EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110870/2019

Final Hearing in person in Glasgow on Monday 11 October, Tuesday 12 October, Wednesday 13 October and Friday 15 October 2021

Deliberation Date Monday 15 November 2021

Employment Judge: R McPherson
Tribunal Member: J Haria
Tribunal Member: J Ward

Ms. M Sudiye	**Claimant** **Represented by:** **A Stobart - Counsel** **I Capoulade: Interpreter**
Oakminster Healthcare Ltd	**Respondent** **Represented by:** **K Stein – Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that:

1. the claimant's claim for Unfair Dismissal succeeds; and

2. the claimant's claim for indirect race discrimination (s 19 Equality Act 2010) does not succeed.

3. the respondent is ordered to pay monetary award for Unfair Dismissal in the sum of **Twelve Thousand, Two Hundred and Forty Four Pounds and Sixty Pence** (**£12,244.60).** The prescribed element of this award is **£10,698.60** and as the monetary sum exceeds the prescribed element by **£1,546.00** that sum is payable immediately to the claimant.

REASONS

Introduction

Preliminary Procedure

1. The claimant presented her claim on **Tuesday 17 September 2019**, no representative was identified, following ACAS early conciliation on **Monday 22 July 2019** and issue of certificate **Thursday 28 August 2019.**

2. The respondent's ET3 was submitted timeously.

3. At case management Preliminary Hearing on **Thursday 19 December 2019,** adjustment was made to existing Standard Orders for joint bundle with the claimant being permitted to provide Further and Better Particulars, the claimant having provided an agenda in which the claimant intimated proposed issues for both Indirect Discrimination and Unfair Dismissal and confirmed that she would be in a position to provide copy documents she would be referring to 6 weeks prior to the Final Hearing**.** The Note identified that that the claims were both unfair dismissal and (indirect) race discrimination, the claimant was permitted to provide Further and Better Particulars within 21 days and the respondent was permitted to respond within 7 days of receipt.

4. On **Saturday 25 January 2020,** the claimant, through her representative, provided Further and Better Particulars and on **Monday 27 January 2020** also provided a Schedule of Loss. The Schedule of Loss set out, so far as relevant for this hearing, her correct date of birth and calculations including basic award (based on start date in February 2017), net weekly pay including overtime and nightshift premium, wage loss to May 2020 (being the then assumed date of hearing) indicating no income since date of termination, 26-week future wages loss, loss of statutory rights calculation (£500) and injury to feeling calculation.

5. On **Monday 10 February 2020** for the respondent, in response to the schedule of loss it was set out that:

1. Reinstatement and re-engagement were resisted; and

2. The basic award (calculation) seemed to be accurate; and

3. The respondent would be challenging the compensatory award on the basis that the claimant had failed to mitigate her loss in respect that she had not earned any money for a year; and

4. The respondent would be challenging future wage loss; and

5. Loss of statutory rights was accepted if the claimant was successful; and

6. the claimant's calculation for injury to feelings would be challenged.

6. At case management Preliminary Hearing on **Monday 15 June 2020,** appointed in consequence of the Covid pandemic it was identified that the claimant's claims were Unfair Dismissal and Indirect Race Discrimination in terms of s19 Equality Act 2010 (EA 2010) with the respondent undertaking to confirm its position in relation to PCP relied on by the claimant. It was confirmed that written witness statements would be used, and, as the claimant required an interpreter, an in-person hearing would be appointed.

7. On **Monday 13 July 2020,** the respondent provided Response to Further and Better Particulars**,** setting out that the respondent did not accept the asserted PCP, nor that any disadvantage arose and while maintaining denial of the application of the asserted PCP described, in the alternative, what was said would amount to a legitimate aim.

8. On **Tuesday 25 August 2020**, the Tribunal intimated to the parties that paper copies of productions should be supplied on the first day of the hearing.

9. Following directions set out from case management Preliminary Hearing regarding exchange of witness statement and subsequent correspondence, including the claimant's representative intimating on

Friday 26 March 2021 that they had witness statements on file, the Tribunal was advised that mutual exchange of witness statement as agreed between the parties took place on **Thursday 1 April 2021.**

10. On **Wednesday 11 August 2021**, final hearing dates commencing Monday 11 to Friday 15 October 2021 (up to 5 consecutive days) were notified to the parties**.**

11. A Preliminary Hearing scheduled for **Wednesday 28 September 2021** was discharged due to the claimant's representative's ill health. The claimant representative had intimated that a joint bundle had been agreed upon and witness statements had been exchanged.

12. The Tribunal heard evidence over the initial 3 days allocated for this Final Hearing.

13. Witness evidence was given by the claimant and her two witnesses Mrs. Lillian Thomson, a care assistant formerly employed by the respondents in 2019, and Ms. Susheela Verghese, a staff nurse who the respondent employed at the material times and although now a senior charge nurse within the NHS she continues to work one backshift a month with the respondent.

14. Witness evidence for the respondent was given by Ms. Lissa Di Giacomo, the respondent's Chief Operating Officer; Ms. Nicola Ferguson, who had worked in the care sector for around 11 years at the material time and who was at the material time employed as Home Manager at a separate care home operated by the respondent; and Mr Iain Ballantyne who had been a care home manager since 2002 and who had worked for the respondent off and on since 1992 and had worked for the respondent up to around September 1999.

15. Witness statements for the claimant were undated and not signed. Witness statements for the respondent witnesses were both signed and dated. However, each of the witnesses confirmed their written witness statements at the Final Hearing. The claimant's witness statement

replicated an error on the date of birth in her ET1 but confirmed her actual date of birth in evidence. No issue was taken concerning the same. Her date of birth was correctly set out in the schedule of loss provided to the respondent and Tribunal as above. All witnesses were permitted limited supplementary oral evidence in chief and were thereafter subject to cross-examination and re-examination.

16. No evidence was adduced by an agency Senior Care Assistant who responded to an email. While recognising the importance of open justice Tribunal considers it unnecessary to identify that person in this judgment and uses non-descriptive initials SCA (P) (denoting the role and the unit he was operating on at the material time).

17. At the commencement of this Final Hearing, it was confirmed that the claimant no longer sought reinstatement in terms of s114 Employment Rights Act 1996 (ERA 1996) nor re-engagement in terms of s115 ERA 1996.

18. While the claimant and her witnesses would have given their evidence from the outset, a request was made by the respondent that Ms. Di Giacomo (the respondent's decision-maker) give her evidence at the outset as the respondent's instructing officer. There being no objection, the panel, noting that written witness statements had been prepared and exchanged, agreed to Ms. Di Giacomo's evidence being interponed at the start of the hearing to allow her to appropriately engage with the respondent's instructed counsel thereafter during the hearing.

19. A hard copy agreed joint bundle was provided to the Tribunal for the commencement of the Final Hearing. At the commencement of day two, Ms. Di Giacomo, having given her evidence in chief and having been cross-examined on day one, a request was made for the claimant that a letter from the claimant's professional regulator, the Scottish Social Services Council (SSSC), which was said to have been issued around **Monday 19 October 2020** be added to the bundle. The respondent objected, arguing that such a letter was not relevant to the issues for this Tribunal intimating the SSSC are not permitted to look at the decision of

this Tribunal, and the respondent would require to adjourn the hearing to seek instructions if admitted. The panel adjourned to consider the matter and issued a unanimous decision, against the background that the letter had not been provided in the agreed hard copy joint bundle provided at the outset of this Final Hearing, from the notified date, it was not available to the decision-maker at the relevant dates, that the letter and its contents were from a date considerably after the relevant date for the dismissal itself and as such would not be admitted.

20. Following the conclusion of the witness evidence around mid-day on the third allocated day, respective Counsel agreed that they would prepare written draft submission for the Tribunal to be presented for Friday 15 October 2021. Both counsel attended on that date to address supplementary matters arising from any Tribunal panel questions, and parties were notified that today's Deliberation Date had been appointed for the Tribunal's panel's private deliberation.

Unfair Dismissal

21. In relation to the Unfair Dismissal complaint, the respondent admits the dismissal and alleges that it was due to gross misconduct. The issues for the Tribunal included:

a. What was the principal reason for dismissal, and was it a potentially fair one in accordance with Sections 98(1) and (2) ERA 1996? The respondent asserts that it was a conduct dismissal.

b. Was the dismissal fair or unfair in accordance with Section 98(4) ERA 1996? Was the decision to dismiss a sanction within the "*band of reasonable responses"* for a reasonable employer?

c. If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the ERA 1996; and, if so, was the dismissal fair or unfair in accordance with Section 98(4) ERA 1996, and, in particular, did the respondent act within the "*band of reasonable responses"*?

Indirect Race Discrimination (s19 Equality Act 2010)

22. It is not in dispute that the claimant is of African descent, is a native of the Democratic Republic of Congo, has French as her principal language and has learned English to a conversational level as an as adult to assist her in gaining employment, has the protected characteristic of race in terms of s9 of the Equality Act 2010 (EA 2010).

23. **Issues for the Tribunal included:**

1. A "PCP" is a "provision, criterion or practice". The PCP the claimant alleged in their Further and Better Particulars to have been applied by the respondent was that employees communicate in English and in soft measured and empathetic tones.

2. Did the respondent apply the PCP(s) to the claimant at any relevant time?

3. Did the respondent apply (or would the respondent have applied) the PCP(s) to persons with whom the claimant does not share the protected characteristic?

4. Did the PCP(s) put persons with whom the claimant shares the characteristic at one or more particular disadvantages when compared with persons with whom the claimant does not share the characteristic, e.g., employees who have English as their principal language and in what way for instance by reason of risk of misinterpretation of their presentation as a result.

5. Did the PCP(s) put the claimant at that/those disadvantage(s) at any relevant time?

6. If so, has the respondent shown the PCP(s) to be a proportionate means of achieving a legitimate aim? The respondent denies the application of the PCP but in the alterative argues that the alleged PCP has a legitimate aim in the provision of effective care to

vulnerable elderly and infirm residents in the care home the majority of whom English is their principal language.

Remedy for unfair dismissal/ Indirect discrimination

24. If the claimant was unfairly dismissed and the remedy is only compensation:

a. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed? **Polkey v AE Dayton Services Ltd** [1987] UKHL 8 (**Polkey**).

b. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, according to Section 122(2) ERA 1996, and if so, to what extent?

c. Did the claimant, by blameworthy or culpable actions, cause or contribute to the dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, according to Section 123(6) ERA 1996?

d. In respect of the indirect discrimination claim what relevant level of injury to feeling, if any, is the claimant entitled to?

Findings in fact

25. The claimant, as a Care Assistant, requires to be registered with relevant regulator for social and care service workforce in Scotland, the Scottish Social Services Council (the SSSC) and was at all relevant times subject to the SSSC Code of Practice. The SSSC code at 5.2 set out requirement for those subject to the code that they *"will not abuse, neglect or harm people who use services".* The respondent is subject to Care Inspectorate assessment.

26. Prior to commencement of employment with the respondent, the clamant had been employed as a care assistant.

27. The respondent operated care homes in the Glasgow area including their Oakbridge Care Home.

28. The claimant was employed a Care Assistant, commonly working nightshift (8 pm to 8am). It was not in dispute that the claimant's net weekly pay was £405.26 which the Tribunal calculates to equating to gross weekly pay of £523.00.

29. The claimant who is of African descent is a native of the Democratic Republic of Congo. Her principal language is French, the official language of the Democratic Republic of Congo and has learned English to assist her in securing employment, speaking English to a reasonable degree on a conversational level.

30. While the respondent considers that staff should be able to have effective communication with vulnerable, elderly, and infirm residents, it does not operate any policy, criteria or practice whereby its employees are required to speak in English and in soft and emphatic tones. The respondent who employees staff with a wide range of national origins have many employees who have English as a second language.

31. The claimant had commenced employment with the respondent on **Friday 13 January 2017** at the respondent's Oakbridge Care Home, a regulated care facility with several units within the building known as Oakbridge Care Home, including Pinetree, Erskine and Clyde Care Units.

32. On commencing employment, the claimant was provided with a one-page contract of employment. She was not asked to sign for or directed to respondent's Staff Handbook. That Staff Handbook set out that it formed part of the claimant's contract of Employment. It described the respondent's intention that so far as possible, depending on the capabilities of each person, all residents should be given opportunities to enable them to make their own decisions. The claimant was aware of that

intention through training including on-line training undertaken by the claimant. It further described that if relationship between the employee and a resident was deteriorating the employee should seek help of the manager. Further it described that "*Anything in connection with residents, visitors etc that is not normal should be reported to the manager"*.

33. In the period **2018** to **2019,** the respondent's Chief Operating Officer Ms Di Giacomo took on the responsibility for disciplinary hearings as the respondents care home managers were considered, by her, to be spending too much of their time dealing with such matters. At that time Ms Di Giacomo decided that investigations should be conducted inhouse and referred to her for any disciplinary hearings. Ms Giacomo is the most senior person within the respondent company. More recently, however, owing to the reduction in the volume of such matters, she has dealt with any appeals from disciplinary hearings with such disciplinary hearings carried out by less senior employees.

34. **Qualified Nurse Ms. Susheela Verghese** had commenced employment with the respondent in June 2018 as a Staff Nurse working principally within the respondent's Elderly Unit and continued in full-time employment with the respondent until December 2019 when she took up an alternate role as Senior Charge Nurse at a Glasgow NHS Hospital. However, she continued to work one backshift per month. If any issue arose with a resident during a shift within the respondent facility, whether within Erskine, Pinetree, or Clyde Units the practice was that the nurse or other person with care responsibility on shift would notify it to the Staff Nurse in charge although that Staff Nurse may be working in one of the other of the 3 Units.

35. In **February 2019,** X became a resident at the respondent's Oakbridge Care Home within the Pinetree Unit through to the relevant dates in mid-March 2019.

36. The claimant was, at the material time, 38 years of age.

37. On the night shift (8 pm to 8 am) preceding **Wednesday 13 March 2019** at Pinetree Unit, the claimant had acted as Care Assistant. On prior dates, various Senior Care Assistants had been allocated to that unit. On each night shift, the claimant had tended to care for patient X, as she had done regularly since patient X's admission in Feb 2019. The claimant and other Care Assistants, including Senior Care Assistant GM, had been advised that resident X had been undergoing various assessments with a view to returning to her home, as set out in a Care Plan including fluid restrictions in connection with blood sugar levels.

38. On **Tuesday 12** and **Wednesday 13 March 2019,** the claimant was working the night shift (8 pm to 8 am) at the Pinetree Unit. The Senior Care Assistant was from an agency on both night shifts, who had not worked with the respondent at any unit previously. In addition, the respondent had an employed Nurse at the facility for the night shift to whom any issues were to be reported. On Tuesday Nightshift, it was Staff Nurse Verghese.

39. For each shift, the respondent employed a qualified nurse who was in charge of the overall facility.

40. Staff Nurse Verghese was engaged on the night shift commencing **Tuesday 12 March 2019**. On that night, she was approached, as the person with overall charge, although based in a separate Unit, by the claimant who reported that; a resident had wished to go outside to smoke, while the claimant was concerned that it was raining and very windy and the resident had become very annoyed. Staff Nurse Verghese spoke to the resident to convince her that it was unsafe, and the resident accepted the same. It was Staff Nurse Verghese's recollection, in around March 2021, during that night, the resident also phoned a family member, who Staff Nurse Verghese recalled was that resident's son, who had then made contact with paramedics who attended and confirmed that the resident had not required any assistance. The respondent did not subsequently contact Staff Nurse Verghese in relation to any events on Tuesday 12 March 2019. Staff Nurse Verghese had been unaware that the claimant faced a disciplinary hearing until after the present

proceedings had commenced. She was not the respondent's employed Staff Nurse with the overall charge for the night shift commencing Wednesday 13 March 2019. The respondent's employed Staff Nurse with the overall charge for the night shift commencing Wednesday 13 March 2019 was not approached by the respondent for any statement regarding any events which the respondent believed had been reported to have occurred on the night shift commencing Wednesday 13 March 2019.

41. For the night shift commencing **Wednesday 13 March 2019,** the respondent had arranged, through an agency, for a Senior Care Assistant SCA (P) to be engaged at Pinetree Unit. The respondents records also record that he had been engaged on the previous nightshift commencing Tuesday 12 March. SCA (P) had also been engaged as SCA on subsequent night shift commencing Thursday 14 March, Friday 15 March and Sunday 17 March 2019. SCA (P) had not previously worked at Oakbridge Care Home. SCA(P), as Senior Care Assistant like all other care assistants would also have been subject to the SSSC Code of Practice.

42. On the morning of **Thursday 14 March 2019,** the respondent received an undated letter (**the Thursday 14 March 2019 resident's brother letter**) from the brother of resident X, describing that

1. it was about "*one of your night shift nurses"*, and described that
2. "***one night*** *when I was on the phone to my sister the nurse came into her room but she didn't know I was on the phone".*
3. the brother considered that the person he was describing was "*very abrupt an raising her voice telling her that she could not have anything to eat"*; and
4. he understood that his sister had diabetes *"but the nurse didn't ever check"*; and
5. his sister "*has told me **since** that while changing her bed she is very rough… feels it is deliberate";* and

6. his sister had "***also*** *told me that the nurse searched her jacket pocket and took her salad roll"* which he described he brought most days for when his sister is hungry at night; and

7. the shift nurse *"also took her packet of cigarettes from her jacket pocket and counted them and told her she smokes too much and that she wasn't to have one."*; and

8. the rest of the staff were brilliant, helpful, and tended to his sister's needs, and while he described that he was not reporting the person to what he described as the Care Commission (a reference to, in effect, the Care Inspectorate).

The **Thursday 14 March 2019 resident's brother letter** did not describe the date he describes being on the phone with his sister, nor when his sister had told him of the matters (being 5 onwards) which he referenced his being told by resident X *"since"* that "*one night"* when the brother was on the phone and had overhead matters, he set out as 1 to 4.

43. The receipt by the respondent of the **Thursday 14 March 2019** resident's X's brother letter prompted the respondent to appoint Ms. Ferguson, a Home Manager for a separate respondent care facility (Oakview Manor), as its Investigating Officer. Ms Ferguson had no formal training in the role of an Investigating Officer.

44. For the night shift **Thursday 14 March 2019** onwards, the respondent arranged for the claimant to be allocated to the adjacent Erskine unit within the respondent facility working alongside a colleague, while SCA (P) continued to be allocated to Pinetree for that night shift and the following Friday 15 March 2019 night shift. SCA (P) did not raise any concerns with the respondents during those shifts regarding the claimant. SCA (P) who had been engaged as SCA on night shifts commencing Thursday 14 March, Friday 15 March and Sunday 17 March 2019 was not approached at this time.

45. Ms Ferguson arranged for colleague to take a statement from resident X on **Thursday 14 March 2019**, (the resident X March 2019 statement) which set out that resident X described that:

1. "last night" the claimant had ordered the resident to bed, with the resident indicating that she proposed to stay in chair to watch TV describing that the claimant had said "you *will buzz in 5 mins and at this the other carer" SCA (P) "told her this is your job";* and

2. she described that "*on the occasion*" where her brother heard the claimant in resident X room, that she had said "*can I have a sandwich cause I'm hungry and my roll that my brother got me has gone missing*", describing that the claimant had responded that resident X was not getting anything because of resident X's blood sugar, to which resident X indicated that she had responded that her "*blood sugar level had not been checked for her to say that";* and

3. that *"last night (13th March)"* she was *"left with no buzzer and her phone had fallen*" but that the claimant *"just walked out but*" SCA (P) "*gave the phone up before he left"*; and

4. that the claimant "*turned the light out also"* describing that that she gets anxious because of this; and

5. that when changing pad overnight the claimant is very rough pointing out incontinence and "*pulls at her at times does get hurt"*; and

6. that "*last night"* the claimant *"told her no more smoking as you smoke too much and said she is removing the packed and while asking if she had anymore was searching through her pockets"* which resident X felt was not fair and described that the claimant also searched cupboard drawers, resident X indicated she tried to explain that he had no more and had the packet for a few days but the claimant had continued.

46. On **Wednesday 27 March 2019 at 8.45**, after the claimant had finished a night shift at 8 am the claimant agreed to stay behind. Ms Ferguson put to the claimant that she was aware that this this was a meeting into allegation made against her by a named Pinetree resident (the March 2019 Investigation Meeting). Ms Ferguson noted the claimant to display lethargy, noting in her subsequent Investigation Report that the claimant "*had just completed a night shift and may well have been tired*"**.** Ms Ferguson had arranged for a Minute Taker to be in attendance. Ms Ferguson summarised, in a single lengthy narrative, what she described were the allegations describing that there "*was an issue raised by the family as he overhead you towards"* resident X "*while he was on the other end of the phone. Also there is a letter on behalf of the resident against you. He did not like you're manor towards*" resident X and" *said you*

1. *ordered her to go to bed and she said No. You replied that she will buzz you in five minutes to go to bed;*
2. *A member* (of staff) *then told you 'you put them to bed when you want not when they want';*
3. The brother *"heard over the phone*" resident X "*ask for a roll, which he had brought … up earlier that day and you said"* resident X "*was not get it,".*
4. *you said her sugar levels were not checked so she can't get it, he felt you shouldn't have said and".*
5. resident X "*didn't have her buzzer".*
6. resident X *"also feels you don't like her, you ignore her and are rough with her at night changes, you pointed out that she is wet, and this hurts her*
7. *you also removed her cigarettes and asked her if she has any and searched her clothes and drawers.*
8. *Were you working 13 March into 14 March?"*

47. In the March 2019 Investigation Meeting, the claimant confirmed to Ms Ferguson that she was working (the night put to her as being Wednesday 13 March to Thursday 14 March) nightshift and had gone into resident X's room; further, the claimant:

1. denied that she had asked resident X to go to bed; and

2. In response to it being put to her by Ms Ferguson did another care assistant say to the claimant it was the claimant job to put "*her to bed and not when they want",* the claimant indicated she could not remember; and

3. In response to Ms Ferguson asking whether she refused to give resident X her roll, explained that "*Normally before bed the SCA checks her BM and then we give her tea, he said it was 8, if its 8 can eat a sandwich so I made her 5 sandwiches she ate and finished them*": and

4. denied searching resident X's pockets for cigarettes explaining that she asked if resident X had other cigarettes and checked resident X's cupboard drawers; and

5. In response to questions from Ms Ferguson around the time resident X went to bed, the claimant described this was after 11pm and resident X had refused to move to her chair (from the wheelchair in which she was sitting) as resident X wanted a cigarette; and

6. Ms Ferguson put to the claimant, that she went back to resident X with a male Care Assistant with a sandwich and she was asked if resident X ate it. The claimant confirmed resident X ate it.

7. confirmed she was aware resident X was on the phone to her brother; and

8. Ms Ferguson asked the claimant, whether the claimant had said resident X could not get a roll because her blood level being high the claimant said "*No when she asked again, I said get BM*

checked first then I will give you" describing that at that point she was in the room alone with resident X; and

9. The claimant confirmed that she was aware, the first time she had gone into resident X's room the brother was on the phone; and

10. Ms Ferguson asked the claimant, whether resident X had her buzzer, the claimant described that resident X always has the buzzer and phone; and

11. The claimant described that she thought her relationship with resident X was fine" *if you check the notes every day I deal with… and she has never complaint"*; and

12. Ms Ferguson asked the claimant, whether she had pointed out the pad was wet the claimant responded, "*I never said that never have".*

13. The claimant confirmed that SCA (P) was in the room the first time describing that "*as he was giving Medications, checked the blood sugars and helped me put her to bed*"; and

14. In response to being asked what the claimant's relationship with resident X's brother was the claimant responded that she didn't know him *"I've never seen him";* and

15. Ms Ferguson asked the claimant whether she was aware that resident X was upset to which the claimant responded that "*Yes, as she wanted a cigarette and it was bad weather, she wanted me to open the window so she could smoke out of it, I told her it was dangerous as the wind was strong".*

16. Ms Ferguson put to the claimant that the facility has a smoke room, to which the claimant responded *"Yes, in Clyde unit but we cant leave the unit at night, if the buzzer goes off then I cant get to the unit to answer the buzzer"*

17. In response to Ms Ferguson asking whether she had anything to add, the claimant stated "*just that a feel bad and sad about this"*

18. Ms Ferguson described that she would speak to the SCA and do a report and go from there "*just now its tit for tat try not to worry, I will get it wrapped up as quickly as I can"* and confirmed that the claimant could work in 2's "*this is to protect you just now".*

48. Ms Ferguson decided only to seek comment from one individual, an agency worker she understood had been present in Pinetree Unit at what she considered was the material date. She decided not to seek further comment from resident X's brother. SCA (P) was scheduled to work

49. On **Monday 8 April 2019** at 9.38 am Ms Ferguson, sent an email to agency care worker SCA (P) (**the Monday 8 April 2019 email),** she did so as she did not have a direct contact, requiring to make contact through the agency, and she recalled that SCA (P) would not agree to attend to provide a statement by that stage, it being indicated that as an agency worker he would not have been paid to do so. The Monday 8 April 2019 email, indicated that it set out a summary of the Thursday 14 March 2019 resident's brother letter. The Monday 8 April 2019 email described that her email communication was a "*fact-finding mission to find out what happened on the night of 13/02/2019 while you were on a shift at Oakbridge*". The April 2019 email described that the Thursday 14 March 2019 resident's brother letter "*raised the following concerns"* which are set out below but not repeated for brevity.

1. that the claimant had ordered resident X to bed, resident X replied that she didn't want to go to bed, she wanted to sit in her chair and watch TV, that the claimant had said to resident X to buzz in 5 minutes and SCA (P) said "*this is your job"*; and

2. resident X was on the phone to her brother "*at this time and overheard*" the resident X asking the claimant for "*a sandwich and the roll that her brother had got her had gone missing",* it was set out that that the claimant replied "*your not getting anything until your blood sugar is checked"*; and

3. resident X had described that she was left without a buzzer that her phone had fallen, and the claimant had walked out of resident's bedroom "*You gave*" resident X "*the buzzer and the phone"; and*

4. the claimant turned off the lights knowing that resident X was anxious with the lights out.

5. the claimant had ignored resident X when she requests assistance; and

6. the claimant "is very rough" when assisting with pad changes throughout the night and points out to resident X that she has been incontinent again; and

7. resident X stated that the claimant had told her "*no more smoking as she smokes too much and removed her cigarettes and asked if she had any more and searched"* resident X's "*bedroom and through her pockets for more cigarettes"*

The Monday 8 April 2019 email described that **Thursday 14 March 2019 resident's brother letter,** as a letter of concern and inaccurately set out the brother had described that he was "*on the phone and heard all the above."* The **Monday 8 April 2019 email** requested that SCA (P) answer the *"following questions to the best of your knowledge and as honestly and openly as you can. I appreciate it is a few weeks ago".* The specific questions are set out below.

50. SCA (P) responded in email **Wednesday 10 April 2019** at 10.43 am on each point (the Wednesday 10 April 2019 email response):

Q1. Were you working at Oakbridge on 13 March 2019 Nightshift?

R1. SCA (P) confirmed that he was.

Q2. If yes- who were you on shift with and what unit were you working in?

R2. SCA (P) confirmed that he was on shift with the claimant.

Q3. Were you in resident X's bedroom when the claimant asked her about going to bed?

R3. SCA (P) set out that he did not remember if he was present when the question was asked.

Q4. Did you tell the claimant, that it was the claimant's job to put residents to bed?

R4. SCA (P) set out that he didn't remember telling the claimant that it was the claimant's job to put the patients to bed. He described that he was reassured during handover that the claimant was familiar with the unit and the resident routines.

Q5. Did you hear the claimant refuse resident X something to eat?

R5. SCA (P) set out "*Yes"* the claimant "*has refused"* resident X *"food and drink. I spoke to"* resident X "*that night and I reassured* "resident X *"at the time that if she wants something to eat she will be given anything (subject to availability)."*

Q6. Did the claimant say to resident X that she would need to get her blood sugar check(ed) before giving the resident something to eat?

R6. SCA (P) set out that "*Yes, I overhead"* the claimant telling resident X *"that she would have to have her sugars checked before getting something to eat."*

Q7. Did you SCA (P)check the claimant's blood sugar and if so, can you (SCA (P)) remember what it was?

R7. SCA (P) described that he had checked resident X's blood sugars. He described that he recalled that it "*was higher than usual however*" , resident X was not symptomatic and described that he had reassured resident X "*that should could perhaps wait around 30 minutes to see if her BM goes down. I made it clear with"* resident X" *that she had a choice and she can still choose to have something to eat regardless*

her high sugar levels", the resident "*decided she will wait 30 minutes. Follow up blood check showed sugar returned to baseline levels."*

Q8. Did the claimant give resident X "*something to eat after the blood sugars were check."*

R8. "*I advised"* the claimant "*that she should prepare*" resident X "*a sandwich".*

Q9. Do you know what time resident X went to bed and did you assist?

R9. SCA (P) described that the claimant was always keen to assist people to bed as soon as she could. SCA (P) described that he reminded the claimant that "*we are here for the patients and patients choose when they want to go to bed – not us"* describing that he had formed a view that the claimant "*was keen to assist"* resident X "*to bed before"* resident X" said she was ready to go. I stopped" the claimant" and reassured resident X "*that she can use the alarm to alert us to when she was ready to go to bed. I don't remember when"* resident X *"went to bed on the night in question".*

Q10. Were you aware resident X's brother was on the phone while you (SCA (P)) and the claimant were in resident X's bedroom?

R10. "*Yes I was aware that"* resident X *"was on the phone to"* offering the name of the brother, describing that resident X "*has indeed asked me to dial his number for her as she was struggling"*.

Q11. Did you (SCA (P)) leave resident X without a buzzer and her phone?

R11. "*There was an occasion when*" resident X" *was left without a buzzer. At some point during the evening/night I entered"* resident X's room to find resident X "*desperate to reach the buzzer alarm. I apologised to"* resident X" *she was left without the buzzer alarm and reminded*" the claimant "*she needs to ensure the patients have access to buzzer alarms".*

Q12. Did the claimant put resident X's bedroom light out knowing that this makes resident X anxious?

R12*."Yes. I found*" resident X's "*bedroom dark at one point during the night"* resident X "*asked me to leave the bathroom light on. I don't believe"* the claimant "*would know dark room would leave*" resident X "*anxious. I believe, from my observations, that* "the claimant would not give resident X " *a choice and*" the claimant " *would take it upon herself to switch lights off".*

Q13. Did you (SCA (P)) witness the claimant searching resident X's cupboard drawers and pockets for cigarettes?

R13. "*No I didn't witness*" the claimant "*searching for cigarettes through"* resident X's "*personal possessions"*

Q14. Did you (SCA (P)) witness resident X asking for a cigarette and the claimant saying resident X smokes too much and no more smoking.

R14 "*Yes"* the claimant "*has tried to restricts*" the claimant's access to cigarettes. I reassured" resident X "*that once I get a minute, I would assist her outside to have a cigarette".*

Q15. "*Did you"* (SCA (P)) "*have any concerns regarding"* the claimant's "*care, manner and attitude"* towards resident X *"on the night in question*"?

R15. "*Yes."* He described that the claimant *"appeared to show little compassion towards"* resident X and the claimant *"chose to ignore "*resident X's "*requests for basic needs*." The claimant *"at one point during the night suggested to restrict*" resident X's "*access to water- I have told* "the claimant "*that it wont be happening on my shift and no patient will be restricted water*" alleging that the claimant's "*reasoning was"* the resident X "*will urinate excessively and that*" the resident "*would have to be changed during the night. I told "*the claimant *"that it doesn't matters how many times we have to assist patient to get changed- I will not be restricting patient access to water."* The claimant

"was not impressed that I spoke back". SCA (P) went to allege other instances although without specification and describing that a named other resident would prefer that SCA (P) interact due to the claimant shouting although conceding that he had not heard the claimant shouting. He described that the claimant tried to assist residents to a degree but set out that it was his view that the claimant showed generally little compassion to patients in her care and from his observations "*I would personally refuse*" the claimant's assistance.

51. On **Friday 12 April 2019,** Ms Ferguson issued an investigation report (the April 2019 Investigation report). It described that she had looked "*the following concerns: Resident" X* and brother*" letter of concern regarding the care provided.".* It set out that the allegations investigated were considered within the definition of risk or harm to vulnerable adults. The report described that on **Wednesday 27 March 2019** Ms Ferguson had interviewed the claimant and that based "*complaints in letters from*" both the resident X and her brother she had "*posed questions in relation to the specific complaints of-*

Abusive tone and manor

Refusing food

*Rough treatment/embarrassment/ (*and incorrectly described that questions were posed in relation to restricting fluid intake).

Searching for cigarette

Switching Lights *off and no buzzer*

Demanding resident goes to bed."

52. The April 2019 Investigation Report described that the claimant had been no previous disciplinary record.

53. The April 2019 Investigation Report incorrectly described that resident X had provided a letter of complaint, and that SCA (P)'s evidence had been provided by Interview and did not describe the date on which his comments were provided.

54. The April 2019 Investigation report concluded that the "*the six main points listed above are confirmed by the family member or by"* SCA (P) who goes onto express concern in relation to the claimant "*ignoring requests for basic needs such as food and water. This caused"* SCA (P) *"to challenge these actions and having to inform"* the claimant that *"these types of restrictions would not be happening on his shift".* It described that when "*taken as a whole the concerns are really quite significant and call into question"* the claimants *"suitability as a care assistant".* The report which included what were described as letter from both the brother and resident X (which was a statement taken at the request of Ms Ferguson), email from SCA (P), interview notes taken with the claimant and what was described as "*off duty"* described that "*As the Investigating Officer, it is my opinion, that the allegation have been found to be correct and upheld. I therefore recommend that this complaint be forward to the next stage in preparing for a disciplinary hearing"*.

55. Ms Ferguson in the Tribunal offered a view, in response to questioning that cultural or racial background was not relevant and that an employee must adjust regardless of their cultural background using a soft gentle manner and be aware of how to speak to other people.

56. By letter issued **Wednesday 17 April 2019** the claimant was invited to a Disciplinary Hearing, on Tuesday 23 April 2019 with the respondent's Chief Operating Officer (the April 2019 Invite letter). The April 2019 Invite letter set out that the allegation were potentially classed a gross misconduct, that the claimant had the right to be accompanied described that evidence that which would be reviewed at the Hearing would be; witness statement from SCA (P), Investigation meeting report 27 March 2019, witness statement from resident, witness statement from resident X's brother and the respondent's disciplinary policy. The allegations were listed as:

1. Speaking in an inappropriate manner to a resident

2. Refusing to give a resident food "*until her blood sugar is checked*"

3. Not giving a resident access to their buzzer.

4. Turning off their lights when their preference is to have it on.

5. Embarrassing a resident when delivering continence care.

6. Searching for a resident's cigarettes and removing the cigarettes.

7. Refusing a resident water.

57. On **Tuesday 23 April 2019** the claimant attended a Disciplinary Hearing (the April 2019 Disciplinary Hearing). The April 2019 Disciplinary Hearing was chaired by the respondent's most senior officer, Chief Operator Officer Ms Di Giacomo, the claimant was accompanied by her fellow employee Ms GM a Senior Care Assistant who was employed by the respondent. The 6 of the 7 allegations set out in the April 2019 invite letter were put to the claimant [Allegation 6 (Searching for a resident's cigarettes and removing the cigarettes) set out in the April 2019 invite letter was not initially listed.]

58. The allegations set out during the disciplinary are listed 1 to 6 below in bold.

1. Speaking in an inappropriate manner to a resident.

1. The claimant response was that she did not speak inappropriately. It was inaccurately put to her the resident X statement "*clearly states that you asked her to go to bed and her brother overhead",* while the resident described her position, her brother did not mention this. The claimant was prompted by Ms Di Giacomo to offer an explanation that resident X raised the concern because the claimant had refused her cigarettes to which the claimant agreed. It was not suggested that the claimants' comments were in any way related to her conversational level of English.

2. Ms Di Giacomo put to the claimant that resident's X brother had heard the claimant being abrupt raising her voice. The claimant denied the allegation. The allegation was not

supported by SCA (P) as the Senior Care Assistant working with claimant on Wednesday 13 March 2019. It was however consistent with a conflated description of the Night Shift on which Staff Nurse Verghese was engaged, being night shift commencing **Tuesday 12 March 2019**. The respondent did not seek clarification from resident X or her brother what were the specific dates each allegation raised related to;

2. Refusing to give a resident food until blood sugar (BM) was checked.

1. The claimant denied the allegation. It was put to the claimant that they had "*an agency SCA who agrees with the statement".* The Tribunal notes that the agency SCA (P) had the statement put to him and had not previously reported same. The claimant set out that "*Normally, SCA will check the BM and then we will give her tea and food"* further describing what she stated was normal practice whereby the SCA on the night shift, after checking the BM, would advise the claimant to give how many sandwiches and described that on "*That day the SCA agency checked the BM …. And I opened the roll and give her the tea".*

2. Subsequently in the Disciplinary, Ms Di Giacomo described that "*Nobody is questioning about you asking the SCA to check her BM?"* The claimant confirmed that she explained this to resident X.

3. Ms Di Giacomo put it to the claimant that the roll was missing to which the claimant responded that it was not missing, and she had with her.

4. Ms Di Giacomo put it to the claimant that "*you are saying you didn't refuse food and water*", imprecisely continuing

that there were 3 statements from SCA (P), resident X and her brother "*stating you caused the resident distress".*

5. Ms Di Giacomo described that the resident did not say in her statement that, the claimant had explained "the BM needed to be checked". The claimant stated that she told resident X.

6. The respondent did not seek any clarification on the related issue of checking the BM and whether the claimant had explained same to resident X, despite the description by their own SCA GM in the course of the Disciplinary Hearing.

7. Ms Di Giacomo did not seek clarification from the Staff Nurse on duty that, or previous nights, as to what was described as normal practice. While SCA (P) in his response email 10 April 2019, described without specification (at to time, date or context) in response to Q5 above described that "*Yes"* the claimant "*has refused*" resident X "*food and drink*" , that was not raised earlier. SCA (P) had described in his response email (Q7) that he had suggested to resident X that they should wait "*around 30 minutes see if her BM goes down.",* that he had "*made it clear with"* resident X "*that she has a choice and she can still choose to have something to eat regardless her high sugar levels"* and that it was resident X who "*decided she will wait 30 minutes.".* No issue had been reported earlier including on scheduled subsequent nights shifts, he had declined to attend for interview and was responding to specific allegations set out by NF in email of Monday 8 April 2019 setting out specific allegations around SCA (P)'s second night shift as Senior Care Assistant with the respondent almost a month earlier on 13 March 2019.

8. The Tribunal notes that SCA (P) had described that *"Follow up blood check showed sugar returned to baseline levels",*

and that resident X had decided to wait (after prompting by SCA (P) 30 minutes. This was consistent with the claimant's description and that of resident X who described that her "*blood sugar hadn't been checked for her to say that",* and the brother's letter that his sister had been told at a point she "*could not have anything to eat. I totally understand about her diabetes, but the nurse didn't even check."*

9. The Tribunal notes that SCA (P) had no prior engagement with resident X beyond the preceding night. The claimant described that she opened the roll. SCA (P) had not described that the claimant had denied resident X a roll. SCA (P) description sets out that resident X had decided to wait 30 minutes before eating. SCA (P) described that he had advised the claimant to make a sandwich for resident X.

10. The Tribunal notes the brother's description that *"the nurse didn't even check"* was inconsistent with SCA (P)'s description that follow up BM check, by (the Tribunal concludes) the SCA, showing a return to baseline levels. SCA (P)'s description of follow up BM check was consistent with the claimant having provided the roll and a subsequent (follow up) BM check having been carried out by SCA (P).

3. Not giving a resident access to their buzzer.

1. Ms Di Giacomo put to the claimant that SCA (P) had gone into resident X's bedroom, that resident X was *"left without her buzzer and he found her trying to reach for it*". The claimant responded that resident X always had her phone and a buzzer and used to keep it on her lap but that each time she moves it would fall and offered the speculation that *"it could be an incident that time the buzzer might have fallen in to the floor*". In response Ms Di Giacomo put to the

claimant, that SCA (P) had stated when he had entered resident's room, he saw that resident X was desperate to reach the buzzer and *"does not mention it being on floor".*

4. **Turning the resident's light off when their preference is to have it on**; and

    1. The claimant denied turning off the resident lights, commenting that she knew the resident liked the light to be on. In response to it being put to the claimant that the agency that SCA described the room being in darkness, she described that the small light was on and "*We usually leave the small light on because she can get a cup of water in the night"*

    2. The Agency SCA in fact merely described that he had found resident X's room in darkness, he described, despite having no prior engagement unlike the claimant, that he did not believe that the claimant would know a dark room would leave resident X anxious and speculated that he considered that the claimant would not offer the resident a choice and would take it on herself to switch the lights off. The claimant had described resident X as being in a wheelchair rather than a chair. No attempt had been made to clarify who had caused any light to be off and whether this could have occurred accidently through the resident herself.

5. **Embarrassing a resident when delivering continence care**

    1. The claimant denied the allegation. Ms Di Giacomo had, however, put two statements to the claimant in a single proposition, the second being that she had suggested to the SCA restricting water intake to minimise the need to change continence pad.

7. Refusing a resident water

1. The claimant denied refusing water explaining that "*normally we leave everything"* on the window and explained that resident X's care plan described that she was restricted with water intake, that she had told the SCA when they were out of the room. The claimant co-worker GM who was a full time SCA asked if she could explain, offering that resident X drinks a lot of water and when carer go to change the pad, they were confused whether it was or water "*because of that they were doing an assessment and they put her to fluid restriction. Even I remember saying to give her tea and not give the 2 litres of water*" resident X "*has been on fluid restriction she was given a special pad before the restriction, every 30 minutes they need to change her pad … Agency worker will not read the care plan and he doesn't know about the fluid restriction"* .

2. The respondent set out that she would, in response to the claimant description, "*check her care plan".* No care plan for the resident X was provided to this Tribunal. The Tribunal is satisfied, on balance, that resident's X care plan was not reviewed prior to Di Giacomo issuing dismissal letter.

3. Ms Di Giacomo erroneously put to the claimant that "*There are 3 people stating that*" resident X "*was refused food because of her BM and water"* .

4. SCA (P) had offered a view in his email *that "at one point during the night"* the claimant "*suggested to restrict*" resident X "*access to water."* That allegation was not made nor supported by resident X in her statement nor by her brother. SCA (P) had not reported this suggestion at any point in the preceding almost month following the conclusion of the shift. Ms Di Giacomo, however

erroneously put to the claimant "*there are 3 people stating that" resident X was refused food because of BM and water.The SCA, the resident and her brother explains that nobody should be restricted water*". Neither resident X nor her brother raised any alleged access to water issue.

5. Ms Di Giacomo asked why, when the claimant was interviewed (after a night shift, and when Ms Ferguson noted the claimant was possibly tired), the claimant had not mentioned "*anything about the care plan*" to which the claimant responded "*I can't lie, I didn't refuse water … and I made sandwich when she asked for food"*, to which Ms Di Giacomo responded *"But the SCA in his statement say he asked you to make her a sandwich"* and the claimant said "*No, that not right*".

6. Allegation 6 (searching for a resident's cigarettes and **removing the cigarettes**) set out in the April 2019 invite letter, was not initially listed by Ms Di Giacomo at the outset of the disciplinary hearing. It was however raised toward the latter part of the Disciplinary Hearing, when the claimant's colleague the respondent's employed SCA described that there was a practice of keeping cigarettes in the drawer and residents would take same.

7. Ms Di Giacomo described that the allegation was that the claimant had searched for the cigarettes with the intention of removing them. The claimant responded that that she was just trying to find where the cigarettes were and described that "*even the SCA couldn't take her because the weather was bad".* Ms Di Giacomo stated the issue was not about taking the resident for a cigarette but "*searching and removing them*" to which the claimant responded that she did it every day and resident X did not complain. Ms Di Giacomo asked why resident X was complaining now, to

which the claimant responded that resident X "*was upset for not going for cigarettes".*

8. Further, the claimant described that the brother was rude to the SCA but had later apologised because he was drunk.

9. The claimant also described that resident X had 2 children who visited every day and had not raised any complaints regarding her care.

10. GM offered the view that "*talking about the manner"* the claimant "*talks she may not use the words Please … instead it will be like move that cup. Even I did not know when I cam to this country we need to use please … I have told my Manager to tell my colleagues do not take it personally because the country were we belong there is no please used in conversation, may be this is what happened.. because of accent".* Ms Di Giacomo did not respond to this comment and the claimant did propose that her colleague's speculation was correct.

11. The respondent's employed SCA, GM stated in conclusion that resident X had been rude to her confirmed she had not removed resident X's cigarettes described "t*hat is the point of this particular* allegation" the claimant "*removed her cigarettes. Your incident is not relevant"*

12. On being asked if there was anything to add the claimant described that she "*can apologise to"* resident X and requested to be given another chance.

13. The claimant did not suggest that the respondent required to interview anyone else.

14. The claimant was referred to the SSSC code and in particular 5.1, although the claimant was not provided with a copy.

15. Ms Di Giacomo concluded the Disciplinary Hearing *"I will take on board what you have said and, also I will check the care plan. I will write to you about the decision".*

59. On **Sunday 28 April 2019,** the respondent's Chief Operator Officer Ms Di Giacomo, issued notice of summary dismissal (the April 2019 Dismissal letter) confirming that the claimant's last day of service was **Tuesday 30 April 2019** and set out that the reasons for dismissal were that:

1. While the claimant denied speaking in an inappropriate matter to resident MD and further denied the resident food "*until her blood sugar is checked"* "*there are three independent witness contradicting"* the claimant's account. No reference was made to any issues of tone or around communication.

2. It was held that the resident X did not have access to her (call) buzzer, it being intimated that the claimant had explained "*that at the time of the incident the buzzer might have fallen to the floor"* but that during the investigation interview the claimant had stated that resident X "*always has her buzzer"*

3. While the claimant denied turning the lights off in resident X's room, the claimant was aware that resident X prefers the lights on. The SCA on entering the bedroom noted the lights were off and this was confirmed by resident X who requested that the SCA turn the lights on.

4. While the claimant denied removing cigarettes and telling the resident that she smoked too much, the claimant had admitted looking for them. Having found the cigarettes, the claimant had left the rooms for 30 minutes but was unable to take the resident X for a cigarette due to bad weather "*therefore the cigarettes were removed from"* resident X's room.

5. The claimant "*denied refusing water and pointed out that the resident was on fluid restriction, but you failed to explain this in any of the previous interviews and this is not documented in any of the*

investigation minutes". It was noted by resident X "that you remarked that "*she is soaked*" which embarrasses her, the (agency) SCA has stated that you told him resident X would *"urinate excessively"* and the claimant had suggested restricting water.

The letter concluded that the actions can be classed as Gross Misconduct, the claimant had not adhered to company policy or the SSSC code of practice and the claimant was dismissed. The April 2019 dismissal letter made no reference to resident X's care plan. It did not describe that resident X's care plan had been reviewed. Resident X's care plan, including the fluid records had not been reviewed by Ms Di Giacomo for the purpose of considering he decision.

60. The effect of the dismissal on the respondent was that they would require to pay for more expensive agency staff to replace the claimant.

61. On **Tuesday 7 May 2019,** the claimant submitted a 6-page letter of appeal (**the May 2019 Appeal letter**). The claimant continued to deny allegations.

1. She described that she knew the brother was on the phone and, in effect indicated that she would not speak inappropriately in such circumstances although describing that due to her language intonation people might perceive a strong tone. She described that she was "*sorry if I made*" the resident uncomfortable and was willing to apologise to both the resident and brother.

2. In relation to buzzer: she described that she was unaware of the buzzer issue had been looking after resident every week at least 5 days a week and "*if it happened it was not done intentionally"* offering an explanation on how the buzzer could have fallen when resident X, describing that she

3. In relation to food: she described that she did not refuse resident X food *"I only told her that I will have to ask SC to check her BM, so I can know with his advise how much food to give".* The claimant set out that when working with other SCA's her practice was to check before

feeding someone with diabetes as it was her understanding that the number of sandwiches pieces resident X might eat could worsen her BM. She described that she had been following this approach without previous issues and on the night the SCA advised that the BM was fine she provided the supper. She described that again she was sorry if resident X and the brother was unhappy.

4. In relation to the light: she described that she usually asked the resident, described that resident X liked her TV on and small light on. She described that she could not recall exactly what had occurred that resident X would not permit her to leave without a light, she indicated she could not understand what had happened speculating that on that night resident X had allowed her to leave with the lights off *"But if this happened and made her feel anxious, I am sorry, lesson learned I will never happen again. I will always comply with policies and resident wishes.*

5. In relation to the cigarettes: she described that resident X had asked for cigarettes toward the start of the shift, the claimant looked for them, left and re-entered found them by which time resident X was in a chair and she placed them beside her, saying would return to take her out for a cigarette. The claimant described attending to the other 14 residents and returning after hearing the buzzer noting the weather was bad and as resident X was becoming upset as she was not being taken out to smoke, called the SCA who was on that night who reassured. The claimant described that she had searched resident X's cupboard drawers "*without her consent. I recognise this was a mistake and I apologise for the* way I made her feel" describing that she was sorry, she had tried to get help of but "*we could not take her for a cigarette.*"

6. In relation to water issue: the claimant described what had occurred had happened "*every day since"* resident X was on fluids with a restriction of 2 litres per 24 hours "*the… explanation I was given by the unit senior was that the restriction was to try to control continence as*" resident X was being assessed to return to her home. She described

that she had provided this explanation to the agency SCA who as he was new "*may be that is why he did not understand"* her. The claimant described that she had poured water into a glass and gave it to the agency SCA, and she put the jug on the window so the claimant could remind the resident of the fluid restriction, know how much she gave and record on the fluid balance chart. The claimant described that the fluid restriction was documented and could be confirmed by other permanent staff. Regard the issue of continence the claimant described waking the resident up after identifying a loss of continence and the resident agreeing the claimant changing resident X as the bed was wet. The claimant described that she did not mean to make her feel bad and "*I am sorry if I did it"* .

7. The claimant described that she was shocked and surprised by the allegations, that she was caring for resident X for a few weeks, that resident X's son and daughter had always thanked her for looking after resident X. She described that she believed resident X was unhappy that night because she could not go for a cigarette and described that she was aware that the bother was on the phone as he had suggested that his sister be allowed to smoke in the room or via the window but might have been upset as the claimant had told her it was not safe. The claimant described that the brother heard her saying to resident X "*I can not give"* her supper just now "*I will get the SCA to check her blood sugar, then he will guide me on…much to feed her*".

The claimant set out that she honestly apologised to anyone she made uncomfortable that night She requested a second chance and described that she will always abide by the policies and seek help when appropriate.

62. On **Tuesday 14 May 2019** the respondent's Operations Manager Mr Ballantyne, who was junior to the COO Ms Di Giacomo, held appeal. A Minute taker was present and although the claimant was afforded the opportunity to attend with a colleague as a representative she attended on her own. Handwritten Notes were taken reviewing the terms of the appeal which notes were subsequently typed up. He had the claimant appeal letter and the Minutes of the Disciplinary Hearing**.** Mr Ballantyne did not

consider that was necessary to carry out further investigations and did not consider there were other witness present at times when the allegations took place.

63. On **Thursday 16 May 2019** the respondent's Operations Manager, Mr Ballantyne, set out in writing (the May Appeal Outcome letter) that he had gone through the claimant's letter of appeal and had listened to the claimant's views and opinions on what had occurred but concluded that that he could find no reasons to overturn the original decision taken by the COO on Tuesday 23 April 2019 as, the claimant "*did not bring or share any new information that had a bearing on the original decision"* and confirmed that the appeal had been unsuccessful. Mr Ballantyne's, assessment was in error. The claimant had set out matters which had not been investigated and had not been set out has having been investigated in the dismissal letter, including the fluid charts information on fluid restriction as set out by the claimant, and which Ms Di Giacomo, had set out she would explicitly investigate, by reference to Care Plan during the Investigation Meeting set out in the Minutes, reflecting the claimant's detailed response in relation to the water issue**.** He had not considered the claimant description was indicative that the cigarette event had occurred on a previous night and that the brother had indicated that his sister smoke in the room.

64. The respondent required to refer the claimant to the SSSC. It was the claimant's position that following the termination of her employment she was unable to secure alternate employment as a care assistant because of a failure on the part of the respondent to provide a short factual reference in accordance with their normal practice. There was no documentation of any such jobs applied for. The claimant described that beyond the care sector where she had focused applications, she had applied for a few cleaning jobs. Had the claimant made consistent efforts to secure alternate equivalently remunerated employment, she would have successfully secured alternate equivalent paid remunerated employment within 6 months, that is by 1 November 2019.

65. No evidence was adduced of any written requests to the respondent to provide any form of reference, the claimant did not give any notice in her ET1 not in Further and Better Particulars that such a request had been made and to whom, nor that any request had been refused or not acknowledged. While the claimant's Schedule of Loss referenced attending various interviews unsuccessfully as largely due to her inability to provide a satisfactory reference no specification was provided.

66. Following the issue of communication from the claimant's regulator (SSSC) around **Monday 19 October 2020** the claimant was able to secure equivalent alternate employment as a care assistant within a short period of time and by November 2020 notwithstanding the absence of any factual reference from the respondent.

67. The respondent did not adduce any specific evidence of care assistant, or other employment opportunities which the claimant could have applied for but did not.

68. The claimant did not describe in her witness statement and supplementary oral evidence any alleged injury to feelings suffered by her.

Submissions

69. Written submissions were provided for the claimant supplemented by oral submissions. It is not considered necessary to set out the claimant's submission in detail. For the claimant reference was made to **Sainsbury's Supermarkets v Hitt** [2002] EWCA Civ 1588 (**Hitt**) approving the 3-fold Burchell test. In addition, the claimant referred to **Abernethy v Mot Hay and Anderson** [1974] ICR 323. **Whitbread Plc v Hall** [2001] EWCA Civ 268 Lady Hale para 16. **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220 (Small), para 23, **Sandwell & West Birmingham Hospitals NHS Trust v Westwood** [2009] UKEAT 0032-021712 (**Sandwell**) para 5. **Archibald v Fife Council** [2004 UKHL 32 **(Archibald**) para 32. It was argued that the dismissal was unfair, the respondent did not have reasonable grounds and had not conducted a reasonable investigation. It was argued the disciplinary process was indirectly

discriminatory. It was argued there was a lack of due diligence on establishing the date of alleged conduct, the interview of the claimant was conducted unfairly, the fairness of the investigation as tainted by influencing the witness SCA (P), the investigation showed a lack of balance, the claimant's employment record was not taken into account. The claimant argued that the claim of indirect discrimination should be upheld noting the evidence of Ms Ferguson and it was argued that at no point was any consideration given to the claimant's racial background and how that might be interconnected to allegations of speaking in an abrupt manner, referring to GM's comments at the Disciplinary Hearing.

70. **For the respondent,** written submissions were provided, supplemented by oral comments; it was argued that the reason for dismissal was conduct, the respondent carried out a reasonable investigation and the respondent had a reasonable believe that the claimant's actions amounted to abuse and breach of the SSSC Code of Conduct entitling the respondent to dismiss. It is not considered necessary to set out the respondent's submission in full. The respondent argued that they had met the 3 stage **Burchell** test, referred to the ACAS Code, **Sainsbury plc v Hitt** 2003 ICR 111 CA (**Hitt**). A copy of **Stuart v London City Airport** UKEAT/0273/12/BA 2013 **(Stuart**) was provided to the Tribunal.

71. It was further argued that if the Tribunal was not minded dismissing the claim of unfair dismissal a reduction of 100% should be applied reflecting the claimant's contribution. The allegations of discrimination were denied and if the Tribunal was to uphold same it was argued that any injury to feelings should be nominal there being no evidence of same before the Tribunal. In supplementary oral submissions it was observed that no issue had been raised as to the relevant dates further the investigation meeting laid out allegations and the claimant was in any event aware of the full allegations by the Disciplinary Hearing. It was not accepted that evidence of SCA (P) was tainted, the approach to set out the matters was reasonable in all the circumstances and SCA (P) had offered his legitimate view and had not offered a more critical view. Further it would be wrong to discount SCA (P) because he was "*new"* given that such an individual

could be, in effect be a whistleblower to wrongdoing. In relation to discrimination allegations the allegations were not regarding tone. Ms. Di Giacomo had checked the fluid chart and record but neither had been restricted. It was argued that the nurse from Clyde would have provided no additional evidence. In conclusion it was noted that the claimant had accepted that the allegations were serious, and it was not disputed that if upheld they amounted to gross misconduct.

Witness evidence

Discussion and decision

72. While the Tribunal considers that Ms DiGiacomo was honest in her perceived recall, the Tribunal considers that during the disciplinary hearing elements of what had been set out prior to same had become conflated. In addition, the Tribunal is not satisfied that the fluid charts and records were as Ms Di Giacomo recalled examined before issuing her decision to dismiss the claimant**.** The Tribunal would not wish these reasons to be misunderstood as implying a finding that Ms Di Giacomo lied. The Tribunal was unable to accept the accuracy of Ms Di Giacomo's honest, but the Tribunal considers inaccurate, recall, including having regard to the absence of that documentation before the Tribunal and specific reference to same in the dismissal letter and further in relation to her evidence when compared to those who gave contradictory accounts in relation to other aspects of her evidence. The claimant was wholly straightforward in her evidence. NF was broadly straightforward as was Mr Ballantyne who intimated that his recall of his involvement as the appeal officer in May 2019 was limited by the time of his giving evidence to the Tribunal.

73. The Tribunal found Staff Nurse Verghese to be open and honest.

74. While the Tribunal does not accept the claimant's position in relation to her having sought references from the respondent and does not accept, in all the circumstances having regard to the evidence before the Tribunal, that the claimant had made reasonable efforts to minimise her loss, the Tribunal would not wish these reasons to be misunderstood as implying a

finding that the claimant lied. The position is that Tribunal was unable to accept the accuracy of the claimant's honest, but the Tribunal considers inaccurate, recall in relation to those matters. The Tribunal in relation to the substance of matters culminating in the termination of her employment and appeal preferred the evidence of the claimant where there were any discrepancies.

Unfair Dismissal

Applicable Test

75. An employer need not have conclusive direct proof of an employee's misconduct, but a genuine and reasonable belief reasonably tested. In terms of the Burchell guidance, it is appropriate to consider whether the respondent had a reasonable belief in the misconduct of the claimant so:
    a. did the employer believe it; and
    b. did they have reasonable grounds upon which to sustain that belief?

76. The employer requires to show a potentially fair reason within s98(2) ERA 1996.

77. If so, in terms of s98(4) ERA 1996, was the dismissal fair or unfair (that is

    a. was it reasonable to dismiss, or

    b. can it be said that no reasonable employer would have dismissed - there is a band),

having regard to the matters set out in s98(4) (a) and (b) – whether taking into account the size and administrative resource of the employer, it acted reasonable or unreasonably in treating the reason as a sufficient reason for dismissing the employee in accordance with equity and the substantial merits of the case.

Relevant Law

78. The starting point is the Section 98 of the Employment Rights Act 1996 (ERA 1996) provides, so far as material for this case, as follows:

"98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (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.

(2) A reason falls within this subsection if it—

(a) ……

(b) relates to the conduct of the employee,

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

(a) depends 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

(b) shall be determined in accordance with equity and the substantial merits of the case."

79. The approach for the Tribunal is set out in the case of **British Home Stores Ltd v Burchell** [1978] IRLR 379 (**Burchell**), in which the EAT stated: *"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is*

really stating shortly and compendiously what is in fact more than one element. ***First*** *of all, there must be established by the employer the fact of that belief; that the employer did believe it.* ***Secondly,*** *that the employer had in his mind reasonable grounds upon which to sustain that belief. And* ***thirdly****, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further."*

80. Subsequently in **Iceland Frozen Foods Ltd v Jones** [1982] ICR 432 (**Jones**), the EAT stated, referring to the then statutory provision now found in section 98(4) of the Act

"We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by s.57(3) of the 1978 Act is as follows.

(1) the starting point should always be the words of s.57(3) themselves;

(2) applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the

decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

81. While an investigation and hearing may not always be required, the importance of doing so usually was set out by the House of Lords in **Polkey v AE Dayton Services Ltd** [1987] IRLR 503 (**Polkey**), in which Lord Bridge made the following comments: "*Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognised as valid by [ERA 1996 s 98(2)]. These, put shortly, are:*

(a) that the employee could not do his job properly;

(b) that he had been guilty of misconduct;

(c) that he was redundant.

But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as 'procedural', which are necessary in the circumstances of the case to justify that course of action. Thus…; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation;...

If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment] *tribunal is not permitted to ask in applying the test of reasonableness posed by* [s 98(4)] *is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of* [s 98(4)] *this question is simply irrelevant. It is quite a different matter if the Tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that,*

in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under [s 98(4)] may be satisfied."

82. The Tribunal has reminded itself of the comments of the EAT in **Boys and Girls Welfare Society v McDonald** [1997] ICR 693 (**McDonald**) "*Whilst accepting unreservedly the importance of that test, we consider that a simplistic application of the test in each and every conduct case raises a danger of industrial tribunals falling into error in the following respects.*

(1) The burden of proof

… as a result of the 1980 amendment, it was no longer necessary for the employer to satisfy the Tribunal that it had acted reasonably. The burden of proof on the employer was removed. The question was now a "neutral" one for the industrial Tribunal to decide.

The risk that by following the wording of Arnold J.'s test in Burchell a tribunal may fall into error by placing the onus of proof on an employer to satisfy it as to reasonableness is not confined to industrial tribunals.

(2) Universal application of the Burchell test

Setting aside the question of onus of proof, it is apparent that the three-fold Burchell test is appropriate where the employer has to decide a factual contest. The position may be otherwise where there is no real conflict on the facts.

…

(3) The range of reasonable responses test

It should always be remembered that at the conclusion of the three-fold test in Burchell Arnold J. observed that it is the employer who manages to discharge the onus of demonstrating those three matters, who must not be examined further… Leaving aside the onus of proof, we do not understand Arnold J. to be saying that the converse is necessarily true; that is to say, an employer who fails one or more of the three tests is, without more, guilty of unfair dismissal. In British Leyland U.K. Ltd. v. Swift [1981] IRLR 91 the Court of Appeal

formulated the range of reasonable responses test. Lord Denning M.R. said, at p. 93:

> *"It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was … reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may have not dismissed him."*

83. The band of reasonable responses also applies to the procedure by which the decision is reached referencing the Court of Appeal decision **Sainsbury's Supermarket Ltd v Hitt** [2003] ICR 111 (**Hitt**) para 30 which sets out *"The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."*

84. Further the Tribunal reminded itself that in **London Ambulance Service NHS Trust v Small** [2009] IRLR 563 (**Small**), Mummery LJ noted:

> *"It is all too easy, even for an experienced ET to slip into substitution mindset. In conduct cases the Claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."*

85. The Tribunal has reminded itself of the Inner House decision in **Sneddon v Carr-Gomm Scotland Ltd 2012 IRLR 820,** Ct Sess (Inner House), (**Sneddon**) in which Sneddon, a care worker, was dismissed by CGS Ltd

following allegations that he had shouted at and bullied a vulnerable care user during an overnight stay. The allegations were made by the care user's neighbour to her friend, who also worked for CGS Ltd and who duly reported back what the neighbour had told her. CGS Ltd began an investigation, which included a short conversation between the investigating manager, F, and the neighbour, of which F made brief notes. It was primarily this evidence on which CGS Ltd relied when deciding to dismiss Sneddon. However, the investigation had also involved F questioning Sneddon's colleagues, none of whom identified any concerns about his conduct, or his treatment of the care user concerned. Furthermore, there had been no complaint by the care user and Sneddon strongly contested the allegations. In the circumstances, therefore, the Court of Session held that an Employment Tribunal had been entitled to find that a reasonable employer would have gone back to the neighbour to explore matters more fully and double check on the detail, the reliability and the credibility of her account, rather than relying on her initial conversation with F, which took place at a preliminary stage in the investigation. The dismissal was therefore unfair.

86. The respondent provided a copy of **Stuart v London City Airport** [2013] UKEAT/0273/12/BA 2013 Jan (**Stuart**) in which the EAT considered that heightened scrutiny applied where an allegation of dishonestly having taken goods without paying – such an allegation was serious and required careful investigation which included gathering evidence which might potentially be viewed as exculpatory is consistent with the claimant's explanation. The Court of Appeal overturned the EAT decision noting (at para 16) there was no basis for suggesting that the Tribunal had overlooked the gravity of the allegation when assessing the extent of the investigation. The claimant, Stuart had been dismissed for dishonesty and breach of trust after he walked out of the duty-free shop at the airport where he worked without paying for the goods he held in his hands. Stuart did not dispute the essential fact of the allegation but asserted that (i) he had not realised that he had stepped outside the boundary of the shop, and (ii) he had only stepped outside to talk to a friend, not with any dishonest intent. The dismissing officer relied on a witness statement from

a shop cashier saying that she saw Stuart concealing items under his jacket as evidence of dishonesty. However, the cashier did not give oral evidence during the disciplinary proceedings and the dismissing officer refused to look at CCTV footage of the shop. An Employment Tribunal found that this was nonetheless a reasonable investigation, and the Court of Appeal upheld that decision on appeal. After inspecting the shop layout for himself, the dismissing officer had decided that it was impossible for Stuart to believe that he had never left the area of the duty-free shop. Having therefore formed a view as to Stuart's credibility on this point, it was reasonable for the dismissing officer not to carry out further investigations in relation to the alleged concealment of the goods.

87. In **A v B** 2003 IRLR 405, EAT (**A**) which was referred to in **Stuart** above the EAT stated that the gravity of the charges and the potential effect on the employee will be relevant when considering what is expected of a reasonable investigation. In its view, an investigation leading to a warning need not be as rigorous as one likely to lead to dismissal. In that case, the fact that the employee, if dismissed, would never again be able to work in his chosen field was by no means as irrelevant as the tribunal appeared to think. Serious criminal allegations must always be carefully investigated, and the investigator should put as much focus on evidence that may point towards innocence as on those which points towards guilt. But having said this, the EAT accepted that the standard of reasonableness will always be high where dismissal is a likely consequence, so the serious effect on future employment and the fact that criminal charges are involved may not in practice alter that standard. Such factors merely reinforce the need for a careful and conscientious inquiry.

Appeals

88. While procedural defects are in principle capable of rendering the dismissal unfair, as the EAT commented in **Whitbread & Co plc v Mills** [1988] IRLR 501 (**Mills),** "*not every formality of legal or quasi-legal process is required during the disciplinary and appeal procedures. Each*

set of circumstances must be examined to see whether the act or omission has brought about an unfair hearing."

89. The Tribunal has reminded itself of the EAT decision in **Sharkey v Lloyds Bank PLC** UKEATs/0005/15 (**Sharkey).** For ease, the Tribunal sets out the passage at para 9 referred to *"The focus is thus on the employer's reason for dismissal and whether the employer's actions, focusing upon those actions, were reasonable or unreasonable. The conventional approach, derived from British Home Stores Ltd v Burchell [1978] IRLR 379, is that it is for the employer to show the reason (here, the reason was conduct; that is not controversial). Then there is a four-stage test in order to determine the question arising under section 98(4): does the employer have a genuine belief in the misconduct, are there reasonable grounds for that belief, do they follow a reasonable investigation, and is the decision to dismiss one that is within the band of reasonable responses?"*.

90. Whether or not the appeal process is sufficiently comprehensive to redress any earlier procedural defects will be a question of fact for the employment tribunal. However, this will not depend upon an analysis of whether the relevant appeal was by way of rehearing or simply a review.

Appeal

91. The Tribunal reminded itself of the Court of Appeal decision in **Slater v Leicestershire Health Authority** [1989] IRLR 16 (**Slater**) that for some employers, it may not always be straightforward to avoid a situation where the same person carries out the investigation, discipline and the appeal and set out that *"it could not be held that because the person, conducting the disciplinary hearing had conducted the investigation, he was unable to conduct a fair inquiry. While it is a general principle that a person who holds an inquiry must be seen to be impartial, the rules of natural justice do not form an independent ground upon which a decision to dismiss may be attacked"*.

ACAS Code

92. The Tribunal has reminded itself of and considered the application of the ACAS Code of Practice on Disciplinary and Grievance Procedures which came into effect on 11 March 2015: Code of Practice (Disciplinary and Grievance Procedures) Order 2015.

Gross Misconduct

93. On the question of whether the disputed actions amounted to gross misconduct, the Tribunal has however reminded itself of the guidance in Reilly **v Sandwell Metropolitan Borough Council** [2018] IRLR 558 (**Sandwell)** states that what amounts to gross misconduct involves deliberate wrongdoing or gross misconduct and found that it involves deliberate wrongdoing or gross negligence. The Tribunal further noted that in the case of deliberate wrongdoing, it must amount to a willful repudiation of the express or implied terms of the contract (referencing **Wilson v Racher** [1974] ICR 428 (**Racher**).

94. The Tribunal has further reminded itself that the courts have considered when *'misconduct'* might properly be described as *'gross'*: In **Neary v Dean of Westminster** [1999] IRLR 288 (**Neary**), Lord Jauncey rejected a submission that gross misconduct was limited to cases of dishonesty or intentional wrongdoing. Neary was considered more recently by the Court of Appeal in **Adesokan v Sainsbury's Supermarkets Ltd** [2017] I.C.R. 590 (**Adesokan**) at paragraph 23, Elias LJ said that the focus was on the damage to the relationship between the parties; that some deliberate actions which poison the relationship obviously fall into the category of gross misconduct.

95. Gross misconduct means misconduct so serious that it breaches the contract of employment in such a way as to relieve the other party to the contract of being bound by it. Most such terms are implied. A classic formulation of the implied term of confidence and trust between employer and employee was set out in **Woods v PWM Car Services (Peterborough) Ltd** 1981 IRLR 347 (**Woods**), as approved in **Malik v**

BCCI (1997) IRLR 468 (**Malik**), cases dealing with employer's conduct, as that a party to the contract must not "*without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*."

Discussion and Decision

Indirect Discrimination.

96. The Tribunal does not accept that at the relevant time the respondent operated a PCP as alleged by the claimant that employees communicate in English and in soft measured and empathetic tones. The Tribunal accepts the evidence of Ms Di Giacomo that no such PCP operated at any relevant time. While the Tribunal notes that Ms Ferguson who was not a decision maker, expressed some comment, she was the Tribunal considers merely offering a view that it would be useful when communicating with vulnerable other to seek to do so in an empathetic tone. Her comment did not describe the operation of the PCP set out.

97. The Tribunal does not accept that the respondent applied (or would have applied) the alleged PCP(s) to persons with whom the claimant does not share the protected characteristic?

98. In the absence of the respondent operating the alleged PCP at the relevant time, the remaining issues for consideration in terms of s 19 EA 2010 require to be answered in the negative. The question (in the alternative) of whether the PCP, denied by the respondent was demonstrated to be a proportionate means of achieving a legitimate aim does not arise.

Discussion and Decision

Unfair Dismissal

99. The Tribunal expressly recognises that it is important not to fall into the trap of substitution and that an employer need not have conclusive direct proof of an employee's misconduct, but a genuine and reasonable belief

reasonably tested. In terms of the Burchell guidance, it is appropriate to consider whether the respondent had a reasonable belief in the claimant's misconduct.

100. The Tribunal expressly records that it is not critical of the use of imprecise language around dates of matters raised in a letter of concern, such as the brother's letter, recognising the seriousness of such concerns.

101. With regard to the brother's letter of concern the Tribunal considers, however, that such an individual would welcome an attempt by the respondent to seek clarity from the author, as to the dates of those concerns, including to identify which individual resident X's brother had assumed to be a nurse (there being no reference to Care Assistant) in order to progress a reasonable investigation.

102. The Tribunal expresses concern in relation to the Investigation Report it was noted that, in effect, the claimant was tired at the end of a 12-hour night shift and considers that a reasonable investigation would have offered to arrange an interview at the commencement of a shift.

103. The Tribunal notes SCA (P) responded in email **Wednesday 10 April 2019** at 10.43 am on each point (the Wednesday 10 April 2019 response email): The Tribunal considers that this response was belated and amounted to a directed prompted statement, there being no evidence of any issue previously being raised reflecting the professional responsibility of SCA (P) as a Senior Care Assistant, in handover or at any subsequent point until he receives the directed prompting statement. It is noted that against all the issues set out SCA (P) elected not to attend to provide a statement and offered his comments, only in response to a directed email.

104. It is not clear to the Tribunal why such an agency SCA was not directly interviewed at the commencement of his subsequent allocated shifts by the respondents.

105. The Tribunal considers that respondent Monday 8 April 2019 email set a context of potential criticism of his actions as Senior Care Assistant at Pinetree, that a record had been made and understanding reflecting the context of the claimant having been directed as the focus of criticism, including his Wednesday 10 April 2019 email response to

1. Q7 as the senior care assistant on whether he had checked the blood sugar levels, a reasonable reading of SCA (P) description amounts nuance of difference where the SCA (P) encouraged resident X not to eat until after bloods had been taken and that resident X had decided she would wait 30 minutes. The respondent did not raise with the senior nurse on duty that night appropriate procedure for resident X, nor was the issue referred to other SCA's employed by the respondent with greater experience of resident X; and

2. Q9, a reasonable reading of R 9 does not support a description that resident X had been left without a buzzer or how that had occurred. A reasonable reading of R9 does not support a description that resident X had been required to go to bed earlier than she had wished, rather it offers SCA (P) self-description of supporting resident X; and

3. Q12 which (above R12) amounts to a self-description offered in the context of potential criticism as the Senior Care Assistant. The Tribunal considers on R12 that it does not offer on any reasonable reading a description that the claimant had been aware of the buzzer loss nor that she had ignored same. The self-description at R12 merely offers a neutral statement.

106. While SCA (P) describes receiving information at the handover start shift there was no evidence that he raised any matter at the conclusion of the shift handover and or at any point until it was put to him that allegations were set out in writing; and

107. The Tribunal notes that no efforts were made to take a statement from the senior professional with overall responsibility on shift that night of the facility being the Staff Nurse. The Tribunal notes the express provision

within the Staff Handbook that "*Anything in connection with residents, visitors etc that is not normal should be reported to the manager*".

108. The Tribunal is critical of Ms Ferguson as the Investigating Officer, having identified concerns which she regarded as calling into question the claimant career, in not seeking clarity from the brother or resident X of the specific dates, the absence of any note as to the delayed circumstance in which SCA(P) ultimately provided comment and further the absence of any comments of the Staff Nurse who had overall responsibility of the facility on specific shift.

109. The Tribunal expresses concern in relation to the April 2019 Investigation report which it was noted that, in effect, the claimant was tired at the end of a 12-hour night shift and considers that a reasonable investigation would have offered to arrange an interview at the commencement of a shift.

110. Further the Tribunal notes that April 2019 Investigation Report incorrectly described that; questions were posed to the claimant in relation to restricting fluid intake, resident X had provided a letter of complaint, and that SCA (P)'s evidence had been provided by Interview and did not describe the date or the circumstances in which his comments were provided.

111. The Tribunal notes that the April 2019 Disciplinary Hearing was chaired by the respondent's most senior officer.

112. In relation to the allegations put to the claimant at the April 2019 Disciplinary Hearing:

1. **Speaking in an inappropriate manner to a resident.** It was inaccurately put to her the resident X statement "*clearly states that you asked her to go to bed and her brother overhead",* while the resident described her position, her brother did not mention this. The claimant was prompted by Ms Di Giacomo to offer an explanation that resident X raised the concern because the claimant had refused her cigarettes

to which the claimant agreed. It was not suggested that the claimants' comments were in any way related to her conversational level of English. Ms Di Giacomo put to the claimant that resident's X brother had heard the claimant being abrupt raising her voice. The claimant denied the allegation. The allegation was not supported by SCA (P) as the Senior Care Assistant working with the claimant on Wednesday 13 March 2019. It was, however, consistent with a conflated description of the Night Shift on which Staff Nurse Verghese was engaged, being night shift commencing Tuesday 12 March 2019. The respondent did not seek clarification from resident X or her brother on the specific dates each allegation was said to have occurred. The Tribunal considers that a reasonable investigation would have sought clarification from resident X or her brother on what specific dates each allegation raised was said to have occurred

2. **Refusing to give a resident food until blood sugar (BM) was checked.** The Tribunal notes that the agency SCA (P) had the statement put to him and had not previously reported same. The claimant offered an explanation of what would "*Normally"* occur, describing a process whereby the SCA on the night shift would check the BM before the resident would have food. Ms. Di Giacomo described that "*Nobody is questioning about you asking the SCA to check her BM?".* The claimant confirmed that she explained this to resident X. The claimant denied that the roll was missing. Ms. Di Giacomo put it to the claimant that "*you are saying you didn't refuse food and water*," imprecisely continuing that there were 3 statements from SCA (P), resident X and her brother "*stating you caused the resident distress."* The Tribunal considers that Ms. Di Giacomo conflated separate allegations around the provision of food and water, while only SCA (P) raised any issue with water. While SCA (P)'s email response of 10 April 2019 set out, without, specification that the claimant had refused resident X food, he also set out that he overhead the claimant telling resident X that she would have to wait to have her (blood) sugars checked before getting something to eat. SCA (P) further described that he had checked blood sugar, it was higher than

usual. That was inconsistent with the brother's description that *"the nurse didn't even check"*. SCA (P)'s email response that he had discussed matters with resident X and that in consequence resident had decided to delay eating for 30 minutes, was not supported by resident X or her brothers' statement. A reasonable investigation would have addressed that inconsistency by seeking further information against the background that SCA (P) had not reported any issue earlier and had declined to attend for interview. The Tribunal notes that Ms. Di Giacomo did not seek clarification from the Staff Nurse on duty that, or previous nights, as to what was described as normal practice with resident X despite the description by the claimant and the respondent's own SCA GM in the course of the April Disciplinary Hearing. SCA (P)'s email response was to specific allegations set out by Ms. Ferguson in an email of Monday 8 April 2019, setting out specific allegations relating to SCA (P)'s second night shift as SCA with the respondent almost a month earlier on 13 March 2019. The Tribunal notes that SCA (P) description that *"Follow up blood check showed sugar returned to baseline levels"* was consistent with the claimant's description of the normal process. The Tribunal notes that SCA (P) had no prior engagement with resident X beyond the preceding night. The claimant set out what she described as normal practice being that the SCA (P) would check BM and the claimant described that she had opened the roll. SCA (P)'s email response described that resident X had on his prompting decided to wait 30 minutes to eat. SCA (P) described that he had advised the claimant to make a sandwich for resident X. Given the serious nature of the allegation, a reasonable investigation would have extended considering the delayed nature of SCA (P) only description of events including why SCA (P) had not identified any matter until his email on Wednesday 10 April 2019 issued in response to Ms Ferguson's Monday 8 April 2019 email, and further identifying the Staff Nurse who had overall responsibility at the relevant time and whether the claimant's described process, including any delay to allow for blood sugar to be taken by the SCA, was normal and further a review of resident X's Care Plan.

3. **Not giving a resident access to their buzzer.** A reasonable reading of SCA (P) description does not support an allegation that the claimant had not given resident X access to her buzzer. SCA (P)'s description merely offered that when SCA (P) had entered resident X's room identified that she did not have her buzzer and gave it to her.

4. **Turning the resident's light off when their preference is to have it on**. The Agency SCA (P), in fact, merely described that he had found resident X's room in darkness. He described, despite having no prior engagement, unlike the claimant, that he did not believe that the claimant would know a dark room would leave resident X anxious. He speculated that the claimant would not offer the resident a choice and would take it on herself to switch the lights off. The claimant had described resident X as being in a wheelchair rather than a chair. No attempt had been made to clarify who had caused any light to be off and whether this could have occurred accidentally through the resident herself.

5. **Embarrassing a resident when delivering continence care**. The claimant denied the allegation. Ms Di Giacomo had, however, put two statements to the claimant in a single proposition, the second being that she had suggested to the SCA restricting water intake to minimise the need to change continence pad.

6. **Refusing a resident water.** The claimant denied refusing water explaining that "*normally we leave everything"* on the window and explained that resident X's care plan described that she was restricted with water intake, that she had told the SCA when they were out of the room. The claimant co-worker GM who was a full time SCA asked if she could explain, offering that resident X drinks a lot of water and when carer go to change the pad, they were confused whether it was or water "*because of that they were doing an assessment and they put her to fluid restriction. Even I remember saying to give her tea and not give the 2 litres of water*" resident X "*has been on fluid restriction she was given a special pad before the restriction, every 30 minutes they*

need to change her pad … Agency worker will not read the care plan and he doesn't know about the fluid restriction" .

113. The respondent set out that she would, in response to the claimant description, "*check her care plan".* No care plan for the resident X was provided to this Tribunal. The Tribunal is satisfied, on balance, that resident's X Care Plan was not reviewed prior to Di Giacomo issuing dismissal letter.

114. Ms Di Giacomo erroneously put to the claimant that "*There are 3 people stating that*" resident X "*was refused food because of her BM and water"* . SCA (P) had offered a view in his email *that "at one point during the night"* the claimant "*suggested to restrict*" resident X "*access to water."* That allegation was not made nor supported by resident X in her statement nor by her brother. SCA (P) had not reported this suggestion at any point in the preceding almost month following the conclusion of the shift. Ms Di Giacomo, however, erroneously put to the claimant "*There are 3 people stating that"* resident X *"was refused food because of BM and water. The SCA, the resident and her brother and the SCA explains that nobody should be restricted water*". Neither resident X nor her brother raised any alleged access to water issue. The respondent's SCA attending the disciplinary hearing offered an explanation on fluid restriction. Ms Di Giacomo undertook to check resident X's Care Plan.

115. Ms Di Giacomo asked why, when the claimant was interviewed (after a night shift, and when Ms Ferguson noted the claimant was possibly tired), the claimant had not mentioned "*anything about the care plan*" to which the claimant responded "*I can't lie, I didn't refuse water … and I made sandwich when she asked for food"*, to which Ms Di Giacomo responded *"But the SCA in his statement say he asked you to make her a sandwich"* and the claimant said "*No, that not right*".

116. Allegation 6 (searching for a resident's cigarettes and **removing the cigarettes**) set out in the April 2019 invite letter, was not initially listed by Ms Di Giacomo at the outset of the disciplinary hearing. It was however

raised toward the latter part of the Disciplinary Hearing, when the claimant's colleague the respondent's employed SCA described that there was a practice of keeping cigarettes in the drawer and residents would take same. Ms Di Giacomo described that the allegation was that the claimant had searched for the cigarettes with the intention of removing them. The claimant responded that that she was just trying to find where the cigarettes were and described that "*even the SCA couldn't take her because the weather was bad".* Ms Di Giacomo stated the issue was not about taking the resident for a cigarette but "*searching and removing them*" to which the claimant responded that she did it every day and resident X did not complain. Ms Di Giacomo asked why resident X was complaining now, to which the claimant had responded that resident X "*was upset for not going for cigarettes".*

117. The April 2019 Dismissal letter did not refer to resident X's care plan, and it did not describe that resident X's Care Plan had been reviewed. Resident X's care plan, including fluid records, had not been reviewed by Ms. Di Giacomo for the purpose of considering her decision.

118. In relation to the **May 2019 Appeal letter** the Tribunal notes that the claimant's description at that time was consistent with the cigarette event having occurred the previous night. The respondent had not sought clarification of the dates and had not taken reasonable steps to interview the Staff Nurses. The claimant described that the fluid restriction was documented and could be confirmed by other permanent staff.

119. While noting the Court of Appeal decision in **Stuart,** the factual matrix in the present case is different. In **Stuart** the claimant did not dispute the essential fact of the allegation (offering a view that he had not realised he had stepped outside the boundary of the shop), as described in Stuart (para 16) that case was not one in which findings potentially impacted on that claimant's employability (as described in para 12), in which context the Tribunal notes the views of SCA (P) and the conclusion of Ms. Ferguson's Investigation Report, that the concerns were really quite significant and called into question the claimant's suitability as a Care

Assistant. In the present case, unlike in **Stuart,** claimant disputed all the allegations further offered contextualized explanations for all. Further during the disciplinary hearing in this case Ms. Di Giacomo (acting as decision maker) erroneously described that 3 people stated that resident X was refused food and water, did not clarify on what dates each of the allegations were said to have occurred and further, the Tribunal is satisfied that Ms. Di Giacomo having undertaken, in the Investigation Hearing to review the Care Plan, did not so.

120. The May 2019 Appeal Outcome letter concluded that Mr. Ballantyne could find no reasons to overturn the original decision taken by the COO on Tuesday 23 April 2019 as the claimant "*did not bring or share any new information that had a bearing on the original decision"* and confirmed that the appeal had been unsuccessful. Mr. Ballantyne's assessment was in error. The claimant had set out matters which had not been investigated and had not been set out had having been investigated in the dismissal letter, including the Care Plan documentation on fluid restriction as set out by the claimant, and which Ms. Di Giacomo had set out she would explicitly investigate, by reference to Care Plan during the Investigation Meeting set out in the Minutes, reflecting the claimant's detailed response in relation to the water issue. He had not considered the claimant's description was indicative that the cigarette event had occurred on a previous night and that the brother had indicated that his sister smoke in the room. While recognising that the Tribunal should not fall into a substitution mindset, taking the terms of the detailed appeal, the Tribunal does not accept that the claimant "*did not bring or share any new information that had a bearing on the original decision".*

121. The Tribunal concludes that when taken, as a whole, there was not a reasonable investigation.

122. The Tribunal concludes that neither the Disciplinary Hearing nor the Appeal was as thorough and effective as was reasonably possible based on the information available at the time.

123. While the Tribunal considers that the respondent believed in the alleged misconduct, they did not have reasonable grounds to sustain that belief in all the circumstances. At the stage at which the respondent formed the belief (both the Disciplinary Hearing to the subsequent dismissal letter; and the Appeal Hearing to the outcome of the Appeal letter), the respondent had not carried out as much investigation into the matters as was reasonable in all the circumstances, including but not restricted to review of the resident X's charts. The Tribunal concludes that the respondent has failed to carry out a reasonable investigation, the Tribunal concludes that the decision to dismiss falls out with the band of reasonable responses.

124. For these reasons, the claimant's unfair dismissal claim succeeds.

Discussion and Decision

Reduction for Contributory Fault/Polkey/ ACAS Code

125. In the circumstances of this case, the Tribunal does not consider the claimant's conduct was culpable or otherwise blameworthy. There is no basis for reduction of the basic award (s122(2) ERA 1996) or compensatory award (s123(6) ERA 1996).

126. The Tribunal does not consider there is any basis for a Polkey reduction, the unfairness on the available evidence was not merely procedural.

127. While the respondent did not carry out a reasonable investigation, the Tribunal is satisfied that there is no basis for adjustment for failure to follow the ACAS code.

Discussion

Mitigation of Loss

128. The respondent argues that the claimant had not mitigated her loss. The Tribunal accepts Ms. Di Giacomo's evidence on the recruitment challenges in the care sector. Following termination of the claimant's employment, the respondent would require to utilise agency staff,

reflecting a high demand for staff. There was no clear evidence of any steps the claimant had taken to minimise her loss. In all the circumstances, the Tribunal is not satisfied that the claimant acted reasonably and had taken appropriate steps to minimise her losses. The claimant described that she had been unable to secure alternate employment due to the absence of a reference from the respondent. There was no specific evidence from whom such requests had been made. The Tribunal notes that the claimant described that she secured alternate employment without it being suggested that this was consequential upon a reference being provided.

129. In all the circumstances, balancing the evidence, the Tribunal concludes that the claimant ought reasonably to have secured alternate employment within 6 months of the termination of her employment, that the Tribunal considers that the claimant ought to have secured alternate employment by Friday 1 November 2019 and that the respondent would be responsible for loss only to Thursday 31 October 2019.

Relevant Law
Basic Award

130. Section 119 of ERA 1996 sets out the provision for a basic award.

Basic Award
Discussion and Decision

131. The claimant is entitled to a basic award equating to statutory redundancy payment of; being 2 full years' service x £523 x 1 having regard to the claimant's age.

Relevant Law
Compensatory Award

132. Section 123(1) of ERA 1996 provides" *... the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the*

complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

Relevant Law

Recoupment of benefits

Relevant law

133. The Tribunal has reminded myself that the Employment Protection (Recoupment of Jobseekers Allowance and Income Support Regulations 1996 (the Recoupment Regs 1996) have been considered by the EAT (Judge Pugsley presiding) in **Homan v Al Bacon Ltd** [1996] ICR 721 which stated "*In our view the prescribed element deals with the element in the award which is attributable to loss of wages and the only period to which it can apply was the period for which compensation was awarded".*

Compensatory Award

Discussion and Decision

134. The claimant is entitled to a Compensatory Award.

135. The claimant's net weekly earnings with were £405.25 per week. The Tribunal concludes that she is entitled to recover loss to **Thursday 31 October 2019.**

136. The claimant entitled to the sum of **£500** for loss of her statutory rights.

137. The total Compensatory Award is **£11,198.60.**

138. The Tribunal is satisfied that the claimant would have been entitled to receive Universal Credit during the period to which loss is attributable. Universal Credit is a recoupable benefit in terms of Reg 8 of the Recoupment Regs 1996. The Recoupment Regs 1996 apply to the period for which the claimant is awarded compensation. The prescribed period is **Wednesday 1 May 2019** to **Thursday 31 October 2019.** The Prescribed amount is **£10,698.60.** The total compensation award for unfair dismissal **£12,244.60** exceeds the prescribed element by **£1,546.00,** and that sum is payable immediately.

139. The role of the Tribunal is to weigh the evidence before it. This involves an evaluation of the primary facts and an exercise of judgment. The Tribunal has done so applying the relevant law.

Employment Judge: **R McPherson**
Date of Judgment: **30 November 2021**
Entered in register: **6 December 2021**
and copied to parties