Lilagan explained that TC was particular about how the call bell was tied. When in the room, Ms Lilagan stated that TC referred to the Claimant as “useless”, to which Ms Lilagan responded by asking TC not to say such things. Ms Lilagan did not observe TC as being anxious. Ms Lilagan explained that the call bell was wrapped on the handle but not as TC wanted. Having tied the call bell to TC’s standard, Ms Lilagan then left the room and the Claimant helped TC to bed. Ms Lilagan reported that TC was not a patient who often complained, and she had good cognition.

17. TC was interviewed on 15 November 2019, several days after the incident. Mr Lopes approached the interview sympathetically. TC was not able to pinpoint the precise day that the incident occurred. In response to an open

question as to what happened that night, TC stated that "She threw it". Mr Lopes asked her if she meant that "She threw the call bell against the wall" (a leading question) and TC confirmed that to be correct. When asked who was responsible, TC responded "I think her name was Maria". TC was vague in her answers as to whether she had spoken about the incident with anyone else.

18. The Claimant's account of the incident was that she was helping TC to get ready for bed as normal. The Claimant tried to tie the call bell to TC's handle but TC was not satisfied with it and asked the Claimant to fetch Ms Lilagan. Ms Lilagan came and wound the call bell to TC's satisfaction (actually in the same way that the Claimant had already done) then left the room, and the Claimant put TC to bed. The Claimant categorically denied throwing any object or having any argument with TC or otherwise being impolite or disrespectful. The Claimant confirmed Ms Lilagan's account of TC having said to Ms Lilagan that the Claimant was "useless" but said that she did not react to that.

19. Aside from the interviews, Mr Lopes also inspected TC's room and observed (and photographed) the wall behind TC's bed on which there was an orange scratch, next to the call bell, with a length and width similar to the edge of the call bell.

20. On 2 December 2019 Mr Lopes produced a Disciplinary Investigation Report ([154-159]). He concluded on the basis of the evidence obtained that:

- There was no physical aggression towards TC. The Claimant's behaviour caused TC to feel 'annoyed' and 'a bit scared'.
- There is a scratch on the wall that may suggest the call bell has been thrown, though it was essentially TC's word against the Claimant's in this regard.
- The shortness of breath and shaking presented by TC when reporting the incident are signs of distress that can be indicators of psychological or emotional abuse. TC's experience with the Claimant was negative, inconsistent with person-centred care.

21. Mr Lopes therefore concluded that there were serious concerns regarding the Claimant's conduct and therefore a disciplinary hearing should be convened, and that the Claimant remain suspended until the outcome of that hearing.

22. By a letter of 3 December 2019, the Claimant was invited to a disciplinary hearing on 10 December 2019. The letter (at [169]) set out the allegations; gave the Claimant notice of her right to be accompanied; provided her with copies of (i) the disciplinary procedure, rules and code of conduct, (ii) Mr Lopes' investigation report, and (iii) the supporting documents; and explained the potential outcomes, including dismissal. An error regarding whether the Claimant had an active written warning on file was corrected by a further letter sent the following day ([163]).

23. The Claimant did not attend the hearing on 10 December 2019. Rather than proceed in her absence (as the invite letter indicated was an option open to the Respondent), the Respondent rearranged the hearing to take place on 10 January 2020.

24. The disciplinary hearing proceeded on 10 January 2020. The meeting was chaired by the disciplinary manager, Mr Simon Pedrizi. Mr Pedrizi is the Director of Care Services for the Respondent. The Claimant attended, accompanied by her Union rep, Ms Terra. Mr Lopes attended to present the results of the investigation. Ms Johal, the HR Manager, also attended, as well as a notetaker.

25. The notes of the hearing run to 22 pages and are at [169]-[170T]. The Claimant accepted in cross-examination that she had a full opportunity to put her case through her union representative and to challenge the findings of Mr Lopes' investigation, and the notes of the meeting make it clear that that opportunity was taken. The points raised by the Claimant (or Ms Terra on her behalf) included:

    - That Mr Lopes had asked leading questions in his interviews;
    - That Mr Lopes was biased in his approach as, by apologising to TC for what "had happened" he had prejudged that something had, indeed, happened;
    - That neither Ms Lilagan (who was on duty with the Claimant on 9 November 2019), nor any of the staff on duty on 10 November 2019 had observed TC being distressed;
    - That TC had not objected to the Claimant putting her to bed in the immediate aftermath of the call bell incident, making it very unlikely the Claimant had been aggressive to her;
    - That Mr Lopes' assessment of the possibility of the call bell having been thrown was unscientific;
    - That the accounts provided by the various witnesses were not consistent;

26. Mr Pedrizi also asked questions of Mr Lopes, and made clear that he was assessing matters on the balance of probability. The Claimant put forward her own account of what had happened.

27. Mr Pedrizi took time to consider the information presented and I find that he did consider all of the evidence presented. On 22 January 2020 he issued the outcome letter ([172]-[173]). Mr Pedrizi specifically noted in his letter that Mr Lopes had asked leading questions of TC, and that the marks on the wall Mr Lopes observed could not conclusively be confirmed to have been made by the Claimant. Nevertheless, Mr Pedrizi concluded "*under the balance of probability, that there is sufficient evidence to support the allegations*". Mr Pedrizi considered the acts to amount to gross misconduct and the outcome was summary dismissal. The letter noted the Claimant's right to appeal, and enclosed the notes of the disciplinary hearing.

28. The Claimant appealed the disciplinary outcome. The appeal was filed late due to a bereavement in the Claimant's family. The Respondent agreed nevertheless to hear the appeal. The Claimant provided extensive grounds of appeal by an email dated 13 March 2020 ([176]-[186]). The appeal centred on three grounds:

    1. The manner of conduct of the investigation was such that it was impossible to establish a fair and balanced view of the facts relating to any disciplinary allegations against the Claimant before deciding whether to proceed with a disciplinary hearing.

    2. There were material biases in the disciplinary hearing.

    3. The decision to dismiss was unfair in the light of the procedure that was followed and the evidence available.

29. As a result of COVID-19, the appeal hearing did not take place until 6 May 2020 and was conducted via Zoom. The meeting was chaired by Ms Helen Simmons, Chief Executive of the Respondent, as appeal manager. Mr Pedrizi was also in attendance. The Claimant attended, again accompanied by her Union rep, Ms Terra. Finally, Mrs Bernadette Thomas, the Respondent's Director of HR, was in attendance.

30. The appeal hearing lasted for more than three hours. However, Zoom recording captured only the first 35 minutes and there was no minute taker. The Claimant gave evidence to the Tribunal that Ms Simmons had said that there would be a minute taker, but this is not consistent with the transcript of the part of the hearing that was recorded ([190A]-[190E]), in which Ms Simmons is noted as having said "*we don't have a minute taker*". The Claimant was provided with a copy of the Zoom recording and has not presented any evidence that the transcript is inaccurate. I therefore reject the Claimant's evidence on this point.

31. In view of the failure of recording, the appeal hearing was re-convened on 19 May 2020 to continue from the point at which the recording of the first hearing had stopped. The notes of the re-convened hearing are at [198]-[222].

32. The re-convened hearing began with a debate regarding certain comments that the Claimant and Ms Terra suggested Ms Simmons had made in the un-recorded part of the original hearing. The Claimant went as far as to allege that the recording had been deliberately deleted in order to cover up these comments. The allegation was that Ms Simmons had said (i) that the Claimant's 25 years of service was immaterial, (ii) that 70% of the residents were unable to make any complaints and (iii) that she could not trust 75% of her staff. Ms Simmons responded to explain that her recollection of the first point was that she had asked Mr Pedrizi whether he had considered length of service in determining sanction and that Mr Pedrizi had indicated that, in the case of safeguarding of a vulnerable adult where there is potentially psychological abuse, length of service is not a mitigating factor. Ms Simmons denied having made either of the other comments. Having heard the oral evidence of Ms Simmons and of the Claimant, and reading

the transcript of the exchanges in the re-convened hearing, I accept Ms Simmons' account of what was and was not said in this regard. The alternative account did not strike me as credible. It is more likely that the Claimant and Ms Terra misunderstood something that Ms Simmons had said. I also reject the Claimant's allegation that the recording of the original meeting was deliberately deleted – it is more likely that this was a technical error as a result of difficulties using the Zoom platform in the early stages of the COVID-19 pandemic.

33. As with the disciplinary hearing, and as the Claimant accepted in cross-examination, the notes of the appeal meetings make clear that the Claimant had a full opportunity to put her case herself and through her union representative and to challenge the findings of Mr Pedrizi. At various points of the hearing, Mr Pedrizi was asked, and answered, questions by both Ms Simmons and Ms Terra on safeguarding matters in the context of his decision. This included a discussion of the Pan London Protocols which, as Mr Pedrizi explained at [219], reflect that in a safeguarding scenario once cannot start by disbelieving a person who is raising a safeguarding concern.

34. The Claimant presented her claim to the Tribunal on 20 May 2020. The claim was brought in time.

35. On 28 May 2020 Ms Simmons issued the appeal outcome letter. The letter addressed the various points raised by the Claimant in the appeal. Ms Simmons upheld the decision to dismiss.

Relevant law

Unfair dismissal

36. Section 94(1) ERA provides that an employee has the right not to be unfairly dismissed by their employer. It is not in dispute that the Claimant was a qualifying employee and was dismissed by the Respondent.

37. Section 98 ERA deals with the fairness of dismissals. There are two stages within this section.

    37.1 First, the employer must show that it had a potentially fair reason for the dismissal, *i.e.* one of the reasons listed in section 98(2) or "*some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*" (section 98(1)(b)). Conduct is one of the potentially fair reasons.

    37.2 Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider whether the employer acted fair or unfairly in dismissing for that reason. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of

the case. The burden of proof at this stage is neutral.

38. It was common ground that, in cases relating to conduct (as this case is), the Tribunal should apply the test set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379. In summary, the employer must demonstrate that:

    38.1 it genuinely believed that the employee was guilty of misconduct;

    38.2 it had reasonable grounds for that belief; and

    38.3 it had carried out an investigation into the matter that was reasonable in the circumstances of the case.

39. The issues identified in paragraph 6 above were framed so as to apply the principles set out in *Burchell*.

40. It is not for the Tribunal to substitute its own view of what it would have done in the position of the employer, but to determine whether what occurred fell within the range of reasonable responses of a reasonable employer, both in relation to the substantive decision and the procedure followed (*J Sainsbury plc v Hitt* [2003] IRLR 23; *Whitbread plc v Hall* [2001] ICR 699).

41. An investigation must be even-handed to be reasonable, and particularly rigorous when the charges are particularly serious (*A v B* [2003] IRLR 405). The employer must consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the *Burchell* test will depend on the circumstances as a whole – the investigation should be looked at as a whole when assessing the question of reasonableness (*Shrestha v Genesis Housing Association Ltd* [2015] IRLR 399).

42. The size and administrative resources of the employer's undertaking are relevant, as is the ACAS Code of Practice on Disciplinary and Grievance Procedures (the "ACAS Code"). The ACAS Code recognises that an employee might be dismissed even for a first offence where it constitutes gross misconduct. The employee's length of service is a factor to be considered (*Strouthos v London Underground Ltd* [2004] IRLR 636) but is not determinative. The employer is entitled to take into account the attitude of the employee to his/her conduct (*Paul v East Surrey District Health Authority* [1995] IRLR 305).

43. The approach to be taken to procedural fairness is a wide one, viewing it if appropriate as part of the overall picture, not as a separate aspect of fairness. Any procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness (*Taylor v OCS Group Ltd* [2006] IRLR 613).

Conclusions

Unfair dismissal

Issue 1: Did the Respondent conduct a reasonable investigation?

44. As regards the scope of the investigation, no criticism can be levelled. The Claimant accepted in cross-examination that the investigating officer, Mr Lopes, interviewed all of the potentially relevant witnesses and that there were no other witnesses who should have been interviewed. The focus of the Claimant's criticism of the investigation was that it was approached in such a way that the process was biased against the Claimant from the outset.

45. It was submitted that Mr Lopes approached the matter on the premise that TC was telling the truth, and that Mr Lopes was therefore looking only for evidence to disprove that account rather than an impartial approach. Mr Lopes strongly denied that in cross-examination, and I accept his evidence. It is certainly true that, in accordance with his training and the Pan-London Protocol, Mr Lopes had to approach his interview with TC sympathetically. It is also true that he did, on occasion, ask leading questions of TC, albeit only after it had been established that something had been thrown.

46. However, Mr Lopes also gathered evidence from other witnesses. Some of this evidence supported TC's account. In particular, three other members of staff confirmed in interview that they had been told by TC that "Mary" had thrown the call bell and had been "horrible". There were other interviews which confirmed no such concerns had been raised with those individuals, including the only other staff member who was present on the night of the alleged incident (Nellie Lilagan) – although Ms Lilagan did give evidence that there had been some degree of conflict between the Claimant and TC over the wrapping of the call bell.

47. Taking account of the full picture of the evidence (and I find that Mr Lopes did consider all of the evidence he gathered, both for and against the Claimant), there was sufficient basis for the case to be referred to a disciplinary hearing. There was a case to answer.

48. No suggestion was made at the disciplinary hearing or at the appeal stage to suggest that any further investigation needed to be undertaken.

49. I conclude that the Respondent did carry out an objectively reasonable investigation.

Issue 2: Did the Respondent genuinely believe that the Claimant was guilty of the misconduct complained of?

Issue 3: If yes, did the Respondent have reasonable grounds for that belief?

50. I will address these issues together.

51. No suggestion has been made by the Claimant that the decision maker, Mr Pedrizi, had any ulterior motive. It has not been suggested that there was

any other reason why Mr Pedrizi may have wished to dismiss the Claimant. The same can be said of Ms Simmons at the appeal stage.

52. I have already mentioned the breadth of the evidence gathered by Mr Lopes as part of the investigation. I find that Mr Pedrizi fully considered all of that evidence. The Claimant accepted in cross-examination that she had a full opportunity to put her case through her union representative and to challenge the findings of Mr Lopes' investigation. The notes of the disciplinary meeting make clear that that opportunity was taken, and Mr Pedrizi's decision letter demonstrates that he did take on board a number of the points raised by the Claimant (including the leading questions asked of TC and the unreliability of the marks on the wall in TC's room as evidence of the Claimant's conduct). Mr Pedrizi nevertheless concluded that there was sufficient evidence on the balance of probabilities to support the allegations. I find that he did genuinely believe the Claimant was guilty of the misconduct alleged.

53. Having considered the totality of the evidence, I find that Mr Pedrizi had reasonable basis to come to that conclusion. I am not persuaded by the Claimant's submissions that Mr Pedrizi was applying a presumption of guilt when reaching this decision by following the Pan-London Protocol (which reflect that in a safeguarding scenario once cannot start by disbelieving a person who is raising a safeguarding concern), or that he failed to take a step-back and consider the totality of the evidence. On considering the notes of the disciplinary hearing and the content of the outcome letter, as well as the evidence of Ms Johal (who supported Mr Pedrizi in the exercise of his duty as disciplinary officer), I find that Mr Pedrizi did do what was required of him as a decision maker: to weigh up all of the evidence and to come to a reasonable decision based on that evidence. He recognised that there was competing evidence, but came to a conclusion that I am satisfied was not an objectively unreasonable one. Another employer might have come to a different conclusion to Mr Pedrizi but, as the Respondent correctly submitted, that is not the relevant test. I reject the submission that Mr Pedrizi's statement in the appeal hearing that "*there is no reason to doubt the allegation [TC] raised*" ([221]) indicates he was placing the burden on the Claimant to disprove TC's allegation – the full picture of the evidence indicates otherwise.

54. The same can be said for the appeal stage, where (as the Claimant accepted in cross-examination) the Claimant had a full opportunity to put her case. I accept Ms Simmons' evidence that she carefully considered all of the evidence and submissions and find that she did genuinely conclude, and that it was objectively reasonable for her to conclude, that that there were no grounds to impugn Mr Pedrizi's decision. The Claimant raised an argument that Ms Simmons could not possibly have given the Claimant a fair appeal in view of the allegations that the Claimant raised regarding what she says Ms Simmons said regarding trust in her staff and the reliability of service users as witnesses. I do not accept that argument. I found Ms Simmons' explanation that the Claimant and her union rep misunderstood what she had said as more plausible. In any event, I see no basis to find that this dispute affected Ms Simmons' ability to fairly determine the appeal. A reasonable and fair-minded observer would not consider that Ms

Simmons was biased taking account of all of the circumstances. It is plain from the transcript of the appeal hearing that the Claimant was afforded a very full opportunity to set out her case, and I accept Ms Simmons' evidence that she carefully and fairly considered everything that had been put before her.

55. I conclude that the Respondent genuinely believed that the Claimant was guilty of the misconduct complained of and had reasonable grounds for that belief.

Issue 4: Was dismissal within the range of reasonable responses open to the Respondent?

Issue 5: Was the procedure adopted by the Respondent fair and reasonable in all the circumstances?

56. I will address these issues together.

57. The Claimant accepted in cross-examination that the allegations were serious and that, if made out, the allegations made against her would justify dismissal. I find that having concluded that the Claimant was guilty of the misconduct alleged, dismissal was an objectively reasonable response for the Respondent to take. This is particularly so given the Claimant was already subject to an informal action from September 2019 in relation to raising her voice and being verbally abusive to her line manager and the HR department.

58. As regards procedure, I accept the Respondent's submissions that the approach to the investigation, disciplinary process and appeal process was in all material respects compliant with the ACAS Code. Certain accommodations were made for the benefit of the Claimant, including not conducting the disciplinary hearing in her absence when she did not attend, allowing her appeal to be filed late, and re-hearing the appeal following recording difficulties.

59. The Claimant listed seven alleged procedural failings in the draft list of issues (including cross-references to allegations made in the Statement of Claim), though these were not focused upon in closing. I nevertheless address them in turn:

    59.1 "*The conduct of the investigation was such that, it was impossible to establish a fair and balanced view of facts relating to the allegations brought against the Claimant*" – I have already addressed and rejected the criticisms of Mr Lopes' investigation under Issue 1, and refer to the discussion earlier in these reasons. That addresses the majority of the points made in paragraph 6.1 of the Claim in this regard. Insofar as the Claimant maintained the arguments made in paragraph 6.1 of the Claim that there was any relevance to whether statements gathered by Mr Lopes were or were not signed, I reject those arguments. Having heard from Mr Lopes, I do not doubt that those records are accurate. Regarding the allegation made in paragraph 6.1(v) of the Claim that the Claimant had never received the informal warning letter dated 23 September 2019, the Claimant accepted in cross-examination that she

had received it. Insofar as the Claimant maintains the suggestion that Mr Lopes had somehow influenced the statements of witnesses against the Claimant in his investigation, again I reject that allegation. As I have already said above, I accept Mr Lopes' evidence that he did not approach the matter on the premise that TC was telling the truth.

59.2 "*No weight was lent to the evidence of the witness who was present at the scene of the alleged event*" – I have already addressed this criticism under Issues 2 and 3, and found that Mr Pedrizi did take account of the evidence of Nellie Lilagan as part of the overall package of evidence. Ms Lilagan's account does not render unreasonable the conclusion that the Claimant committed the alleged misconduct.

59.3 "*Substantial weight was lent to the hearsay evidence of the people who were not on duty or present on the night of the alleged incident which led to the dismissal of the Claimant*" – It is plain that Mr Pedrizi did give weight to this evidence. I find that he was entitled to take account of this evidence, as part of the whole picture, when drawing his conclusions. The accounts given by each of Ms Avwunu, Ms Ofori Asante and Ms Clarke of what TC had told them were substantially consistent and it would have been wrong for Mr Pedrizi to disregard them.

59.4 "*There were substantial and material inconsistencies in the interview statement of TC; and the investigation officer asked leading questions*" – Mr Pedrizi acknowledged that leading questions had been asked of TC and this was taken into account in his decision. There is nothing in the statement that suggests the account of TC was so unreliable that Mr Pedrizi should have given it no weight. I find that he was entitled to take account of this evidence, as part of the whole picture, when drawing his conclusions.

59.5 "*There were material biases shown against the claimant during the disciplinary hearing*" – I reject this allegation. None of the examples given in paragraph 6.2 of the Claim indicate that there was any bias against the Claimant.

59.6 "*The summaries on which the disciplinary manager based his conclusions were inconsistent with the investigation notes and other evidence before the Disciplinary Hearing*" – this is not a procedural failing, but a challenge to the substantive findings made by Mr Pedrizi. I have already concluded that Mr Pedrizi's findings were reasonable above.

59.7 "*The Claimant did not have an unbiased workplace appeal*" – the basis for this allegation is what the Claimant alleged Ms Simmons said during the first appeal hearing, and the Claimant's allegation that the Respondent deliberately deleted the recording of that part of the hearing in order to cover this up. I have already rejected the Claimant's arguments in this respect above. It is also suggested (paragraph 5(xxii) of the Claim) that Mr Pedrizi was inappropriately allowed to be "a Judge in his own case". Having considered the transcript of the appeal hearing,

I can see nothing inappropriate about the role Mr Pedrizi played at the appeal hearing. He was asked questions by both Ms Simmons and the Claimant's representative regarding his decision, some of which also required him to rely upon his expert knowledge in relation to safeguarding. This introduced no bias into the appeal from the perspective of a reasonable and fair-minded observer.

60. I conclude that the decision to dismiss was within the band of reasonable responses and was both substantially and procedurally fair.

Overall conclusion

61. In view of the above findings, I conclude that the claim for unfair dismissal is not well-founded and is dismissed.

Employment Judge Abbott

Date: 11 October 2021