



EMPLOYMENT TRIBUNALS

Claimant: «Sally Greatorex»

Respondent: «Presentation Sisters Care Centre»

Heard remotely on CVP:

On: 9 March 2022

Before: Employment Judge Omambala QC

Representation

Claimant: Ms King-Owen

Respondent: Mr Taylor

RESERVED JUDGMENT

The Claimant's claim of unfair constructive dismissal pursuant to sections 95 and 98 of the Employment Rights Act 1996 succeeds. The Claimant was unfairly constructively dismissed.

The Claimant contributed to her dismissal by her conduct and this is reflected in a reduction to the compensatory award of 20%.

It is just and equitable to increase any award payable to the Claimant by 15% by reason of the Respondent's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

The Respondent is ordered to pay the Claimant the sum of £9,899.15.

Comprising a basic award in the sum of	£7,087.00
Loss of statutory rights	600.00
Loss of earnings less contributory fault	£ 920.96
Uplift @ 15%	£1,291.19

REASONS

Introduction

1. The Respondent is a nursing and residential care home in Matlock, Derbyshire, owned and managed by the Presentation Sisters, a Catholic religious order. It

provides a range of activities and therapies to its residents who are older adults. The Claimant began work at the Care Centre as a Care Assistant when she left school at sixteen in 1995. By the time her employment with the Respondent ended the Claimant was working as a Housekeeper and had been employed for twenty-six years.

Claims

2. The Claimant brings a claim of unfair constructive dismissal. On 28 July 2021 ACAS was notified under the early conciliation procedure. The early conciliation certificate was issued on 8 September 2021. The Claim Form was presented on 21 October 2021. The ET3 was received by the tribunal on 23 November 2021.

3. The hearing was conducted via CVP. The Claimant attended the hearing and gave evidence. She was accompanied by Ms. Jacqueline King-Owen who represented her and gave evidence on her behalf. The Respondent was represented by its chairman of trustees, Mr. Steve Taylor. I heard evidence from three witnesses for the Respondent: Melanie Marsden, Housekeeper, Jayne Carnall, Care Centre Manager and Matthew Bird, Residential Care Manager. I was referred to documents in an agreed bundle during the course of the hearing.

Preliminary Matters

4. Ms. King-Owen advised the Tribunal that the Claimant has a mild learning disability and a speech impediment. She explained that the Claimant had difficulty reading, understanding paperwork and difficulty coping with change and stressful situations. In the context of the hearing this meant the Claimant might experience difficulty concentrating, absorbing information and understanding what was being asked of her.

5. With the agreement of the parties the following reasonable adjustments were made to the tribunal process:

- Witnesses and representatives would be called by their first or preferred name
- All participants would use uncomplicated language where possible
- Questions asked would be short and clear
- We would take a ten-minute break after each hour of hearing time
- The Claimant and any other witness could ask for additional breaks as necessary.

Issues

6. The issues in the case were agreed with the parties at the start of the hearing. The Claimant alleges that the Respondent's treatment of her in investigating a grievance brought against her by a colleague, entitled her to resign and bring a claim of constructive dismissal. The Respondent disputes that there has been a dismissal.

7. The agreed issues are: -

- (1) Has there been a dismissal within the meaning of section 98(1) (c) of the Employment Rights Act 1996 ("ERA")?
- (2) If there was a dismissal has the Respondent established the principal reason for that dismissal?

- (3) If so, was the dismissal fair or unfair within the meaning of section 98(4) of ERA?
8. It was agreed that in order to decide this case I have to decide
- 8.1 Whether the Respondent breached the terms of the Claimant's contract of employment by doing the following things: -
- (1) Failing to state that the Claimant's suspension was a neutral act;
 - (2) Failing to identify a person to provide pastoral support to the Claimant whilst she was under investigation;
 - (3) Failing to clarify to the Claimant the status of a meeting which she was required to attend on 19 July 2021;
 - (4) Concluding a disciplinary investigation into allegations against the Claimant without interviewing her;
 - (5) Informing the Claimant that it would be considering a sanction of summary dismissal if the allegations against her were proved;
 - (6) Referring to a previous disciplinary matter in correspondence with ACAS and the employment tribunal.
- 8.2 Whether, any of the alleged breaches amount to a breach of an express term of the contract?
- 8.2.1 If so, was the term breached a fundamental term so that the Claimant was entitled to treat the contract as being at an end?
- 8.3 In its disciplinary investigation of the Claimant and/or by doing all or any of the things set out at paragraph 8.1 has the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the relationship of trust and confidence which must exist between employer and employee?
- 8.4 Did the Claimant resign in response to the Respondent's breach?
- 8.5 The Respondent does not suggest that the Claimant affirmed her contract after the alleged breaches and before resigning.
9. In relation to remedy the issues it is agreed I must determine are: -
- (1) What financial losses did the dismissal cause the Claimant?
 - (2) Is there a chance that the Claimant would have been fairly dismissed anyway, if a fair procedure had been followed?
 - (3) If so, should the Claimant's compensation be reduced? If so, by how much?
 - (4) Did the ACAS Code of Practice on Disciplinary and Grievance procedures apply?
 - (5) Did the Respondent unreasonably fail to comply with it by conducting a flawed and unfair disciplinary process?
 - (6) Did the Claimant unreasonably fail to comply with it by refusing to failing to attend the resumed disciplinary hearing on 23 July 2021?

- (7) If so, is it just and equitable to increase or decrease any compensatory award payable to the Claimant? By what proportion up to 25%?
- (8) What basic award is payable to the Claimant, if any?
- (9) Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?
- (10) Would it be just and equitable to reduce the compensatory award because of any conduct of the Claimant before the dismissal? If so, to what extent?

Findings of Fact Relevant to the Issues

10. The Claimant was first employed by the Respondent as a healthcare assistant in the Care Centre in 1995. She became a Housekeeper in 2013.

Terms and Conditions of Employment

11. Document 5 in the Hearing bundle is a statement of the terms and conditions of the Claimant's employment. It was signed by the Claimant on 6 June 2013 and counter-signed by Ms. Carnall on 10 June 2013.

12. Paragraph 10 of the terms and conditions document sets out the notice provisions. The Claimant was entitled to receive one week's notice for each year of service up to a maximum of twelve weeks' notice after twelve years' service. The Claimant was required to give one month's notice of her intention to leave employment.

Paragraph 11 states: "The Disciplinary Procedure is given in the Staff Handbook."

Paragraph 12 states: "If you have a grievance about your employment, you should raise it in the first instance with your immediate manager. If the matter remains unresolved there is a formal grievance procedure which can be found in the Staff Handbook."

Finally, paragraph 14 states that employees are expected to familiarize themselves with a number of documents including the Staff Handbook and the policies and procedures file.

The Staff Handbook

13. The Staff Handbook which was updated in May 2020 was document Six in the hearing bundle. Its introduction states that it gives an overview of the terms and conditions of [your] employment. At page 6.4 the Handbook states: "Further detailed policies and procedures which may or may not be mentioned or referenced as part of this document but which still form part of your conditions of employment with us are included with this handbook."

Background

14. The Respondent and its employees faced the challenge of sustaining its business and maintaining the health and safety of its residents and staff during the Covid-19 pandemic. As a result of the efforts of its employees the Respondent did not have a single case of Covid-19 infection amongst its residents.

15. The Respondent described the Claimant as an extremely reliable employee with a very good understanding of all aspects of housekeeping and infection prevention control measures. The Claimant worked well with colleagues and on her own. She was well liked by residents of the Centre.

16. At the time the Claimant left the Respondent's employment she had a clean disciplinary record. The Claimant had received a final written warning in 2012 which had remained on her disciplinary record for twelve months. No further disciplinary incidents had been reported or raised with her since that time.

Allegations

17. Mrs. Carnall told me that on 29 June 2021 the Respondent received a written report from a member of staff at the Presentation Sisters Convent that a member of the housekeeping team, Melanie Marsden, had been seen distressed and crying. The staff member wished to remain anonymous but noted a change in Mrs. Marsden's behaviour saying that she had become anxious and withdrawn. I have not been shown the original written report and the author was not identified in evidence before me.

18. Ms. Carnall approached Mrs. Marsden to discuss the report that had been received. Mrs. Marsden told her that she was being harassed and bullied but did not wish to tell her by whom. Ms. Carnall offered Mrs. Marsden two options to try and resolve the situation. The first was mediation with a facilitator; the second was the use of the Respondent's grievance procedure. Mrs. Marsden took some time to consider her options. She wrote a grievance letter which is dated 4 July 2021 and appears at document 9 in the agreed bundle. On 7 July 2021 she raised a formal grievance by providing that letter to Ms. Carnall. In her grievance Ms. Marsden identified the Claimant and Jackie Boswell, another housekeeper as the colleagues who had bullied and harassed her.

19. Mrs. Marsden's grievance letter stated that

"events which have taken place over a period of 4 months ...have created a hostile & offensive working environment. I have been verbally abused, insulted & asked very personal questions which are meant to humiliate, offend & intimidate in a very hostile manner which I feel is degrading. I would like to formally complain about the harassment & victimisation I endure on a daily basis which has become more persistent over the last several weeks. The harassment I endure whilst carrying out my duties has now reached the point that I have to take action due to the stress these actions are having on my life as a whole both at work & whilst reflecting on them at home. At times the bullying is incessant and is totally unnecessary."

20. In her evidence to me Mrs. Marsden explained that she had been experiencing symptoms of menopause and that some of her colleagues had made unkind and hurtful remarks about this. She said that she had been made to feel uncomfortable by innuendoes about her age and appearance. This left her feeling stressed and uncomfortable and impacted on her home life.

21. In evidence Mrs. Marsden said that the Claimant and Ms. Boswell were equally responsible for the behaviour which she regarded as harassment. However, when she was interviewed by Ms. Carnall Mrs. Marsden told the Respondent that she believed that the Claimant was manipulated by Ms. Boswell and behaved differently when she was not around.

22. Mrs. Marsden's grievance letter identified two specific incidents in which the Claimant had been involved. The first on 28 April 2021 when the Claimant was alleged to have sworn at her line manager, Anthea Shantz. The second on 28 June 2021 when the Claimant was alleged to have made comments about Mrs. Marsden's age and tried to lift her dress up. The Claimant is alleged to have argued with her about whose turn it was to use the staff room to get changed. When Mrs. Marsden had changed her clothes and was putting on lipstick the Claimant is alleged to have said that she looked like a prostitute.

23. The Claimant denied the first incident. Ms. Shantz did not give oral evidence to the Tribunal. Although I have been taken to a number of written statements from Ms. Shantz none mention this alleged incident. Ms. Carnall confirmed that no action was taken by Ms. Shantz against the Claimant in relation to any alleged incident. I also note that the conduct in question was not directed to Mrs. Marsden but to another Respondent employee.

24. In her evidence to the Tribunal the Claimant accepted that on 28 June 2021 she had spoken to Mrs. Marsden as they and other colleagues were waiting to get changed. The Claimant said that she did not shout at Mrs. Marsden but said that she had tried to lift up the corner of her dress. She described her actions as "a bit of fun" and said that "if she had told me to stop, I would have stopped straightaway." The Claimant said that she did not call Mrs. Marsden a prostitute but did remark, "you know what they say about red lipstick." When Mrs. Marsden asked her "what do they say?" the Claimant replied that prostitutes wear it. The Claimant said that her comment was meant as a joke and a bit of fun and that she thought Mrs. Marsden knew that. In her statement the Claimant said that she and Mrs. Marsden had a laugh together and she had never received the impression that she was taking things too far.

25. I accept evidence contained in witness statements from Respondent employees that jokes and personal comments were made in the workplace and were generally made and received with good humour. I also accept evidence from her work colleagues that the Claimant "takes banter too far on occasions" and tends to think that "everything is a laugh." One observed that the Claimant "had no filter." I note that the Claimant's line manager had not taken up these issues with her, nor as far as the evidence before me indicates did any other Respondent employee, manager or trustee.

26. I find that the Claimant did lift up Mrs. Marsden's dress. I accept her evidence that she did not expose Mrs. Marsden's underwear. I find that Mrs. Marsden was upset, humiliated and offended by the Claimant's actions and did not see them as a joke.

27. I find that the Claimant did not call Mrs. Marsden a prostitute although that is how Mrs. Marsden interpreted her comment. I accept that the Claimant made her comment in an ill-judged attempt at humour. Mrs. Marsden did not find her comment funny and was upset and offended by it.

28. Having received Mrs. Marsden's grievance letter Ms. Carnall suspended the Claimant on 7 July 2021.

29. Ms. Carnall told the Claimant that she had received an allegation of harassment and bullying against her and another housekeeping staff member. Ms. Carnall told

the Claimant that the allegation was a very serious one and that she would need to interview staff members. Ms. Carnall told the Claimant that she was being suspended on full pay so that she could conduct an investigation and witnesses could speak freely without fear of recrimination. She explained that after staff members had been interviewed the Claimant would either be asked to return to work or interviewed to answer questions under the caution of a possible disciplinary sanction. Ms. Shantz' witness statement records that Ms. Carnall asked the Claimant if she understood this and the Claimant said "yes."

30. Ms. Shantz witnessed the suspension and escorted the Claimant to her locker to retrieve her coat and bag. In her witness statement Ms. Shantz described the Claimant as shocked and said the Claimant asked her what she had done wrong. At that time Ms. Shantz said she was not aware of the facts of the allegation.

31. Ms Carnall confirmed the Claimant's suspension by letter which appeared at document 10 in the agreed bundle. The suspension letter enclosed a copy of the Respondent's disciplinary procedure and instructed the Claimant not to make any contact with staff members. It stated that any such contact "would be interpreted as harassment."

The Respondent's Disciplinary Procedure

32. The parties agreed that the relevant disciplinary procedure was document 6 in the agreed bundle. It states that allegations should be investigated by the most appropriate manager who is not directly involved with the incident being investigated. It provides that a report should be prepared which outlines the facts of the case. That report should be submitted to the appropriate senior manager/Director who will decide whether further action is required.

33. The procedure indicates that in most circumstances where serious misconduct is suspected it will be appropriate to set up an investigatory meeting. However, it does provide that "if there is irrevocable evidence of gross misconduct the employee will be cautioned to attend a disciplinary meeting with a possible sanction.

34. At that meeting which should be chaired by the senior manager/Director accompanied by a senior member of staff to act as witness evaluator and minute taker, the manager would present the findings of the investigation in the presence of the employee who has been investigated. The procedure provides for the investigating manager to gather the version of events from the employee suspected of misconduct by way of cross examination. The Chair and the senior member of staff would give the employee a chance to state their case before adjourning the case. The decision makers would then discuss the case and decide whether to take no further action against the employee; to recommend counselling for the employee or to proceed to a disciplinary hearing. Once that decision has been made the parties should be brought back and informed which option has been chosen.

35. Thus, the Respondent's disciplinary procedure permits a decision to be made to proceed to a disciplinary hearing following on immediately from the investigatory hearing provided that the following specified criteria are met: -

- The employee has been informed by letter that the investigatory meeting may turn into a disciplinary hearing and that she has the right of representation.
- The employee has been informed by letter that the incontrovertible evidence gathered will mean that the employee will present their evidence under the caution of a disciplinary sanction
- The employee has been told in advance what the nature of the complaint is and had time to consult with a representative
- All the facts have been produced at the investigatory hearing and the manager/Director is in a position to decide on disciplinary action.
- The manager has informed the employee and their representative that the hearing would now become a formal disciplinary hearing, where a sanction may be given and invite them to say anything further in relation to the case.

The Investigation

36. Ms. Carnall conducted the disciplinary investigation by speaking to a number of employees. No particular explanation was provided as to why Ms. Carnall undertook the investigation when she had also received a complaint about the Claimant and spoken to Mrs. Marsden about her grievance. Ms. Carnall told me that Ms. Shantz who line managed both the Claimant and Mrs. Marsden was not capable of conducting the disciplinary investigation.

37. Ms. Carnall told me that she spoke to individuals named by Mrs. Marsden. She typed out what the employees said in their interviews and then sent them a copy of her notes and asked them to sign if they agreed that the notes were an accurate record. I was taken to signed statements from four employees: Mrs. Marsden, Kim Taylor, Kelly Taylor (who are sisters) and Libby Adams.

38. On 13 July 2021 Ms. Carnall wrote to the Claimant to tell her that she had completed her investigation and required her to attend a disciplinary meeting on 19 July 2021 [document 13]. The letter advised the Claimant that the meeting would “consider the question of disciplinary action against you with regards to: Harassment- single and pair.” It did not enclose a copy of the Harassment and bullying policy but it did advise the Claimant of her right to be accompanied by a work colleague to trade union representative. Ms. Carnall enclosed statements taken from the Claimant’s colleagues with her letter which also referred to enclosing her findings from the interviews. [document 12.1] Ms. Carnall did not prepare a report which outlined the facts of the case.

39. The letter informed the Claimant that “given the severity of the act of gross misconduct, the possible consequences arising from this meeting might be summary dismissal.

40. Ms. Carnall’s letter to the Claimant did not explicitly state that she had concluded that the evidence of gross misconduct was incontrovertible. She did not advise the Claimant that she would be attending the meeting to be cross examined so that the question of what disciplinary sanction would be imposed could be decided.

41. At the Tribunal Ms. Carnall explained that the reference to having concluded her investigation in the letter was a reference to having concluded the investigation

of the grievance from Mrs. Marsden's point of view. In her evidence to the Tribunal Ms. Carnall stated that she had found irrefutable evidence of gross misconduct and intended to question the Claimant about her intentions and understanding of her behaviour. Ms. Carnall accepted that she had concluded that the Claimant had committed gross misconduct in advance of the disciplinary meeting and the purpose of the disciplinary meeting on 19 July 2021 was for her to decide on what disciplinary sanction was appropriate.

42. Ms King-Owen is the Claimant's friend. In her evidence Ms. King-Owen described the Claimant as being very distressed and frightened at her suspension. Because the Claimant was concerned that the terms of her suspension letter meant that she could not speak to any person employed by the Respondent without being deemed guilty of harassment, Ms. King-Owen contacted Ms. Claire Buttle, a work colleague of the Claimant on 15 July 2021 on her behalf. She asked her to attend the disciplinary meeting with the Claimant on 19 July 2021.

Disciplinary Meeting: 19 July 2021

43. Ms King-Owen helped the Claimant to write a statement for the disciplinary meeting which the Claimant signed [document 16]. Ms. Buttle attended the meeting on 19 July 2021 with the Claimant.

44. Ms. Carnall told me that she had prepared some questions to ask the Claimant at the meeting on 19 July 2021. Ms Carnall asked Mr. Bird to attend the disciplinary meeting on 19 July 2021 to observe and to take notes. His notes are at document 17 of the agreed bundle. I accept that they are a fair and accurate summary of what took place on 19 July 2021.

45. Mr. Bird's evidence was that at the start of the meeting the Claimant handed out copies of her statement and asked Ms. Carnall what her status was. Ms. Carnall replied that she was not sure at this stage and wanted to ask the Claimant some questions first.

46. Ms. Carnall asked the Claimant if she wanted her to read her statement first. The Claimant said she did. As Ms. Carnall began to read the statement she said that the Claimant had made derogatory statements and counterclaims about her colleagues which was fine but that she had also made a derogatory statement about her.

47. In her statement the Claimant alleged that Ms. Carnall had told her to get a life and lose some weight when she had gone to her when she was struggling with her mental health during the pandemic. Ms. Carnall described that statement as "an outright lie." Mr. Bird noted that Ms. Carnall "was clearly upset and hurt about this." Ms. Carnall confirmed in evidence to the Tribunal that she was upset by the content of the Claimant's statement and concerned that the Claimant was trying to suggest that she had a vendetta against her.

48. Mr. Bird recorded that "Both Sally was getting angry and defensive and Jayne was upset by what Sally had written." Ms. Carnall told the Tribunal that she felt that she might be unable to be fair to the Claimant if the hearing went ahead that day. Ms. Carnall therefore asked if the meeting could be reconvened the following week once both sides had "cooled off." The Claimant conferred with Ms. Buttle and agreed that the meeting should re-convene the following Friday.

49. Ms. Carnall wrote to the Claimant on 20 July 2021 [document 18]. She said that having read through the Claimant's statement she wanted to formally interview her at the resumed hearing. Her letter explained that the interview would be the conclusion of her findings and the Claimant would then be advised in writing of what the next stage might be.

50. On behalf of the Claimant it was suggested that Ms. Carnall's letter was evidence of her back-tracking once the flaws in the process she had carried out had been pointed out to her. Ms. Carnall denied this and stated that she was trying to be fair to the Claimant. I find that Ms. Carnall recognised that she had failed to follow the Respondent's disciplinary procedure and her response was an attempt to mitigate her failure. The statement in the grounds of resistance that no decision or judgment had been made by 19 July 2021 is at odds with the evidence before me and I reject it. I prefer the oral evidence of Ms. Carnall that she had decided that the Claimant had committed gross misconduct and the purpose of the hearing on 19 July was to enable her to ask questions of the Claimant and decide what sanction to apply.

End of Employment

51. The Claimant replied by letter dated 22 July 2021. She told Ms. Carnall that she had taken advice regarding her employment rights and did not want to put herself "through a witch hunt and flawed disciplinary process." She said she had made the decision to resign with immediate effect. The letter also advised the Respondent that she would be pursuing a complaint for constructive dismissal and compensation for the stress and anxiety that Ms. Carnall's behaviour had caused her.

52. Ms Carnall acknowledged the Claimant's letter on 9 August 2021 and confirmed that she would be paid until 22 August 2021.

53. The Claimant obtained new employment as a Housekeeper under a zero hours contract with the New Bath Hotel on 26 July 2021. Her hourly rate of pay was £8.91 but she did not receive enhanced rates for Sunday working and she did not receive travel expenses. The Respondent had paid the Claimant travel expenses of £25 per week. On 28 December 2021 the Claimant obtained permanent employment as a Housekeeper at Bakewell Cottage subject to satisfactory completion of a three-month probationary period. She is contracted to work 29 hours per week and receives £9.75 per hour.

Law

54. Section 95(1) (c) of the Employment Rights Act 1996 states that there is a dismissal when the employee terminates the contract of employment with or without notice in circumstances where she is entitled to terminate without notice by reason of the employer's conduct.

55. In order to claim constructive dismissal, the employee must establish that:

- there was a fundamental breach of contract by the employer
- That breach caused the employee to resign
- The employee did not delay too long before resigning.

56. If the Claimant does establish that there has been a dismissal, I bear in mind that a constructive dismissal is not necessarily an unfair dismissal. In exceptional cases it is possible for the employer to show a potentially fair reason for dismissal.

57. It is for the employer to show the reason for dismissal. The question of whether a dismissal is fair or unfair is determined by applying the provisions of section 98(4) of the Act which states: -

“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.”

Conclusions

58. I find that the Respondent’s Disciplinary Procedure was incorporated into the Claimant’s terms and conditions of employment.

Breach of Express Term?

59. The disciplinary procedure does not require the Respondent to state that suspension is a neutral act nor does it require the Respondent to identify contact details for a support person or to provide pastoral support to a suspended employee. Accordingly, the Respondent’s failures did not breach any express term of the Claimant’s contract of employment.

60. I find that the Respondent was required to identify the nature of the meeting the Claimant was required to attend on 19 July 2021. I find that the Respondent did so in its letter to the Claimant dated 13 July 2021 where it described the meeting as a disciplinary meeting.

61. The Respondent’s disciplinary procedure permitted it to move to a disciplinary meeting without having conducted an investigatory meeting with an employee suspected of misconduct or serious misconduct if there is irrevocable evidence of gross misconduct or if the employee was caught in the act. The procedure notes that in most circumstances it will be appropriate to set up an investigatory meeting.

62. I find that Ms. Carnall’s investigation did not produce irrevocable evidence of gross misconduct so that an investigatory meeting with the Claimant could properly be dispensed with. I therefore find that the Respondent’s actions in this regard amount to a breach of the terms and conditions of her employment.

63. I do not find that the Respondent breached any term of the Claimant’s contract of employment by informing her that summary dismissal was a possible consequence of the disciplinary meeting. It is considered good practice to inform employees of the possible sanctions that may flow from disciplinary allegations which are made against them.

64. I do not find that the Respondent breached any term of the Claimant’s contract of employment by referring to spent disciplinary sanctions in correspondence with ACAS or the employment tribunal after her employment had come to an end.

65. I find that the Respondent did not breach a fundamental term of the Claimant's contract of employment in dispensing with an investigatory meeting with her. I have regard to paragraph 5 of the ACAS Code of Practice on Disciplinary and Grievance Procedures which recognises that establishing the facts of potential disciplinary matters can be done by the collation of evidence by the employer for use at any disciplinary hearing.

Breach of Implied Term?

66. I have concluded that the way in which the Respondent handled the disciplinary process in relation to the Claimant did breach the implied term of trust and confidence. The Claimant was entitled to expect and to receive a proportionate and fair investigation and a fair hearing. The manner in which the Respondent conducted itself prevented this. In particular, Ms. Carnall's admitted determination that the Claimant was guilty of gross misconduct before she had been given an opportunity to state her case precluded any possibility of a fair dismissal.

67. Under its own procedures there was no adequate reason to dispense with an investigatory meeting with the Claimant. No investigation report was produced albeit that the Claimant was furnished with copies of witness statements that had been collected. The Claimant was not informed that she would not be interviewed nor that her case would proceed straight to a disciplinary hearing.

68. Further, the investigating manager was Ms. Carnall, who was also the decision maker. Ms. Carnall had decided that the Claimant was guilty of gross misconduct having spoken to Mrs. Marsden and other employees but without having given the Claimant an opportunity to state her case. Ms. Carnall was also to be the person who decided on the appropriate sanction despite having expressed a view on the severity of the act of gross misconduct in both the letter suspending the Claimant and the letter inviting her to a disciplinary hearing. The Claimant stated in her evidence that she had no confidence that Ms. Carnall would treat her fairly. I find that the Claimant's concerns were warranted. This was particularly in light of Ms. Carnall's observed reaction to reading the Claimant's witness statement on 19 July 2021.

69. I have considered the Respondent's size and administrative resources but I have not been provided with any satisfactory explanation as to why Ms. Carnall needed to be the grievance investigator, the disciplinary investigating officer and the disciplinary hearing decision maker. In particular, I was presented with no evidence as to why another manager such as Mr. Bird could not have conducted the disciplinary meeting on 19 July 2021.

70. I consider that in all the circumstances of this case, viewed objectively, the Respondent did conduct itself in a manner which was likely to destroy or seriously damage the relationship of confidence and trust between employer and employee without reasonable or proper cause.

71. The Respondent did not seek to argue that the Claimant resigned for any other reason than the matters which she alleged were breaches of the terms of her contract. I accept the Claimant's evidence that she felt compelled to leave a job she enjoyed and did well because of the way in which Ms. Carnall had gone about investigating complaints made against her. The Respondent did not seek to suggest that the Claimant had affirmed her contract of employment or waived its breach.

72. I therefore find that the Claimant has been dismissed within the meaning of section 95(1) (c) of the Act.

73. The Respondent has denied that there has been a dismissal and did not put forward a reason for dismissal in the alternative.

74. I have therefore concluded that the Claimant's constructive dismissal is unfair.

Remedy

75. The Claimant has suffered financial loss as a result of her dismissal. It is agreed that the Claimant was paid £1200 per month net by the Respondent and received travel expenses of £25 per week. In her role at the New Bath Hotel the Claimant received £1130 per month net and no travel expenses. She currently earns an average of £1182.20 per week net.

Loss of Earnings

76. The Claimant was paid to 22 August 2021. Her loss of earnings is therefore calculated as follows:

23 August 2021 to 28 December 2021

Difference in earnings: £1200 less £1130 = £70 per month

4 months at £70 = £280.00

Travel expenses @ £100 per month

4 months at £100 = £400.00

January 2022 to 9 March 2022

Difference in earnings £1200 less £1182.20=£17.80 per month

3 months at £17.80 £53.40

Travel expenses

3 months at £100 £300

77. I accept the Claimant's unchallenged evidence that her new employment is subject to a 3-month probationary period which she has yet to complete. I award losses for a further month in the sum of £117.80 from the date of the hearing to encompass the remainder of the probationary period. Thereafter I assume that the Claimant will be earning a wage comparable to that which she received whilst employed by the Respondent.

78. The parties have agreed that the Claimant is entitled to receive a basic award in the sum of £7,087.00

79. I award a sum of £600 in respect of loss of statutory rights.

80. Having regard to all the evidence I have read and heard and the nature of the flaws in the Respondent's disciplinary process I do not consider that there was a realistic chance that the Claimant would have been fairly dismissed had a fair procedure been followed.

81. The Respondent did not comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures because it conducted a flawed investigation and disciplinary process. I increase the award payable to the Claimant by 15% to reflect this.

82. I do not consider that the Claimant unreasonably failed to comply with the Code by failing to attend a resumed disciplinary hearing, or by failing to raise a grievance about the deficiencies in the Respondent's investigation of complaints against her. I have found that the nature of the Respondent's treatment of the Claimant amounted to a breach of the implied term of trust and confidence and in these circumstances, I do not consider it just and equitable to reduce any award payable to the Claimant.

83. I do not consider that it would be just and equitable to reduce the basic award payable to the Claimant given her length of service, her good working relationships with colleagues and the failure of the Respondent's managers to draw concerns about her conduct to her attention.

84. I do consider that the Claimant's admitted conduct towards Mrs. Marsden to be blameworthy. I consider that it contributed to her dismissal. Accordingly, I reduce the amount of the compensatory award by 20%.

Employment Judge **Omambala QC**

Date 14 March 2022