



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109826/2021

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Final Hearing held in Glasgow on 17 – 19 January 2022

by Cloud Based Video Platform (CVP)

Employment Judge Tinnion

10 **Ms. June Wright**

Claimant
Represented by
Mr. Lawson -
Solicitor

15 **McCarthy & Stone Management Services Ltd.**

Respondent
Represented by:
Mr McHugh -
Counsel

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RESERVED JUDGMENT

1. By consent, the name of the Respondent (the Claimant's former employer) is amended to "*McCarthy & Stone Management Services Limited*" (**MSMS**).
2. The Claimant's complaint of unfair dismissal under ss.94-98 of the
25 Employment Rights Act 1996 is not well founded and is dismissed.

REASONS

Background

3. By an ET1 and Paper Apart presented on 28 May 2021, the Claimant (**Mrs. Wright**) presented a complaint of unfair dismissal against the Respondent

under ss.94-98 of the Employment Rights Act 1996 seeking a finding of unfair dismissal and financial compensation flowing from her dismissal.

4. In her Paper Apart, Mrs. Wright contended her dismissal by letter dated 26 February 2021 for gross misconduct was unfair for the following reasons:

- 5 a. the sanction of dismissal was too harsh and not in the band of reasonable responses;
- b. the Respondent failed to consider and/or put sufficient weight on her mitigating factors;
- c. the Respondent's investigation, disciplinary and appeal process was not
10 dealt with in an even-handed manner;
- d. the Claimant was not given sufficient time to prepare for the investigation meeting and disciplinary meeting;
- e. the investigating officer went beyond her legitimate role when investigating the case against the Claimant;
- 15 f. the Claimant's Article 8 human rights were breached when the Respondent's managers at the disciplinary and appeal hearings considered her private and confidential messages on WhatsApp;
- g. the Claimant was not given sufficient opportunity to give her position on all evidence being considered by the Respondent;
- 20 h. the Respondent's Covid-19 guidance was contradictory and unclear, and the Claimant followed it to the best of her ability;
- i. the Claimant's dismissal was procedurally unfair.

5. In her Paper Apart (i) Mrs. Wright did not deny being guilty of misconduct or gross misconduct (ii) Mrs. Wright did not contend a finding of misconduct or
25 gross misconduct on her part had not reasonably been open to the Respondent.

6. The final merits hearing was conducted on 17-19 January 2022 via video/CVP. At that hearing, Ms. Graham was represented by solicitor Mr. Lawson, the Respondent by counsel Mr. McHugh. The Tribunal heard evidence from 4 witnesses: the Claimant; Nicola Bradley (Investigating Officer); Gary Lyne (Dismissal Officer); Jenette Martin (Appeal Officer). Both parties made written and oral closing submissions.
7. A 410-page joint production contained the documentary evidence in the case – references in square brackets refer to the relevant pages of that production.

Findings of fact

8. The Tribunal makes the following findings of fact, including any contained in the Discussion/Conclusions section below, on the balance of probabilities.
9. Respondent MSMS forms part of a wider group of companies which trade under the 'McCarthy & Stone' brand name which provide retirement living homes and associated services to homeowners in their retirement years throughout the UK.
10. In 2016, Mrs. Wright began working for MSMS at its premises at Conachar Court, Isla Road, Perth (**Conachar Court**) as House Manager. The Conachar Court development has approximately 50 privately-owned retirement flats.
11. The Respondent's job description for House Manager [226-231] states the key purpose of the role is to (1) enhance homeowners' quality of life and enable them to maintain their independence by (amongst other methods) being available to homeowners and offering help, support and advice as necessary (2) maintain the highest levels of customer service by ensuring regular contact is maintained with homeowners and being the 'go to person' when a homeowner needs support (3) ensuring homeowners understand the level of support available from the House Manager whilst adhering to company policies (4) being alert to the needs of each homeowner and taking appropriate action to liaise with relevant support providers (GPs, local support and health services) (5) promoting homeowners' wellbeing by facilitating the

provision of domestic support, assistance and care when appropriate and necessary.

12. It is important to note at the outset that due to the limited nature of the retirement and related services MSMS provides residents at Conachar Court, the Conachar Court development is not regulated or inspected by the Care Quality Commission (**CQC**). It was a legitimate business interest for MSMS to have at the time to ensure its staff did not provide services to Conachar Court residents which might fall within the CQC's purview.
13. In the period 2016 – 2020, Mrs. Wright competently discharged the duties of her post. The Tribunal infers she was – and was seen by residents to be - a friendly and approachable member of staff who genuinely cared about their welfare.

Events triggering investigation

14. The sequence of events which resulted in Mrs. Wright's dismissal were triggered by a 20 January 2021 at 18:53 email [123] Nicola Brady (Respondent's Area Manager) received from careworker SD (her initials, not an employee of the Respondent), who had been a carer for JY, a Conachar Court resident with dementia who lived by himself after his wife passed away.
15. In that email, SD alleged JY had told her that JY had given Mrs. Wright £500 for a holiday. On further investigation, the sum given was allegedly £400. SD stated in her email: "*I am frustrated that the situation is unhealthy and that June Wright, manager, is in a position to exploit a vulnerable adult as [JY] has non capacity.*"
16. In a further email to Ms. Brady sent on 21 January at 03:18 [131], SD alleged that 5 people – 4 carers, 1 cleaner – for JY were being paid via Mrs. Wright.
17. In a further email to Ms. Brady sent on 21 January 2021 at 08:06 [121], SD made the following allegations about Mrs. Wright:

"I forgot to put in my email that each month the carers give their hours to June who then uses [JY's] cheque book to pay us. She writes out the cheques and

gets [JY] to sign them. She lets her friend Carer take [JY] to the bank and withdraw money. [JY] often has a lot of money in his wallet and I have spoke to June about this several times. The new notes are hard to handle and often when your out [JY] drops all his money. June does not seem to be concerned about this. We also have to run everything by June to get her permission to do anything with [JY] ...”

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18. In an email to Ms. Brady sent on 21 January 2021 at 12:01 [128-130], SD raised further complaints about Mrs. Wright as well as complaints about one of JY’s other care workers.
- 10 19. In an email to Ms. Brady sent on 21 January 2021 at 13:46 [132-133], SD raised further complaints about Mrs. Wright’s conduct towards JY.
- 15 20. Following a phone conversation with him earlier that day, by email on 21 January 2021 at 12:25 [126] Ms. Brady asked Mr. George Henderson – JY’s intended executor who had appropriate involvement in JY’s financial affairs – to confirm that (1) he was aware that Mrs. Wright did a lot of extra tasks for JY arranging his care provision and cleaning (2) Mrs. Wright had received £400 from JY towards a holiday which Mr. Henderson felt was recompense for all the extra duties Mrs. Wright had been performing for JY (3) Mrs. Wright writes the cheques for JY’s carers and cleaners for JY to sign which Mr. Henderson was satisfied is in order.
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21. By email to Ms. Brady on 21 January 2021 at 13:17 [125-126], Mr. Henderson stated (1) Mrs. Wright had organised a rota of carers and a cleaner to take care of JY (2) Mrs. Wright was very supportive of JY, and spent a lot of time out of working hours to allow JY to adapt to living on his own after his wife’s death, including being one of JY’s few visitors when he was in hospital (3) in 2020 JY had volunteered to make a donation to Mrs. Wright’s holiday which Mr. Henderson felt was appropriate in view of the practical and emotional assistance she had provided JY (4) the donation was a one-off payment (5) JY’s cheque book remained in JY’s home in a secure place that only Mr. Henderson and Mrs. Wright knew (6) Mrs. Wright assisted JY to write his cheques when Mr. Henderson was not available to pay JY’s staff, which Mr.
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Henderson confirmed was in order (7) Mrs. Wright and SD had had a falling-out over JY's medication, and being strong-minded women had not reconciled (8) Mr. Henderson had faith and confidence in Mrs. Wright as a person, employee, and friend of JY.

5 22. On 21 January 2021 at 3.15pm [134], Ms. Brady and Amy Murrell (HR Business Partner) spoke to Mrs. Wright by telephone and told her she was suspended pending an investigation into the matters which had been raised.

23. Under cover of an email from Ms. Murrell sent on 21 January 2021 at 15:59 [135], by letter dated 21 January 2021 [] Mrs. Wright's suspension was confirmed in writing. The letter stated: "*I am writing to confirm our decision to suspend you from work from 21st January 2021 to enable a full investigation into allegations of gross misconduct relating to failing to disclose a financial gift and failing to maintain professional boundaries.*"

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Investigation

15 24. By email on 25 January 2021 [137], Ms. Murrell asked Mrs. Wright to attend a remote video investigation meeting on 25 January 2021.

25. On 25 January 2021, Mrs. Wright attended an investigatory meeting with Ms. Brady and Ms. Murrell – see note at [138-144]. At that meeting, Mrs. Wright said the following about the holiday cheque she had received from JY:

20 a. Mrs. Wright accepted she had received a £400 cheque from JY for a holiday, which she said her husband had accidentally cashed, and had given JY care worker 'AG' £400 cash she had in her house [138];

b. Mrs. Wright said AG had receipted the £400 cash and kept the receipt [138-139];

25 c. Mrs. Wright accepted she knew the Respondent's policy – "*only get cards with £20 in*" [139]

d. Mrs. Wright accepted she had not mentioned the incident to Ms. Brady [139];

- e. Mrs. Wright denied JY had felt obliged to give her the money [139];
- f. Mrs. Wright stated JY had dementia [139];
- g. JY gave Mrs. Wright the cheque for the things she had done for him – changing lightbulbs, sorting out his phone, sorting out his TV, encouraging him to wash his dirty clothes, making coffee for him [140].

26. The Tribunal notes that:

- a. para. 4.1 of the Respondent's 'Anti-Bribery and Corruption and Fraud Policy' [269-282] (amended November 2020) stated gifts over £50 offered or received (irrespective of whether they are accepted or rejected) must be recorded in the Gifts and Hospitality Register. Paragraph 4.3 states details of gifts should be notified by completing and returning the relevant form to a designated email address;
- b. in December 2020, the Respondent circulated its December 2020 newsletter [283-290] reminding staff that "*At this time of year, Homeowners often wish to show their appreciation for all of your support throughout the year. Please remember to fill out the attached declaration for if a single gift exceeds £20 in value*" [288].

27. At the investigatory meeting, Mrs. Wright said the following about her involvement in JY's care and cleaning arrangements:

- a. Mrs, Wright denied being involved in arranging care for JY [140];
- b. Mrs. Wright denied being involved in arranging the rota for JY's carers [140];
- c. Mrs. Wright admitted being involved in paying JY's carers but only to the extent that she wrote out the cheques which JY signed [141].

28. At the investigatory meeting, Mrs. Wright confirmed she had entered JY's flat when he had asked her to, to turn his TV off, and turn off his under-counter lights when he was panicking. She stated she had adhered to Covid guidance

as much as possible. Mrs. Wright stated she had been in JY's flat twice when he was not there, both times when he had gone missing and the police had been summoned [141, 144].

- 5 29. On 26 January 2021, Ms. Brady spoke to JY carer AG who was working with JY that morning, who confirmed Mrs. Wright's account that the £400 had been returned to JY by returning the money to his cash draw and JY then being advised on subsequent weeks that he didn't need to withdraw his usual amount, thereby allowing the £400 to be returned without JY knowing it had been. The £400 receipt was obtained [146]. Ms. Brady documented that
10 conversation in an email to Ms. Murrell at 09:16 [145].
30. By email to Ms. Brady on 28 January 2021 at 10:32 [157], SD forwarded WhatsApp messages [158-171], which included the following:
- a. *"Hi [SD] if you can you do a couple of hours with [JY] tomorrow"* (5 May 2020) [163];
 - 15 b. *"Hi [SD] How many hours worked up till this Friday please ... Cheers my dear ... [SD] I think your wages may be wrong ca[n] you let me know"* (21-22 May 2020) [166];
 - c. *"Hi [SD] can you send me your hours from 1st June till the 30th please, and week beginning 6th July can you cover [AG's] shifts that week please"* (24
20 June 2020) [167]
 - d. *"Hi can you give me an idea of how much wages u r due, and are you able to take a cheque"* (15 July 2020) [167];
 - e. *"Could u do 2 hours with [JY] today"* (28 July 2020) [168];
 - f. *"Sorry to be a pain can I have your holiday dates again"* (18 August 2020)
25 [169].
31. By email on 28 January 2021 at 15:51 [178], SD forwarded further WhatsApp messages to Ms. Brady [179-186], which included the following:

5 a. *“Looking for cover for [JY] sat n sun 5th 6th sept for an hour or 2 during the day, 9th and 10th Sept for tea time, 11th Sept during day for a couple of hours but most needed is 12th and 13th Sept as this is first anniversary of his wife’s death, [AG], [R] can you assist with any of these dates?”* [20 August 2020) [179];

b. *“Remem[b]er your hours girls and txt me so I can get wages done this week, from 1st of the.montj till end of aug”* (23 August 2020) [182].

10 32. By email to Ms. Brady on 28 January 2021 at 16:58 [152], SD forwarded copies of messages Mrs. Wright had sent on WhatsApp chats [153-156], which Ms. Brady forwarded to Ms. Murrell [152], which included the following:

a. *“Hi [SD], can you tell me how many shifts you have had this month”* (22 April 2020) [153]

15 b. *“Thank you, could u put up a half doz at apt [] tomorrow and just ring bell and leave please, I am late with ur wages but will get it sorted on Monday, sorry”* [153]

c. *“Could you do a couple of hours tomorrow with [JY]”* (2 May 2020) [156]

33. On 28 January 2021 at 20:43 [172], SD forwarded further WhatsApp messages to Ms. Brady [173-178].

20 34. On 2 February 2021, Ms. Brady completed a formal ‘Investigation Report’ [115-120] with 23 Appendices which recommended a disciplinary hearing be held into five specific allegations [119].

25 35. On 2 February 2021, a further remote video meeting was reconvened with Mrs. Wright, Ms. Brady and Ms. Murrell [291-293] at which Mrs. Wright was told that the investigation had concluded and they were recommending the matter be referred to a disciplinary. They stated that they were not making a recommendation regarding the outcome, and told Mrs. Wright that she remained suspended from work while she went through the disciplinary process.

Disciplinary hearing

36. Under cover of an email sent on 2 February 2021, by letter dated 2 February 2021 [294-295] Mr. Lyne asked Mrs. Wright to attend a remote video disciplinary hearing on 5 February 2021 to discuss the following allegations of misconduct:
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- a. Allegation #1 - failing to disclose a matter relating to a financial gift from a homeowner;
 - b. Allegation #2 - performing duties that relate to the care of a homeowner and fall outside of the House Manager role, including writing a homeowner's cheques and coordinating external carers;
 - 10 c. Allegation #3 - failing to follow Government and company guidance relating to Covid-19;
 - d. Allegation #4 - inappropriate communication with an external carer relating to an exchange over medication where Mrs. Wright told a carer 'get [the] f—k out of my office and don't come back';
 - 15 e. Allegation #5 - failing to perform the duties within the House Manager role and job description.
37. The letter attached 23 appendices, including Appendix 11 (text messages, WhatsApp messages, emails). The letter warned a sanction up to dismissal might be given if Mr. Lyne reasonably believed the allegations were justified. The letter informed Mrs. Wright of her right to be accompanied by a work colleague or union representative.
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38. On 5 February 2021, a remote video disciplinary hearing was held [296-305], which chaired by Mr. Lyne (Regional Operations Manager). Ben Roberts (HR Business Partner) took notes. Mrs. Wright attended, accompanied by Stuart Collie. At the 5 February 2021 disciplinary hearing:
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- a. Mrs. Wright was asked whether she was happy to proceed, confirmed she was, and stated she felt "*quite prepared*" [297];

- b. Mrs. Wright stated JY was physically in great health, but had dementia;
- c. Mrs. Wright stated she had 20 years' experience working in social care, and had qualifications [297];
- d. Allegation #1 - Mrs. Wright repeated her explanation that her husband had accidentally cashed JY's £400 cheque, which this time she claimed to have reimbursed by going to Tesco Express to take the £400 money out, then giving it to JY carer AG. Mrs. Wright stated the incident had happened in mid-June 2020, and did not dispute that she had not notified the Respondent about it 2[98];
- e. Allegation #2 (writing out cheques) – Mrs. Wright admitted writing out cheques for JY and other homeowners (*“First of all, only writing cheques, I don't sign it, assisting to write them, done this for other homeowners who can't hold a pen, done Christmas cards. I am not signing it – no signature. Just the amount he signed it. Banks happy to accept it.”*) [300];
- f. Allegation #2 (coordinating external carers) – when Mr. Lyne put to Mrs. Wright that the WhatsApp and text messages showed her involvement in the rota for JY carers, Mrs. Wright did not provide a substantive response, and challenged the propriety of their disclosure to the Respondent [300];
- g. Allegation #3 (following Covid guidance) – Mrs. Wright accepted going into JY's apartment during the Covid lock down (*“Reason for going in – he comes down, says I need help, ask what do you need, he says the thing, don't know exactly as he can't communicate because of his condition, he forgets words, unable to say words, I PPE up, I go down, it's just a light left on, I say nothing to worry about, switch it off, make coffee, then leave. As you know, very different levels of dementia, dealing with on a daily basis ... If something happens in his flat, he doesn't understand what it is, like television going off and he doesn't know. I have homeowners like that who don't have dementia, something happened, light blew, sat in with no light, I can't say 'carer will deal with it', especially in winter when it's pitch*

black. Yes, I went in, and it's not the only apartment been in, but with PPE.”) [301]

5 h. Allegation #4 (inappropriate communication with carer) – Mrs. Wright accepted she had done this, and explained that the carer had herself been verbally abusive towards her, causing her to feel intimidated [303];

i. Allegation #5 (failing to perform House Manager role/duties) – Mrs. Wright contended that she had performed those duties, and although she accepted some paperwork might not have been up to date, she pointed out she was not able to do this every day given her other tasks [304-305];

10 39. At the end, Mrs. Wright’s representative Mr. Currie summarised her case: *“June performed to the best of her abilities over her length of service – I’m asking you to look favourably on her case and support her. There is an element of hearsay involved. I understand the comments regarding the cheques and June admitted that, it’s not gross misconduct.”* [305].

15 40. By email on 18 February 2021 [307], the Respondent’s HR Business Partner sent Mrs. Wright (i) the notes of the disciplinary hearing (ii) an email from Mr. George Henderson dated 5 February 2022 308-309] highly supportive of Mrs. Wright’s efforts to look after JY – *“The only way that [JY] has managed to stay in his property is through the kindness of June Wright, who has pointed me in the right direction with appointing carers, cleaners and a variety of tradespeople to assist [JY’s] everyday living – shopping, banking, GP’s appointments.”* [308].

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41. By email on 18 February 2021 [313], Mrs. Wright confirmed she was happy for Mr. Henderson’s email to be included as evidence. She identified alleged errors in the note of the hearing, and put forward further explanation regarding mitigating circumstances. By email on 19 February 2021 [312], the Respondent’s HR Business Partner stated he had added her comments as a second set of notes of the meeting.

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42. Mr. Lyne reached the following conclusions about Mrs. Wright’s conduct in respect of the five allegations:

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- a. Allegation #1 (failing to disclose £400 financial gift from JY) – Mr. Lyne determined that Mrs. Wright had been aware of the Respondent’s policies regarding gifts from homeowners and breached them by not reporting this gift. However, he accepted Mrs. Wright’s proper intentions at the time were not in doubt – outcome: final written warning (although it could have been capable of constituting gross misconduct);
- b. Allegation #2 (performing duties outside House Manager’s role - writing cheques for JY, coordinating JY’s external carers) – outcome: gross misconduct:
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- i. Ms. Wright overstepped her House Manager role by completing cheques for JY to pay for personal care for JY, including the amount payable and who is payable, potentially exposing JY to abuse in respect of his finances;
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- ii. the WhatsApp and text messages demonstrated that Mrs. Wright had been responsible for coordinating the wages to be paid to JY’s carers, and had been asking carers directly what amount was payable, with no robust record or verification of hours worked, placing JY in a vulnerable position open to abuse;
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- c. Allegation #3 (failing to follow Covid guidance by entering homeowners’ apartments) – allegation upheld (Mrs. Wright admitted staying in JY’s apartment to make coffee, contravening health and safety advice, placing homeowner’s life at risk) - outcome: serious (but not gross) misconduct;
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- d. Allegation #4 (inappropriate comments to external care) – allegation upheld, but taking into account mitigation outcome was finding of misconduct, not serious misconduct or gross misconduct;
- e. Allegation #5 (failing to perform duties of House Manager regarding required checks) – some checks were not performed, but given the pandemic and other mitigating factors no further action to be taken.

43. By letter dated 26 February 2021 [318-322] giving the reasons, Mr. Lyne notified Mrs. Wright that she was being dismissed on 26 February on grounds of gross misconduct. The letter informed Mrs. Wright of her right to appeal.

44. Read literally, Mr. Lyne's dismissal letter appears to suggest (i) Mrs. Wright was dismissed for gross misconduct (ii) the only gross misconduct Mr. Lyne found related to Allegation #2, hence (iii) Mrs. Wright was dismissed because of her conduct relating to Allegation #2 (iv) Mrs. Wright was not dismissed because of her conduct relating to Allegation #1 or Allegation #3. In his oral evidence, however, Mr. Lyne explained his thought process regarding dismissal as follows:

"It was based around breaching Covid guidelines – a serious health and safety breach. It was about organising and paying for care for a homeowner. Paying carers cash and cheques. Taking the [£400] cheque and not following the appropriate company guidelines ... My priority was safeguarding other homeowners ... I recall some mitigation around the Claimant's mental health issues, but I felt it was the right outcome regarding accepting money from a homeowner and not declaring it. If it had just been accepting that money, it might have been a final written warning."

45. The Tribunal accepts that evidence, and on that basis finds that it was Mrs. Wright's conduct relating to Allegations #1-3 – not just Allegation #2 – which was in Mr. Lyne's mind when he made the decision to dismiss Mrs. Wright for misconduct.

46. By letter [324-326] and email [323] on 2 March 2021, Mrs. Wright appealed against her dismissal on 15 separate grounds.

47. By email on 5 March 2021 [327], the Respondent invited Mrs. Wright to attend a remote video appeal hearing on 18 March 2021. The letter informed Mrs. Wright of her right to be accompanied.

48. On 19 March 2021, a remote video appeal hearing was conducted [328-336], chaired by Jeanette Martin (Care Director). Notes were taken by Michaela

Parry. Mrs. Wright attended, accompanied by representative Mr. Davie Lawson.

49. At the 19 March 2021 appeal hearing:

- 5 a. Mrs. Wright objected to the introduction/reliance on the WhatsApp and text messages on the basis that they were not discussed at her investigation meeting and permission to introduce them was not requested from those in the group [328];
- 10 b. Mrs. Wright objected to a comment Ms. Brady made about her honesty in the investigation report [329], which she claimed had influenced Mr. Lyne [329];
- c. Mrs. Wright complained that a final written warning in respect of Allegation #1 was inappropriate due to a lack of support with a challenging homeowner [339];
- d. Mrs. Wright denied having paid carers in cash [332].

15 50. Mrs. Wright made numerous other points in support of her appeal.

51. By email on 23 March 2021 [338-339], Ms. Martin offered Mrs. Wright the chance to make any further comments she wished to make about the WhatsApp and text messages, which she said she would consider as part of her appeal.

20 52. By email on 25 March 2021 [340-341], Mrs. Wright made further comments about the WhatsApp and text messages, including a complaint about them being relied upon and a complaint concerning their legality, no permission having been requested from the group participants. Absent from Mrs. Wright's email was any attempt to challenge what the messages suggested
25 on their face, vis, that she had been directly involved in organising care worker rotas for JY and organising the payment of JY's care workers.

53. By letter dated 1 April 2021 [342-346], Ms. Martin notified Mrs. Wright that her appeal against dismissal had not been successful. The appeal letter addressed each of the 15 grounds of appeal Mrs. Wright had raised.

Relevant Law

5 54. The reason for dismissal is the set of facts known or beliefs held by the person who makes the decision to dismiss. Abernathy v Mott [194] IRLR 213.

55. A dismissal for misconduct will be unfair if, and only if, dismissing the employee for that misconduct was outwith the band of reasonable responses open to the employer at the time, based on the evidence before it at the time.

10 56. In determining whether a dismissal was outwith the band of reasonable responses, the Tribunal must assess the fairness of the dismissal judged as a whole, not focus solely on the procedural or substantive fairness of the dismissal.

15 57. In determining whether a dismissal on conduct grounds was fair, the Tribunal should consider (a) whether the dismissing officer genuinely believed the employee was guilty of the misconduct alleged (b) whether any such belief was held on reasonable grounds (c) whether the employer conducted such investigation into the misconduct alleged as was reasonable in the circumstances. BHS v Burchell [1980] ICR 3030.

20 58. Whether the sanction of dismissal for misconduct was fair or not will depend on whether that sanction was within the band of reasonable disciplinary responses open to the employer at the time.

Discussion / Conclusions

25 59. First, the Tribunal is satisfied that the reason for Mrs. Wright's dismissal was for the potentially fair reason of conduct, specifically, the following conduct:

- a. Allegation #1 - Mrs. Wright's conduct in accepting a £400 cheque from JY which was inadvertently cashed then returned to JY in cash without

notifying the Respondent in accordance with company policy of either her receipt of that gift or its return to JY;

- b. Allegation #2 - Mrs. Wright's conduct in writing out cheques for JY to sign;
- c. Allegation #2 - Mrs. Wright's conduct in organising care for JY and organising payment for his carers;
- d. Allegation #3 - breaching Covid guidance by entering JY's apartment in non-emergency situations (to fix his TV) and by staying in JY's apartment longer than she needed to be there for (eg to make coffee for JY).

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60. The Tribunal therefore does not accept Mrs. Wright's case that the conduct for which she was dismissed related solely to Allegation #2.

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61. Second, the Tribunal is satisfied Mr. Lyne's reason for dismissing Mrs. Wright – and Ms. Martin for rejecting Mrs. Wright's appeal against dismissal - was genuinely because of the conduct identified. This is admitted in the Claimant's closing submissions ("*it is accepted that the Respondent held a genuine belief that the Claimant was guilty of the allegations which led to her dismissal*").

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62. Third, the Tribunal is satisfied that, looked at in the round, the Respondent conducted a reasonable investigation into the misconduct which led to Mrs. Wright's dismissal, ie an investigation within the band of reasonable responses at the time. The Tribunal reaches that conclusion on the following grounds:

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63. *Allegation #1* (£400 holiday cheque) – the Respondent obtained accounts of what happened from Mrs. Wright and AG, as well as background information from Mr. Henderson. AG confirmed Mrs. Wright's account of what happened and the fact the £400 cheque Mrs. Wright's husband wrongly cashed was discretely and covertly returned to JY in cash. So far as this allegation is concerned, there was no dispute about the facts (ie, what happened), nor was there a dispute about the fact that Mrs. Wright had failed to notify her employer at the time of this potentially serious incident as required under the Respondent's policies which Ms. Wright accepted she was aware of. The

Tribunal is satisfied no further investigation was reasonably required into this allegation, and Mr. Lyne could properly reach an informed view at the disciplinary hearing about (a) what had happened (Mrs. Wright's account of events was accepted) (b) whether what happened constituted misconduct on Mrs. Wright's part (neither Mrs. Wright nor her representative ever claimed her failure to report the incident had not breached the Respondent's policies or was not misconduct) (c) the appropriate finding and sanction in respect of this conduct.

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64. *Allegation #2* (performing duties outside House Manager's role – writing cheques for JY) – the Respondent raised this allegation with Mrs. Wright, who admitted writing out cheques for JY (because he was unable to) which JY (who had dementia) then signed. Mr. Lyne could properly reach an informed view at the disciplinary hearing about (a) what had happened (Mrs. Wright's account of events was again accepted) (b) whether what happened constituted misconduct (Mrs. Wright denied it was misconduct, but the Tribunal's view is that it was open to Mr. Lyne to conclude that writing out cheques for JY went beyond Mrs. Wright's job description and duties as House Manager and did leave JY, a vulnerable elderly adult, at potential risk of financial abuse , albeit it should be noted that it was never alleged, nor was there any evidence, that Mrs. Wright had sought to exploit JY this way, her motives at the time having been to assist JY in doing a task which he could not do himself) (c) the appropriate finding and sanction in respect of this conduct.

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65. *Allegation #2* (performing duties outside House Manager's role – coordinating JY's external carers) – the most important evidence uncovered supporting this allegation were a substantial number of messages which on their face strongly suggested that Mrs. Wright was directly involved in coordinating JY's carers and organising their payments for hours worked. Those messages were not brought to Mrs. Wright's attention during her investigation meeting, and it is fair to say they received almost no attention at the disciplinary hearing. However, Mrs. Wright was on notice that the Respondent relied upon them in support of this allegation, and had clear opportunities to state her case in

response to them at (a) the appeal hearing (b) after the appeal hearing when
was she given a further chance to comment, and in the Tribunal's view
unreasonably declined to comment on the substance of what those messages
suggested. Leaving aside those messages, Mrs. Wright was asked about this
5 allegation at her investigatory meeting and denied it. The Tribunal's view is
that Mr. Lyne and Ms. Martin could properly reach an informed view at the
disciplinary hearing and subsequent appeal about (a) what had happened (the
Tribunal's view is that it was within the band of reasonable responses for Mr.
Lyne and Ms. Martin to rely on the messages to conclude that Mrs. Wright
10 had been directly involved in organising JY's care and paying carers) (b)
whether what happened constituted misconduct (the Tribunal's view is that
Mr. Lyne and Ms. Martin were entitled to reach the view that what Mrs. Wright
had been doing went beyond her job description and duties as House
Manager) (c) the appropriate finding and sanction in respect of this conduct.

15 66. The Claimant's representative accepts the Respondent did have an
investigation meeting with care worker AG but criticises the way that meeting
was conducted on the basis that AG was not asked about Mrs. Wright's claim
that AG not her had been responsible for JY's care worker rota. The Tribunal
accepts that this might have been a reasonable line of inquiry to have
20 pursued, but concludes it was also within the band of reasonable responses
for the Respondent not to have pursued that line of inquiry: the substantive
allegation was clear; the Respondent had obtained Mrs. Wright's account of
what she had done (or in this case, not done); the Respondent had a
significant amount of documentary material which suggested that Mrs. Wright
25 had been involved in organising and paying for JY's care; nothing AG could
say would change what Mrs. Wright had said in those messages; and when
given two chance to comment on what those messages showed, Mrs. Wright
chose not to address their substance at all.

30 67. *Allegation #3* (failing to follow Covid guidelines). At the investigatory meeting,
Mrs. Wright confirmed she had entered JY's flat when he had asked her to, to
turn his TV off, and turn off his under-counter lights when he was panicking.
[141, 144]. Mrs. Wright accepted that at one point she had stayed in JY's flat

to make coffee – a plainly kind, well-intended humanitarian gesture but also a breach of Covid social distancing guidance at the time. The Tribunal is satisfied no further investigation was reasonably required into this allegation, and Mr. Lyne could properly reach an informed view at the disciplinary hearing about (a) what had happened (Mrs. Wright’s account of events was accepted) (b) whether what happened constituted misconduct on Mrs. Wright’s part (c) the appropriate finding and sanction in respect of this conduct.

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68. The Tribunal does not accept Ms. Brady’s investigation was flawed because in the Investigation Report she stated “*It is clear from the conversations and email trail that June had been heavily involved in Mr. Y’s care, and that she was dishonest regarding her level of involvement when asked in the investigation meeting.*” [119]. As investigating officer, Ms. Brady was not barred from expressing any personal opinion whatsoever about the matters she had investigated, and in this solitary instance all Ms. Brady had done was to state her view that she thought Mrs. Wright had deliberately understated the extent of her involvement in JY’s personal care. Importantly, Ms. Brady did not find Mrs. Wright to be a dishonest person. The Tribunal accepts Mr. Lyne made up his own mind about the extent of Mrs. Wright’s involvement in organising JY’s personal care arrangements, and was not materially influenced by Ms. Brady’s comment.

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69. The Tribunal does not accept that Mrs. Wright was given insufficient time to prepare for the investigation meeting and disciplinary meeting. It is not clear that Mrs. Wright needed any time at all to “prepare” for the investigatory meeting, given that the Respondent would likely want to hear her unrehearsed answers to the questions asked. So far as the disciplinary hearing is concerned, Mrs. Wright was asked whether she was content to proceed and she said she was. The Respondent cannot fairly be criticised for taking that assurance at face value.

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70. Fourth, the Tribunal finds that it was reasonable for Mr. Lyne and later Ms. Martin to have concluded that Mrs. Wright was guilty of the misconduct alleged, given (i) the investigation undertaken (ii) Mrs. Wright’s admissions

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about her own conduct (iii) Mrs. Wright's failure to put forward any satisfactory alternative explanation of what her documented messages showed.

71. Fifth, the Tribunal is satisfied it was within the range of reasonable disciplinary sanctions open to it at the time for the Respondent to have dismissed Mrs. Wright for the conduct referred to in Allegations #1-3 collectively (and to the extent relevant, for Mrs. Wright to have been dismissed for the conduct relating to Allegation #1 and Allegation #2 on a 'stand alone' basis). Homeowners at Conachar Court are of retirement age, some quite elderly, and some suffering from dementia. Mrs. Wright was the Respondent's sole employee on site. It was important for the Respondent to have in place a member of staff who could be trusted to follow company procedures to document gifts from homeowners and ensure no financial exploitation of homeowners took place. Mrs. Wright provided no explanation to her employer of why she had not documented her receipt of a very large gift from JY or its subsequent return (in kind) to JY. Writing out cheques for JY, when JY had dementia, exposed Mrs. Wright – and through her, the Respondent – to the risk of allegations of improper payments having been made which would be difficult for Mrs. Wright or the Respondent to rebut in the absence of a clear audit trail in the Respondent's files documenting every cheque she had written out for JY. The Respondent's disciplinary policy gave as an example of gross misconduct "*handling homeowners' financial affairs*" [66]. Mrs. Wright's job description as House Manager empowered her to facilitate the provision of services to homeowners, but it did not authorise Mrs. Wright to directly involve herself in the organisation of care for JY or the payment arrangements for JY's carers. The Tribunal formed the view that Mrs. Wright was (and is) a basically honest, caring person guilty of a degree of naivety when it comes to her conduct at work. It would be obvious to most people – but apparently not to Mrs. Wright – that if she was going to write out cheques for JY to sign, that at an absolute minimum she would need to maintain an independent record of all such cheques stating the date, the payee, the amount, and the reason for the payment. Mrs. Wright did not keep such records, and a note in the stub of JY's chequebook would not be adequate (it could easily get lost).

72. Sixth, the Tribunal is satisfied that the Respondent conducted a basically fair disciplinary and dismissal procedure in this case:

- a. the Respondent had a written disciplinary and dismissal policy, a copy of which was provided to Mrs. Wright;
- 5 b. the Respondent conducted a reasonable, prompt investigation into Allegations #1-5;
- c. different people carried out the investigation and the disciplinary hearing;
- d. Mrs. Wright was informed of, and exercised, her right to be accompanied at the disciplinary hearing and subsequent appeal;
- 10 e. Mrs. Wright was notified in writing of the allegations she would have to answer at the disciplinary hearing, and was provided with the supporting evidence;
- f. Mrs. Wright was given the opportunity to state her case and present evidence at both the disciplinary hearing and the appeal hearing;
- 15 g. Mrs. Wright was dismissed by a manager who had the authority to do so;
- h. Mrs. Wright was informed in writing, in detail, of the reasons why she was being dismissed and why her appeal against dismissal was unsuccessful;
- i. Mrs. Wright was given, and exercised, her right of appeal;
- j. the disciplinary hearing was held reasonably promptly after the conclusion
20 of the investigation;
- k. the appeal hearing was conducted reasonably promptly following the outcome of the disciplinary hearing.

73. The relevant ACAS Code of Practice did not bar the Respondent from advertising Mrs. Wright's post after her dismissal. Although Mrs. Wright's
25 closing submissions claim her appeal was simply a box-ticking exercise, it is

clear from Ms. Martin's letter dismissing the appeal [342-346] that each of Mrs. Wright's grounds of appeal was given careful consideration.

74. Seventh, the Tribunal rejects Mrs. Wright's case that her dismissal was unfair because the Respondent relied on various WhatsApp and text messages as evidence in support of Allegation #2 in breach of her Article 8(1) right to respect for her private and family life, her home and her correspondence. First, the relevant messages did not relate to Mrs. Wright's private or family life, her home, or private correspondence but to the care arrangements for Conachar Court homeowner JY and the payments to be made to carers for that care. Second, the Tribunal does not accept that Mrs. Wright had a reasonable expectation of privacy in respect of those messages – had JY himself wished to see them, it is difficult to see how Mrs. Wright could plausibly argue he had no right to do so. Third, the Respondent obtained the messages not covertly or in an underhand way from an electronic device belonging to Mrs. Wright but from a third party recipient of those messages who had raised concern about JY's care. Fourth, the Respondent had a legitimate interest in reviewing those messages, namely, to determine whether Mrs. Wright's involvement with JY had overstepped the permissible boundaries of her role as House Manager at Conachar Court. Fifth, given their contents, the Respondent acted reasonably in relying upon those messages to substantiate its concern that Mrs. Wright had been organising care for JY and been involved in making arrangements for the payment of his carers. The Tribunal rejects the submission that "*These messages were not relating to matters concerning the Claimant's employment ... It did not relate to the Claimant's job as House Manager.*" Sixth, if there was an interference in Mrs. Wright's Article 8(1) rights requiring justification under Article 8(2), the Tribunal is satisfied that the Respondent's interference with those rights was permissible in this case as a proportionate step "*for the protection of the rights and freedoms of others*", those others being principally JY and, to a lesser extent, the Respondent itself.

75. Eighth, the Tribunal rejects the submission that "*the Claimant ... was not given the opportunity to comment on all evidence which was used in the decision to*

dismiss her.” This complaint concerns the WhatsApp and text messages, which were raised at the appeal hearing, and raised again after the appeal hearing, and on neither occasion did Mrs. Wright engage in any meaningful way with what the text of those message suggested she was doing. Anticipating that response, the Claimant’s submissions state “*this did not rectify the error in the process as the Claimant had lost confidence in the process and believed at that stage that the issue had already been determined.*” The Tribunal does not accept this line of reasoning – if the flaw is that Mrs. Wright was not given the opportunity to comment on the messages at the investigatory or disciplinary stage, that error was demonstrably rectified when Mrs. Wright was given the opportunity to comment on the message at and after the appeal hearing. Her reasons for choosing not to do so are a different matter.

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76. Ninth, for the reasons stated above, the Tribunal is satisfied that Mrs. Wright’s dismissal was within the band of reasonable responses open to the Respondent based on the evidence before it at the time, hence was not unfair. Mrs. Wright’s complaint of ‘ordinary’ unfair dismissal is not well founded.

77. Tenth, although the following matters do not arise given the Tribunal’s finding that Mrs. Wright was not unfairly dismissed, the Tribunal states below what its findings would have been had these matters arisen for determination:

a. the Claimant’s conduct in relation to Allegations #1-2 – but not Allegation #3 - was culpable blameworthy conduct which did cause or significantly contribute to her dismissal – on that basis, the Tribunal would have made a 90% reduction in the size of any compensatory award;

b. if there were procedural defects in the disciplinary and dismissal process which resulted in Mrs. Wright’s dismissal, there is a strong chance that Mrs. Wright would still have been dismissed had a fair process been followed – on that basis, the Tribunal would have made a 90% reduction in the size of any compensatory award;

c. the Tribunal would have determined that it was just and equitable not to make any compensatory award for unfair dismissal on the grounds that entirely separate from the index conduct which led to her dismissal, Mrs. Wright accepted that a master key at Conachar Court had been lost while she was away on holiday which she failed to report to the Respondent. To her credit, and slightly to the Tribunal's surprise, Mrs. Wright accepted in her oral evidence that her conduct in respect of this matter was gross misconduct. In plain English, Mrs. Wright was living on 'borrowed time' after the master key incident, and the only reason she had not been dismissed before the time she was actually dismissed was because this prior incident had not yet come to light.

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Employment Judge:
Date of Judgment:
Date sent to parties:

A Tinnion
02 March 2022
04 March 2022

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