RESERVED JUDGMENT **Case Number: 2404985/2019**
Code: V

THE EMPLOYMENT TRIBUNALS

Claimant: **J**

Respondent: **K**

Heard at: Manchester (by cloud video platform) On: 22-26 February 2021
Deliberations in Chambers: 8 March 2021

Before: **Employment Judge AM Buchanan (sitting alone)**

Representation:

Claimant: **Mr D Flood of Counsel**
Respondent: **Mr N Grundy of Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

IT IS THE JUDGMENT of the Tribunal that:

1. The claim of ordinary unfair dismissal advanced pursuant to sections 94/98 of the Employment Rights Act 1996 ("the 1996 Act") is well founded and the claimant is entitled to a remedy.

2. There will be a reduction of 60% from any compensatory award for unfair dismissal to which the claimant is entitled under the doctrine in Polkey -v- A E Dayton Services Limited 1988.

3. There will be a reduction of 75% from any compensatory award to which the claimant is entitled to reflect her contributory conduct which led to her dismissal. The question of any deduction for contributory conduct from any basic award for unfair dismissal to which the claimant may be entitled will be determined at the remedy hearing.

4. The claim of wrongful dismissal advanced pursuant to Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the 1994 Order") is dismissed.

5. The claim of unpaid holiday pay is dismissed on withdrawal by the claimant.

6. The claim of failure to allow the claimant to be accompanied at a disciplinary hearing pursuant to section 11 of the Employment Relations Act 1999 (“the 1999 Act”) is adjourned generally.

7. A remedy hearing will take place at the Manchester Employment Tribunal on Wednesday 7 April 2021.

REASONS

Preliminary Matters

1. By a claim form filed on 26 April 2019 the claimant brings various claims before me. First, a claim for unfair dismissal pursuant to sections 94/98 of the 1996 Act. Secondly, a claim of wrongful dismissal in respect of notice pay relying on the provisions of Article 3 of the 1994 Order. Thirdly, a claim of unpaid holiday pay and finally a claim of failure to allow the claimant to be accompanied to a disciplinary hearing pursuant to section 11 of the 1999 Act. The claim form was supported by an early conciliation certificate on which Day A was shown as 1 March 2019 and Day B 28 March 2019. There are no time issues in relation to this matter.

2. On 2 July 2019 the respondent filed a form of response in which it denied all liability. The time for filing the response was extended by the Tribunal by a letter dated 3 June 2019 until 2 July 2019.

3. Standard directions were issued, and the matter was listed to be heard on 20 September 2019. At the request of the parties that hearing was postponed and re-listed for 5 and 6 December 2019. The parties made a joint application to vacate those dates and to re-list for five days given the number of witnesses and documents to be heard and considered. The case was therefore re-listed for 22-26 February 2021 and came before me on those dates.

4. An application was made by the respondent for various orders to be issued under the provisions of Rule 50 of Schedule I of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The Tribunal determined that those matters should be considered at a private preliminary hearing in person. That hearing came before Employment Judge Ainscough on 12 November 2019. The result of that hearing was confirmed in an Order dated and sent to the parties on 4 December 2019 in which anonymisation of the parties and various witnesses and other matters was provided for and also a restricted reporting order was made to ensure that the names of the parties and the name and location of the home at which the parties worked (“the Home”) and the identity of the governing local authority were not to be reported. An application for the final hearing to be in private was refused. The basis of the Orders was to protect the identity and right to privacy of the residents of the Home - which is a home for vulnerable young people. The hearing was conducted in accordance with that order and this Judgment reflects the provisions of the Anonymisation Order and the Restricted Reporting Order (“the Orders”) which were signed on 16 January 2020 and sent to the parties on 28 January 2020. In this judgment, any relevant character in the narrative not protected by the Orders is named once and thereafter referred to by initials. I have moved away from the letters “A” and “B” and refer to the claimant as “J” and the respondent as “K”.

5. At the outset of the hearing, counsel for the claimant sought leave to adduce a supplemental witness statement ("the Statement") from the claimant to deal with her response to the allegations which she had faced whilst employed by the respondent and which had led to her dismissal. The Statement contained 57 paragraphs over 12 pages. The respondent objected to the admission of the Statement. I took time to consider. I determined that it was right on balance to admit the Statement which served to bring together the claimant's evidence on matters of central importance to the various claims advanced and which were bound to be the subject of cross examination. I decided that any unfairness to the respondent in so doing could be properly dealt with by adjourning the case at around 12 noon on the first day of the hearing to enable full instructions to be taken on the Statement, by allowing the respondent to ask supplemental questions of its witnesses when they came to give evidence and by indicating that the respondent could, if it wished, seek to apply to recover its costs occasioned by the late admission of the Statement – without giving any indication at all as to whether any such application would be successful.

Witnesses

6. In the course of the hearing, I heard from three witnesses for the respondent namely:
6.1 The dismissing officer ("SS"),
6.2 The appeal officer ("RCEO") and
6.3 Jeanette Swift ("JS") – a service manager employed by the respondent who was the line manager of the claimant.
6.4 In addition I had before me a statement from the Head of Human Resources ("HR") for the respondent. This witness was not called. I read her statement but where conflict arises with the evidence from witnesses who were called before me, I generally prefer the testimony from the witnesses who were called and cross examined.

7. In addition for the claimant I heard from:
7.1 The claimant.
7.2 The claimant's sister who had supported her at the appeal hearing.
7.3 Caroline Mathers ("CM") a former colleague of the claimant who managed a home close to the Home.

Documents

8. I had a bundle before me which extended to over 517 pages. Any reference in these reasons to a page number is a reference to the corresponding page within that agreed trial bundle.

The Issues

9. The issues in this matter were identified at the outset of the hearing as follows:

The claim of ordinary unfair dismissal: sections 94/98 of the 1996 Act.

9.1 Does the respondent establish the reason for the dismissal of the claimant as being related to her conduct and thus falling within section 94(2)(b) of the 1996 Act?

9.2 In particular, does the respondent prove on the balance of probabilities that the dismissing officer held a genuine belief in the misconduct of the claimant?

9.3 If so, were there reasonable grounds for that belief?

9.4 In particular, did the respondent carry out as much investigation into the matter as was reasonable?

9.5 Did the respondent follow a reasonable procedure in moving to dismiss the claimant?

9.6 In particular, if there was a failure to follow a reasonable procedure at the disciplinary hearing, did the decision of RCEO at the appeal hearing to re-hear the matter and then the subsequent re-hearing itself correct any such failure?

9.7 In particular, did the respondent follow the provisions of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 ("the ACAS Code")?

9.8 Did the decision to dismiss the claimant summarily fall within the band of a reasonable response open to a reasonable employer?

9.9 If the decision to dismiss the claimant was unfair, did the claimant contribute to her dismissal by culpable or blameworthy conduct?

9.10 If the decision to dismiss the claimant was unfair, would the claimant have faced a fair dismissal and if so when? - namely the issue in **Polkey -v- A E Dayton Services Limited 1987 ICR 142.**

The claim of wrongful dismissal: Article 3 of the 1994 Order.

9.11 Does the respondent prove on the balance of probabilities that the claimant was guilty of misconduct which amounted to a fundamental breach of her contract of employment with the respondent?

The claim of failure to allow the claimant to be accompanied to a disciplinary hearing: Section 11 of the 1999 Act.

9.12 Was the claimant denied the right to be accompanied by a companion of her choice at any of the investigatory or appeal hearings attended by her during the process which led to her dismissal in January 2019?

9.13 If so, was the hearing in question a disciplinary hearing as defined by section 13(4) of the 1999 Act?

9.14 If so, did the chosen companion meet the requirements of section 10(3) of the 1999 Act?

Findings of fact

10. Having listened to the evidence and the way in which that evidence was given and having considered the documents to which I was referred on the balance of probabilities I make the following findings of fact:

General findings

10.1 The claimant was born on 3 December 1971. She began work for the respondent company on 18 April 2008 and by 2016 had risen to become a registered care home manager. The claimant was summarily dismissed on 7 January 2019. The home ("the Home") at which the claimant was manager was for four female young people aged between 11 and 17. The claimant was line managed at the relevant time by JS in her capacity as Service Manager. In that role, JS was responsible for several homes in her region. In turn, JS was managed by the regional director for the region in which the homes were situated. In this case the relevant regional director was SS. In turn, SS was answerable to RCEO.

10.2 The respondent company operates 38 homes. These homes offer a range of services including specialist therapeutic services and care for young people with emotional and behavioural difficulties. The respondent offers homes for young people aged between 11 and 17 and also has specialist provision catering for younger children aged between 8 and 11 years. The young people who live in the homes operated by the respondent are some of the most vulnerable young people in the country. Young people are placed in the homes by various local authorities which are individually known in relation to each young person as "the Commissioner" given that the authority commissions the respondent to provide care for a young person who generally will have been placed in the care of the local authority by a court. A young person can only be removed from a home, once accepted, at the request of the relevant local authority or, if necessary but exceptionally, at the request of the respondent. If the request emanates from the respondent, it needs to be approved by the relevant service manager and by the head of service for the region in which the home is situated. The respondent is regulated by OFSTED in relation to the running of its homes. The respondent company's annual turnover is in the region of £24m.

10.3 To ensure the managers of the various homes and other employees know what is expected of them, the respondent has various policies in place. These policies include a Dignity at Work Policy (pages 34-36) and a Code of Conduct Policy (pages 70-82). The respondent also has its own disciplinary policy (pages 63-69). I have considered these policies and make further reference to them below where relevant.

10.4 In the Dignity at Work Policy, at section 3.2, bullying is described as *"offensive, intimidating, malicious or insulting behaviour and/or an abuse or misuse of power that is meant to undermine, humiliate or injure the person on the receiving end".* In the Code of Conduct the duties expected of employees towards the children in the care of the respondent are set out. Section 4 of that policy states at paragraph 4.1 *"All…. employees are accountable for the way in which they exercise authority, manage risk, use resources and protect children and young people from sexual, physical and emotional harm. Children have a right to be treated with dignity and respect".* The code makes it plain that employees must always act and be seen to act in the best interests of a child in the care of the respondent. The code also sets out guidance on the exercise of professional

judgement and makes it plain that, when dealing with circumstances where the code provides no specific guidance, the overriding rule or requirement is that employees *"are expected to make judgements about their behaviour in order to secure the best interests and welfare of the children in our care. Such judgments, in these circumstances, should always be recorded and shared with a senior manager"* (page 71).

10.5 The claimant had written terms and conditions of employment (pages 83-94) and a job description in which the main purpose of her job role was said to be: *"As registered manager, you will ensure that good quality care is delivered to the children and young people in the home. You will hold the registration and have overall responsibility for the home. You will have responsibility for recruitment, training, supervision, placements, care plans, audits, budgets and working with multidisciplinary teams".*

10.6 The claimant had a period of absence from work from August 2017 until she began a phased return to work in December 2017. During that five-month period, the claimant's deputy Mel Black ("MB") acted up as manager of the Home. When the claimant returned to her duties, MB reverted to her role as deputy. There were some difficulties in the relationship between the claimant and her deputy on her return and the claimant raised these difficulties with her line manager. I infer that MB had some difficulty adjusting back to her deputy role. MB had been praised by the respondent for the way she carried out her duties during the period of the claimant's absence and she was considered a success in the role of acting manager. MB gave notice to leave the respondent's employment in July 2018 and left in August 2018. In the event when the claimant was dismissed in January 2019, MB was appointed by the respondent as her successor, and she remains in post to this day.

<u>Events leading to the suspension of the claimant.</u>

10.7 At a planned monthly supervision meeting between JS and SS in September 2018, JS raised, for the first time, issues in relation to the conduct of the claimant and how the claimant was not responding to her in her role as line manager. Unknown to SS at the time, there had previously been a friendly relationship between JS and the claimant, and they had socialised outside the work setting. That friendly relationship cooled somewhat in mid-2018. I infer that the difficulties in the working relationship, to which JS referred in her meeting with SS in September 2018, was in large part due to the cooling of that friendship outside the workplace. I accept the contents of paragraph 8 of the witness statement of JS as giving an accurate description of the changing relationship: *"My relationship with the claimant did change to an extent. …I did question her more as I didn't think she was handling situations very well. She became pre-occupied with how I managed her and would take no guidance or direction".*

10.8 In early October 2018 a young person ("YP2") was accepted into the Home by the respondent. The young person stayed at the Home for only some 10 days and during that 10-day period some 5 days were spent by her in hospital. The behaviour of YP2 was particularly challenging and YP2 did not get on with the other young people in the Home. The behaviour of YP2 before she was admitted to hospital had been the subject of discussion between the claimant and the representatives of the local authority culminating in an email from the claimant at 13:00 on 11 October 2018 (page 117). I infer from this message that the claimant was not happy with the prospect of YP2 remaining in the Home. Later in the day on 11 October 2018, an incident occurred when YP2 returned to

the Home from hospital and her behaviour quickly became particularly challenging. YP2 threatened another young person in the Home with violence and also the staff. The claimant challenged YP2 and YP2 absconded from the Home. The claimant liaised with representatives of the commissioning local authority who attended the Home and there was discussion as to whether YP2 was in fact suited to the Home at all. After some discussion, the decision was taken that YP2 was not suited to the Home and should be removed. The claimant understood that this decision came from the officials of the local authority. I infer from the fact that the local authority refused to pay a notice payment for YP2 that, through its officers, it believed that it was the claimant who said YP2 could not be accommodated at the Home. I am satisfied that it was the claimant's wish to see YP2 removed no matter where responsibility for the decision lay. By 6pm on 11 October 2018, YP2 was still at large, and the police had been informed to look out for her. The claimant left the Home for the day giving an instruction that if YP2 returned she was not to be admitted. In fact, YP2 was returned to the Home by the police in the early hours of 12 October 2018 and the member of staff on duty allowed her to enter and she went up to her room – all contrary to the instruction given by the claimant. When the claimant heard of this at around 6:00am on 12 October 2018, she went to the Home (which was only a short distance from her own home) and remonstrated with the police who had brought YP2 back saying that she should not have been brought back. Confusion ensued with the police officers apologising for bringing YP2 back to what they thought was YP2's home (as it was). The claimant instructed a member of her staff to wake up YP2 and to require her to leave and so at around 8:00am YP2 was woken up and, in some distress, was made to leave the Home with the police who then escorted her to the police station before taking her to other accommodation. This was a very unusual set of circumstances but, on any account, YP2 was badly served by the adults charged with her care on that occasion. The events of those two days eventually formed the subject matter of the second allegation raised by the respondent against the claimant in disciplinary proceedings. The claimant reported that YP2 had left the Home at the request of the local authority. The behaviour exhibited by YP2 was challenging but not unusual in the terms of the behaviour often exhibited by the young people looked after by the respondent.

10.9 The claimant had liaised with JS about YP2 on 11 October 2018. The claimant told JS that she did not think YP2 was safe to be allowed to return to the Home. JS gave an instruction to the claimant that she was not to give an instruction that YP2 should be stopped from returning to the Home. On 12 October 2018 JS contacted the claimant for an update and was told that YP2 had left the Home and was on her way to other accommodation. I accept that the impression given by the claimant to JS was that that had been the decision of the local authority. In reaching this finding I have considered the contents of text messages passing between the claimant and JS at the time (pages 203-204). I accept there were telephone conversations between the claimant and JS and I accept that in those conversations JS was attempting to calm a highly charged situation.

10.10 Some days later an issue arose as to the circumstances in which YP2 had left the Home as the commissioning local authority refused to pay to the respondent fees for the period of notice which should have been given by the local authority to remove YP2 from the home. The local authority took the view that YP2 had left the Home at the request of the respondent and thus no notice pay was payable. RCEO became aware of the situation and asked SS to investigate. A meeting took place on 17 October 2018 between SS and JS and the claimant. At that meeting, the claimant stated that the local authority had agreed that YP2 should not return to the Home and took the view that the discharge of

YP2 was at the request of the local authority. SS reported back to RCEO who took the matter up with the local authority. In the event the local authority refused to make any payment for the notice period. At that stage, the respondent considered the matter closed. No disciplinary action of any kind was taken or contemplated by the respondent against the claimant at that time in respect of the circumstances in which YP2 left the Home. The record at page 107-108 details the challenging behaviour of YP2 on 11/12 October 2018.

10.11 In mid-October 2018, the claimant contacted SS with complaints about the line management style of JS. SS asked the claimant if she wished to raise a formal grievance, but the claimant made it plain that she did not wish to do so in an email dated 29 October 2018 (page 133B). The claimant sent to SS a lengthy email (pages 128-131) detailing her interaction with JS, but it was not clear to SS what the issues of concern were. However, it was apparent to SS that there were working relationship difficulties and so he wrote both to JS and to the claimant suggesting that they should arrange a formal supervision meeting to explore the concerns raised. The claimant was due to go on annual leave at the end of October 2018 and return to work on Monday 12 November 2018.

10.12 Shortly before the claimant went away on holiday, but before her supervision meeting with JS, the claimant had a meeting with her staff and with the manager of a nearby home CM to discuss the arrangements for the Home during the claimant's absence. At this meeting, the claimant discussed the staff rota for the period of her absence, and it appeared from the documents produced that all shifts were covered. In fact, the claimant had said to at least one member of her staff that she would put her down to cover a shift fully knowing that that member of staff could not cover the shift in question but that she would take her name off the rota after the meeting. Arrangements were made for the Home to function during the claimant's absence, but the claimant did not want staff from other homes coming into the Home whilst she was away. During the holiday period, it had been arranged that JS would visit the Home more frequently than usual in order to cover for the claimant's absence and to ensure that CM had some support in the additional duties which she was undertaking.

10.13 The suggested supervision meeting between the claimant and JS took place shortly before the claimant's holiday. At that meeting, there was what JS described in her witness statement at paragraph 14 as a *"frank discussion".* The claimant made it clear that she did not want staff from other homes in the Home whilst she was away. I accept that this is so because that explains the claimant's conduct in seeking to show a fully covered rota at the meeting referred to above. I accept the evidence of JS to the effect that the claimant was confrontational and somewhat aggressive at times towards JS in the course of that meeting. However, the meeting ended on an ostensibly friendly basis with both participants agreeing to reflect during the claimant's period of leave. JS produced a note of this meeting which took place on 30 October 2018 (pages 133F-G) which I accept was made shortly after the meeting and is an accurate account.

10.14 Whilst the claimant was away on holiday and during one of her visits to the Home on 5 November 2018, JS was approached by a member of staff JM with concerns and complaints about the claimant and her conduct and behaviour as manager of the Home. I accept that the matters raised with JS were not prompted by her but came unprompted from JM.

10.15 JS reported those matters to SS who took advice from the respondent's HR Department. SS asked JS to provide him with a statement of the matters of concern and this was provided to him (pages 132-133) and ultimately formed appendix eight of the subsequent investigation report. JM described the claimant as controlling and manipulative who could not cope with any challenge from the young people living in the Home and who wanted to see them out of the Home if they argued with her and she referred to YP2 in that context. JM recounted how she was required by the claimant to wake up YP2 on 12 October 2018 and tell her that she had to leave the Home there and then because the claimant had made it very clear that YP2 was not able to stay in "*her home".* JM referred to the claimant having purchased a card for another young person who was leaving the Home on an earlier occasion which the claimant had described as a "*Fuck Off Card".* JM complained in relation to another young person that the claimant had not followed the plan for ignoring confrontational behaviour. JM described how the claimant had favourites amongst the staff and that the claimant would not hold back from being critical of and then openly discussing staff who had left the Home and, in particular, she referred in that context to MB.

10.16 JM gave JS the names of other employees and former employees who had similar concerns and JS asked JM to get them to contact her. JS was contacted by MB and a meeting took place between them on 8 November 2018 which JS recorded at pages 140-142 which later became appendix 6 of the investigation report. MB provided a litany of complaints about the claimant which included the claimant's alleged negative attitude towards certain members of staff and her favouritism towards others and how the claimant's attitude had allegedly changed when she returned from the lengthy period of sick leave in 2017.

10.17 JS also met with another former member of staff SH who also complained about the claimant's attitude towards her and other staff. JS asked SH to confirm matters in writing and this she did in a lengthy seven-page statement sent to JS on 15 November 2018 (pages 145-151). This document became appendix seven to the investigation report. SH began her statement by saying working at the Home was like psychological warfare and nobody knew from one day to the next who was going to be in trouble or what mood the claimant was going to come in with. SH alleged that the claimant bullied some staff and showed great favour to others. SH was the first member of staff to raise concerns about the way another young person in the Home (YP1) had been treated. It was alleged that on one occasion the claimant had instructed SH to tell YP1 that all her privileges were to be removed which SH considered to be unfair, upsetting and sad. SH recorded how, on 15 September 2018, the claimant had instructed that YP1 was not allowed in any of the rooms in the Home except her bedroom and that YP1 had been made to eat her dinner on a landing downstairs at a small table and not with the other young people in the Home. This information in respect of YP1, and other information which eventually came to light, formed the basis of the third allegation levelled against the claimant at the subsequent disciplinary hearing.

10.18 JS met with another former member of staff CD2 on 9 November 2018 and received various complaints from her which she noted and sent through to HR for the benefit of the Investigation Officer on 19 November 2018. This document (page 154) eventually formed the basis of appendix nine to the investigation report.

10.19 On 9 November 2018 JS was travelling with Emma Wilcock ("EW") the respondent's Head of HR. A discussion took place in relation to how to deal with the allegations which had been made against the claimant and EW advised that, because of the serious nature of the allegations, it would be appropriate to suspend the claimant on her return from holiday to allow a detailed investigation to take place. It was agreed that the claimant should be telephoned on her return from holiday and told to attend the head office of the respondent on the first day of her return to work rather than attend at the Home. JS duly advised the claimant on 11 November 2018 to attend head office on 12 November 2018 and, in accordance with instructions from EW, did not tell her the reason for the instruction.

10.20 On 12 November 2018 the claimant went to the head office and attended a meeting with JS and an HR officer ("HRO"). It was explained to the claimant that serious allegations had been made against her and that she was to be suspended on full pay pending those allegations being investigated. A letter dated 12 November 2018 (pages 137-138) was duly sent to the claimant advising her of serious allegations which if substantiated could constitute a serious breach of the respondent's disciplinary code. The allegations which it was said needed to be investigated were:
"Inappropriate treatment of staff as highlighted by current staff and ex members of staff when you have been recently on annual leave, which if substantiated could constitute bullying.
On the 11th of October 2018 you made an inappropriate management decision whereby you instructed staff not to allow a young person to enter the home".
The claimant was told not to contact her colleagues during her suspension and if she needed HR support she was told where to obtain it. The claimant was invited to nominate a person to be a "support person" for her during the investigation.

The Investigation and the production of the Report

10.21 As head of HR, EW commissioned another experienced care home manager from a different region namely Becky Sharp ("IO") to investigate the allegations raised against the claimant. In her role as investigating officer, IO was assisted by HRO and also by EW. I did not hear any evidence from IO or HRO. I read the statement of EW as set out above.

10.22 On 12 November 2018, when meeting with CM to hand over her laptop and keys for the Home, the claimant asked CM to act as her support person and this CM agreed to do at that stage.

10.23 The claimant was invited to attend a meeting with IO to discuss the allegations against her by a letter (page 143) dated 14 November 2018. The meeting was scheduled for 20 November 2018 and the claimant enquired whether she could bring her support person with her to the meeting and was told that she could not. The meeting duly took place on 20 November 2018 and lasted 4 hours. The meeting was attended by the claimant and IO and HEO. HEO took notes of the meeting (pages 157 - 190 inclusive). These notes were handwritten and were difficult to read throughout and in places illegible. A copy was sent to the claimant on the same day and the claimant asked immediately for a typed copy of those notes. A typed copy was not produced to the claimant until she received the Tribunal bundle. The meeting notes were typed in readiness for the appeal re-hearing before RCEO (below). The handwritten notes were also used at the

subsequent disciplinary and appeal meetings. The typed notes appear at pages 190A-190ZB.

10.24 At the meeting on 20 November 2018, the claimant was asked for her account in relation to the discharge of YP2 from the home on 12 October 2018. In addition, she was asked about record keeping in relation to YP1.The claimant was asked about the alleged instruction given by her that YP1 was not to eat dinner in the kitchen of the Home but on a table on the landing. The claimant denied ever giving that instruction but asked a question (page 190) as to whether that conduct would amount to gross misconduct. The claimant asked why these matters had not been raised with her earlier and she was told that the matters had only recently come to light because staff had said that they did not feel able to come forward earlier with the allegations. The claimant denied (page 190) failing to follow the agreed behaviour policies in relation to YP1. In relation to YP2, the claimant asserted that an officer of the relevant local authority Gail Mason ("GM") had taken the decision for YP2 to leave the Home. The claimant was asked about removing privileges from YP1 and denied that she removed all the privileges on one occasion as was alleged by SH. The claimant was asked about the allegations of bullying of members of her staff. The claimant denied the allegations and reiterated the concerns she had raised previously about the abilities of MB and the claimant denied the allegations advanced by MB. The claimant was asked to comment on the allegations made by JM in her statement and she denied the allegations. The allegations made by SH were discussed and denied. Towards the end of the long meeting, the claimant stated that she felt that she was the subject of a witch hunt and that the staff were colluding against her. IO asked the claimant if there were any members of staff that she wished IO to speak to in order to ensure she had a full and accurate picture and the claimant asked IO to speak to three other members of staff namely RJ, CD and NC. At the end of the four-hour meeting, the claimant commented that that had been a lot of information to take in all at once.

10.25 The IO set about interviewing the three people identified by the claimant and during the investigatory meeting. She interviewed RJ on 21 November 2018 and the record of that meeting (pages 191-192) eventually formed appendix 3 of the investigation report ("the Report"). RJ stated that she had never been asked to make YP1 eat in the hallway and, if she had been given that instruction, she would not have followed it. RJ is recorded as saying that she had heard YP1 had to have her dinner in the hall and that she had told the claimant she did not agree with her eating dinner in the hall. The claimant had replied that it would be different if she had thrown something at RJ. RJ stated that she felt the staff were scared of YP1 and the direction for her to eat in the hall had come from the claimant. RJ also stated that she knew that other staff had been told not to allow YP1 into any room other than her bedroom, but she had never received that instruction herself. She expressed the view that she did not think YP2 was a good fit for the Home because she was too streetwise, and she was too clever for the other young people living in the Home. She stated that she had had no difficulties with the claimant: she could be abrupt with people, but she found her a supportive manager. The claimant had a strong personality but had never acted in a bullying way towards RJ. She had heard staff discussing little disagreements but nothing more.

10.26 On the same day, IO interviewed CD and the record of that interview at pages 193-195 became appendix 4 of the Report. CD commented that the approach to YP1 had lacked consistency across the staff teams. She had been asked on one occasion to make

YP1 eat in the hall because she had been throwing things in the kitchen. She was told by the claimant to shut the kitchen down if YP1 was behaving badly and this had to be done quite often. She would often take food up to YP1's bedroom so she could eat her dinner there. In relation to YP2, CD stated that she recalled 11 October 2018 and that YP2 had threatened to kill another young person in the Home in her sleep because she had told the staff about YP2's razor blades hidden in her room. YP2 had left the Home and the claimant had told CD to report the matter to the police. The claimant had given an instruction that YP2 was not to be let back into the Home but in fact JM had let her back into the Home when the police brought her back at around 6:35am on 12 October 2018. CD had telephoned the claimant when YP2 returned. The claimant had spoken to the police officers and was difficult with them and was abusive and rude towards JM. When she came into the Home, the claimant asked for the numbers of the police officers and was abrupt with them, but subsequently apologised. She confirmed that GM had agreed that the Home was not the right place for YP2. CD stated that she had had no difficulties with the claimant, but the claimant could be rude to people and had an attitude towards certain members of staff and she had heard the claimant speak inappropriately about staff who had left the Home. She could see what people meant by their complaints about bullying but had had no difficulty herself.

10.27 On 22nd November 2018 IO interviewed NC and the record of that meeting at pages 196-198 subsequently became appendix 5 of the Report. NC confirmed that she had been told not to let YP1 into the kitchen and to put a computer table out in the hallway and for her to eat on that table. NC stated that his had happened often from the end of August 2018 and it was in response to YP1 throwing cups and drinks and yoghurts overstaff and other young people. The behaviour was managed by locking down the kitchen and, when she was behaving badly, the kitchen was locked more or less all the time. NC confirmed that when YP1 was behaving badly, there was an instruction that YP1 should not be allowed in any room except her own bedroom. YP1 did eat in her own bedroom and sometimes would not come out of her room even for her medication. The claimant was aware that YP1 was eating in her bedroom. NC stated that she did not know anything about the circumstances relating to the discharge of YP2 from the Home. She had had one problem with the claimant as a manager when she put her down to work a shift on 2 November 2018 when she had told the claimant she could not work that shift. The claimant had told her that it needed to look like the shift was covered before sending the rota to JS but said she would take NC off the rota after the staff meeting. NC stated that the claimant had not bullied her but that if the claimant did not like a particular member of staff, she made sure that they knew it and she would talk about members of staff behind their backs. She had not seen the claimant ignore staff but had seen the claimant ignore young people in the Home.

10.28 IO received from JS copies of text messages which had passed between the claimant and JS in relation to YP2 on 11 and 12 October 2018 (pages 203-204) and these were included in the Report. In one of the text exchanges the claimant wrote to JS (page 204): *"…Moreover I am not prepared to put CD in that position either totally irresponsible failing to safeguard all and potentially lose more staff".*

10.29 On 3 December 2018 (page 205) EW wrote to SS and JS and HRO updating them on the progress of the investigation which she had discussed that morning with IO. She advised that it had been decided the matters being investigated would proceed to a disciplinary hearing which they were proposing to hold on 18 December 2018 to be

chaired by SS. She made clear that the two allegations being investigated would stand and would be joined by a third investigation in relation to YP1. It was noted that the IO was beginning work on the investigation report. EW pointed out that the claimant had not been advised that the matter was progressing to a disciplinary hearing at that stage.

10.30 On 8 December 2018, IO sent a draft of the Report to SS and HRO. SS made comments on the Report and had input into it in an email he sent to HRO and EW on 11 December 2018 (page 237). He requested a meeting to agree what further work was required to pull matters together to make sure everything would be be ready for 18 December 2018.

10.31 During the course of the investigation, IO received information which concerned her in relation to the way that petty cash had been dealt with in the Home by the claimant and also how the staff management rota had been dealt with. The claimant was invited to attend a further meeting on 11 December 2018 to discuss those additional matters and that meeting took place on 11 December 2018 and was minuted (pages 212-220). Present at that meeting where the claimant, HRO (who was standing in for IO who was away) and a minute taker who produced typed written minutes shortly after the meeting.

10.32 At the meeting on 11 December 2018, the claimant raised again the issue that she had not received typed minutes of the meeting on 20 November 2018. At the outset of the meeting, HRO put to the claimant that IO had spoken to BS and BS had told her about difficulties with the claimant putting her down on shifts she did not wish to work. In fact, HRO was incorrect in saying that that conversation had been with BS as it had in fact been with NC (paragraph 10.27 above). The claimant was confused, and that confusion was not resolved until the claimant subsequently received the Report. The claimant denied saying that the rota needed to make it appear that all shifts were covered. The claimant was then asked about various issues in respect of the petty cash at the Home and gave her comments on the matters raised. No opportunity was taken to investigate with the claimant any of the matters raised in the interviews with CD, NC and RJ in respective YP1 and YP2. Subsequent to the meeting the claimant was sent a typed copy of the minutes which she returned with her comments on 12 December 2018.

10.33 On 17 December 2018 (page 236), EW made amendments to the draft investigation report and made suggestions for documents to be added to it. As late as 17 December 2018, IO was completing her investigation and in particular spoke to another member of staff who witnessed the discharge of YP2 on 12 October 2018 namely IJ (page 239). In addition, IO spoke to GM of the local authority (page 240) in which conversation she confirmed that YP2 was threatening to kill staff and young people and she agreed with the claimant that there was no way YP2 could stay at the Home. GM confirmed that as a family support worker she did not have authority to terminate the placement of any young person in a home. She stated that she liaised herself with the social care team at the time but did not think that the claimant herself had contacted that team herself (page 251).

The Report

10.34 The investigation report prepared by IO was finally completed on 17 December 2018 and extended to 18 pages (pages 266-271) and it had attached to it 32 appendices as detailed (pages 272-273). The terms of reference of the inquiry were set out and it was

noted that five allegations against the claimant had been investigated. The first four allegations (specifically detailed in paragraph 10.35 below) were taken forward to a disciplinary hearing, but it was decided that the fifth allegation in relation to petty cash did not merit taking forward. The Report set out the details of people who have been interviewed and various documents were annexed particularly in relation to YP1. The Report dealt with each allegation separately and set out the evidence which had been received and the claimant's response to that evidence.

10.34.1 The conclusion of IO in relation to allegation 1 was that the claimant had acted at times in an unprofessional manner and in a way which could constitute bullying towards her staff and that there was had been a breach of the section 8.1 of the Code of Conduct (page 73).

10.34.2 In relation to allegation 2, details were set out of the individuals interviewed and the conclusion reached was that the allegation had to be seen in the wider context of the entire incident but, that based on the evidence received, the discharge of YP2 was not managed effectively and the needs of YP2 were not central to any decision-making. There was no evidence to disprove that the placement was terminated without appropriate communication and as a result YP2 was left vulnerable and homeless and without adequate planning in place. Company policies in terms of notifying the service manager and head of service of a discharge and consultation about a discharge had not taken place. The evidence tended to show that the claimant had led JS to believe correct procedures had been followed when she knew that they had not.

10.34.3 In relation to allegation 3, it was noted that the treatment of YP1 which was criticised had lasted for some three weeks. The statements from SH and the interviews with NC, CD and RJ were noted. In addition, reference was made to an incident report on 19 July 2018 at appendix 12 of the Report which referred to the kitchen door being locked. Reference was made to an incident report on 11 September 2018 at appendix 13 which IO concluded, evidenced a lack of knowledge and support for staff around dealing with YP1. Reference was made to an incident report of 14 September 2018 at appendix 14 of the Report which recorded that the kitchen door was locked and that as a result, YP1 had kicked it. It was noted that the individual risk assessment for YP1 did not detail locking the kitchen door as a suitable risk reduction strategy and the placement plan for YP1 at appendix 11, including a behaviour support plan, did not detail a proper strategy to be used to manage the behaviour of YP1. The conclusion reached was that the staff were using inappropriate and unregulated methods of behaviour support when dealing with YP1's challenging behaviour. The locking of doors with a deprivation of liberty not only for YP1 but the other young people in the Home. This was not a recognised strategy in dealing with behaviours. Inadequate records had been kept of the methods used. It was commented that the practise of making YP1 eat meals in the hallway was discriminatory and abusive. The claimant's denial of the matters was noted.

10.34.4 In respect of allegation 4, it was concluded that the claimant had knowingly misled CM into thinking the Home was adequately staffed prior to her going on annual leave.

10.34.5 In relation to allegation five, which related to petty cash audits, it was concluded that that was not a disciplinary matter and should not proceed any further as a disciplinary matter.

10.34.6 The overall conclusion of the Report was that there was evidence to support the allegation that the claimant had acted in a way which could constitute bullying towards her staff. There was evidence to support that the correct procedures were not followed in respect of the termination of YP2's placement in the Home. There was no evidence to support the claimant's claim that the team manager was consulted by anyone with authority to terminate the placement. There was evidence that inappropriate methods and

strategies had been used to manage the challenging behaviour of YP1 and there was evidence that the claimant had knowingly misled her service manager into thinking the staff rota was adequately covered in her absence whilst on annual leave.

<u>The invitation to the Disciplinary Hearing.</u>

10.35 On 17 December 2018 (page 244-245), a letter was sent to the claimant advising that she was to attend a formal disciplinary hearing on 20 December 2018 to answer four allegations namely:

"Inappropriate treatment of staff as highlighted by current staff and ex members of staff whilst you have recently been on annual leave which, if substantiated, could constitute as bullying.
On the 11/10/2018 you made an inappropriate management decision whereby you instructed staff not to allow a young person to enter the home.
Inappropriate direction of staff members to use unsuitable behaviour support techniques in relation to YP1's behaviour.
Falsification of the rota, allowing senior management to believe that the rota was adequately covered prior to you going on annual leave. This was specifically in relation to NC and JM".
The claimant was told that the Report and appendices would follow and that she may dispute the evidence and provide her own evidence if she wished. The claimant was warned that, if substantiated, the allegations could amount to gross misconduct and she could face the penalty of summary dismissal. The claimant was told she could be accompanied to the meeting by *"a fellow employee or an accredited trade union representative".*

10.36 At around the same time, correspondence took place between the claimant and IO which clarified that the matters raised on the 11 December 2018 by HEO were allegations made by NC and not JM.

10.37 On 18 December 2018 at 14:53, HRO sent to the claimant and to SS a copy of the Report and the 32 appendices. On the same day at 18:15 (page 276) the claimant made an application to adjourn the disciplinary hearing *"given the sheer volume of documents you have provided …it does not seem reasonable or fair that I only have 24 hours to consider the content and my response".* A reply was sent by HRO on 19 December 2018 at 09:20 saying that that there had been a reasonable time frame for the claimant to review matters and asking her to confirm that she would attend the disciplinary hearing. In addition, the claimant was told by HRO at the same time that it was inappropriate for CM to accompany the claimant to the disciplinary hearing because CM had been overseeing the Home during the claimant's suspension and had been interviewed as part of the investigation into the claimant's conduct and thus was in a position of conflict.

10.38. In the Report, three of the four allegations against the claimant were worded somewhat differently:
The second allegation had the words "*regarding the discharge of a child"* inserted after the word "*decision".*
The third allegation read: "*You directed staff to use unsuitable behaviour support techniques in relation to YP1's behaviour. You failed to monitor staff practice effectively in terms of managing YP1's challenging behaviour".*

The fourth allegation read: "*You allowed senior management and HR to believe the rota was adequately covered prior to you going on annual leave; although you were aware that Natalie had declined to work additional hours on 2.11.18 leaving only JM on shift".*

10.30 On 20 December 2018 the claimant submitted a fit note to the respondent noting that she was unfit for work for 4 weeks due to an acute stress reaction (page 279) and advising that she would not as a result be attending the disciplinary hearing.

10.40 With evident reluctance the respondent agreed to adjourn the disciplinary hearing until 3 January 2019 and made it plain (page 285) that if the claimant did not attend that could mean that the hearing would proceed in her absence. On 21 December 2018, the respondent wrote to the claimant indicating an intention to refer her to occupational health (page 286). That referral never took place. On 21 December 2018, the claimant wrote to the respondent (page 286A) advising that her doctor had recommended she take a break and she had arranged to spend time with her family in Tenerife and would not return to the UK until 17 January 2019.

The Disciplinary Hearing and the Decision to Dismiss

10.41 Notwithstanding the claimant's absence, the disciplinary hearing went ahead on 3 January 2019. In attendance were SS, who chaired the hearing, HR0 who gave HR support and IO. The meeting began at 10:00am and lasted until 12 noon when SS adjourned to consider his decision. In that meeting SS went through the Report with IO and questioned the matters investigated and the conclusions reached. SS stated in evidence to me that IO was crucial for him at the hearing as and that he had subjected her to close questioning in respect of the Report. Having considered the matter, SS upheld all four allegations and decided that the claimant should be summarily dismissed.

10.42 A letter was sent to the claimant on 7 January 2019 (pages 298-301) which set out the conclusions of SS. He stated that a decision to proceed in the absence of the claimant was taken because the medical evidence provided did not specify that she was unable to attend a disciplinary meeting as opposed to being unable to attend work. The first allegation was upheld, and a brief rationale set out. The second allegation was upheld which concluded that the claimant had purposefully misled JS to believe that the correct procedures were followed to justify the claimant's decision to exclude YP2 from the Home. SS stated that the evidence suggested that the claimant did not want YP2 in the Home and that the placement was terminated without following the respondent's procedures. The third allegation was upheld. SS concluded that the claimant had instructed staff to use inappropriate and unregulated methods of behavioural support when managing YP1. He concluded that locking of doors was a deprivation of liberty and the practice of making YP1 eat meals in the hallway and in her bedroom was discriminatory and abusive and had not been properly documented. The fourth allegation was upheld, and the rationale set out. The fifth allegation was not preceded with. The mitigation which had been advanced by the claimant was noted. There was no mention of the claimant's length of service or disciplinary record. It was concluded that the four allegations constituted gross misconduct and the decision was taken that the claimant be summarily dismissed with effect from 3 January 2019. The claimant was advised of her right of appeal.

The Appeal Process

10.43 By letter dated 11 January 2019 (pages 303-305) the claimant appealed against her dismissal. There were lengthy grounds of appeal which were directed to procedural matters rather than matters of substance. The claimant raised the issue of not being allowed to have CM support her at the disciplinary hearing. She raised the issue of not receiving typed minutes from the investigation meeting on 20 November 2018 and the confusion over whether the allegations discussed on 11 December 2018 emanated from JM or NC. The claimant raised the short time given to her to digest the Report and that certain witness statements in the Report were not signed. The claimant noted that a document recording a conversation between CD and HRO included in the Report was incorrectly dated 14 February 2018 and other dating errors. The claimant raised the point that the staff at the Home had been informed on 4 January 2019 that she would not be returning to work but that she herself had not received the outcome letter until 7 January 2019.

10.44 The claimant was invited to an appeal meeting on 30 January 2019. The claimant wrote to the respondent on 25 January 2019 to say that she was still unwell and was not able to attend on 30 January 2019.The claimant began to be represented by her sister at this time. She asked that the appeal take place at a neutral venue away from the head office of the respondent and the respondent agreed to arrange for the appeal to take place at a hotel near Preston on 26 February 2019 but subsequently altered the date to Friday 1 March 2019. There was nothing sinister in the change of date. The appeal proceeded on 1 March 2019. In readiness for that appeal a lengthy statement which had been included in the Report from JS was signed and dated by her (pages 340-343). The meeting was minuted (pages 347-352). The meeting was chaired by RCEO supported by EW and the claimant attended and was supported by her sister. The meeting began at 9:30am and with breaks concluded at 3:10pm.

The Appeal Hearing

10.45 RCEO asked the claimant what outcome she wished from the appeal and the claimant stated that she wanted the respondent to admit the process leading to her dismissal was flawed and that, if it had been carried out properly, she would not have been found guilty of gross misconduct. The claimant stated that she did not seek a rehearing but just wanted an acknowledgement that the process had not been fair and reasonable. RCEO confirmed that he was not undertaking a rehearing but simply looking at the claimant's grounds of appeal and in all 16 points raised by the claimant in her grounds of appeal were discussed. These included the fact that the claimant had not received typed notes of the investigation meeting on 11 November 2018, that she had only been allowed a very short time to read and digest the Report, that witness statements had not been signed that she had been denied an adjournment of the disciplinary hearing between 3 January 2019. HRO was called into the meeting to answer various questions. The question of the representation of the claimant by CM was raised and attempts were made to contact CM by telephone to clarify her position, but these attempts were unsuccessful. The claimant was allowed the opportunity to sum up her case. At 2:25pm the meeting adjourned and at 3:00pm it reconvened and RCEO stated his view that the process had been conducted in a fair and transparent way but as the claimant had not been afforded the right to defend herself, he had decided that the matter should be reheard and that he would conduct the rehearing himself. The claimant stated she would take advice.

10.46 By a letter dated 5 March 2019 (pages 354-356) the respondent confirmed the outcome of the appeal and the decision that the matter should be re heard.

<u>The Rehearing of the Disciplinary Hearing</u>

10.47 On 14 March 2019, through her solicitors, the claimant wrote to the respondent (pages 357-358) saying that the decision to rehear was neither appropriate nor sensible and that the appeal hearing on 1 March 2019 should have been used either to uphold or dismiss the appeal. It was considered disproportionate and unfair to put the claimant through a rehearing and the claimant's trust and confidence in the respondent had been destroyed. It was made clear that the claimant would not take any further part in the disciplinary process.

10.48 Notwithstanding receipt of that letter, the respondent preceded with the rehearing and advised the claimant that the rehearing would take place on Tuesday 26 March 2019.The rehearing went ahead with RCEO chairing the meeting assisted by EW. IO attended to speak to the Report and JS attended as a witness for part of the hearing. RCEO explored each of the four allegations in turn with IO. RCEO asked IO whether there was any evidence of a witch hunt against the claimant and IO confirmed that she had not discovered any such evidence. She saw the situation as one member of staff having the courage to come forward to make disclosures which then opened the floodgates for others to come forward as well. IO stated that it was noteworthy that the claimant had asked that three members of staff be interviewed with a view to them supporting her, but they also had made allegations against the claimant. IO commented that it was clear from staff that the claimant ran a tight ship and closely managed the Home and referred to it as "*my home*". IO confirmed that she felt that the statements she had received from members of staff were truthful. IO commented that she had evidence that the claimant often apologised to staff for her behaviour but there was no evidence of the claimant reflecting and trying to improve that behaviour. JS confirmed that some members of staff were supportive of the claimant, but it was clear that she had favourites and would be different in her attitude to certain members of staff. RCEO investigated the second allegation in respect of YP2. JS confirmed that she had advised the claimant to allow YP2 back into the Home if she returned but it was clear that the claimant had issued an instruction that YP2 was not to be allowed back into the Home if she returned. JS confirmed that she wished to see YP2 returned to the Home on 11 October 2018. IO confirmed that she was satisfied that a clear instruction had been given to staff not to allow YP2 to enter the Home if she returned and that this was outside the process of the respondent and without the direction of management. In respect of allegation 3, IO confirmed that she had had evidence from three members of staff that the claimant had directed that YP1 was not allowed to eat anywhere other than her room or the hallway and that the kitchen was to be locked. In relation to allegation 4, an investigation took place as to the question of whether the rota was covered on 2 November 2018 and questions were asked of JS in relation to that matter.

10.49 RCEO took time to consider and on 28 March 2019 he wrote to the claimant with the details of his conclusions (pages 363-365). RCEO recorded that he had considered all the evidence and had concluded on balance that the claimant had committed the four allegations of gross misconduct at the claim it had been guilty of four allegations of gross misconduct referred to in the Report. It was concluded that there was a bullying culture within the Home created by the claimant and directed towards certain members of staff.

It was concluded that this amounted to a breach of the respondent's dignity at work policy. It was concluded in relation to allegation 2 that the claimant had failed to follow the appropriate procedures for seeking approval for the removal of YP2 from the Home and that the claimant had made a decision based solely on her own interests and not the interests of YP2 and that that brought the respondent organisation into potential disrepute. In relation to allegation 3, it was concluded that the claimant had instructed staff to marginalise YP1 and to treat her in a way which was outside the behavioural plans in place. RCEO concluded that this was likely to have significantly impacted on the emotional well-being of YP1. In relation to allegation 4, RCEO was concluded the claimant had knowingly breached company procedure by allowing only one member of staff to work alone on shift on 2 November 2019 whilst looking after two people in the Home. RCEO concluded that the four allegations were upheld and the decision to dismiss summarily was upheld. The claimant was made aware that RCEO would forward his conclusions to the Disclosure and Barring Service ("DBS") given the serious nature of safeguarding concerns which were raised and in addition, he would make his findings available to Ofsted.

10.50 In the event DBS (pages 471-472) advised the claimant no further action was being taken in relation to the matter as there was no relevant conduct or risk of harm.

10.51 The claimant instituted these proceedings on 26 April 2019.

The position in relation to the attendance of CM at the Disciplinary Hearing and the Appeal Hearing

10.52 A factual issue arises as to whether the claimant was potentially denied having her colleague CM support her at the disciplinary hearing scheduled for 20 December 2018 (which did not in fact proceed) and at the appeal hearing which took place on 1 March 2019. I received conflicting evidence. The witness statement of EW (from whom I did not hear) recorded that CM had contacted EW on 14 December 2018 saying she felt in a position of conflict in supporting the claimant at the disciplinary hearing then due to take place the following week and that EW had told CM that she would tell the claimant that CM would no longer be her point of support and that HRO would take on that role. In relation to the appeal hearing, EW recorded that on 11 February 2019, RCEO had met CM on other matters and CM had stated that she did not want to support the claimant at the forthcoming appeal. EW told CM to be clear with the claimant and then on 12 February 2019 received an email from CM (page 332) which states: "*Good evening both, Just to update I spoke to the claimant today to let her know that I will not be attending her appeal meeting as her support".* That evidence was broadly confirmed by RCEO at paragraph 20 of his witness statement. I did hear from RCEO and I found him an impressive witness.

10.53 On the other hand, I heard from CM. CM left the employment of the respondent on 28 March 2019 by her own choice shortly after the claimant. She recounted at paragraph 12 of her witness statement being told that she could not support the claimant at the disciplinary hearing as there would be a conflict because she was overseeing the Home during the claimant's suspension. She records a conversation the following day with EW and HRO when she was told that she could not support the claimant as she had been interviewed as part of the investigation. CM records at paragraph 14 of her statement that at a meeting with RCEO and EW in February 2019 she had been told she could not support the claimant at the appeal hearing. She wanted to support the claimant and

reluctantly agreed to tell her that she could not do so and wrote to the respondent to confirm she had spoken to the claimant to tell her so.

10.54 I did not find CM to be an impressive witness. She told me that she had given three months' notice to the respondent and left on 28 March 2019. She told me she gave notice in December 2018 and I can see no reason why CM would agree not to support the claimant if she wanted to support her. Her stated reason that she did not want to go against and upset SS and EW does not ring true when it is clear she had already stated that she was leaving the employ of the respondent and had another post to go to elsewhere. I take account of the fact that RCEO and the claimant both tried to contact CM during the hearing on 1 March 2019 to clarify her position, but she made herself unavailable. It is unlikely that RCEO would take that step if he had told CM that she was not to support the claimant. In any event, I can see no reason why the respondent through RCEO and/or EW would not wish CM to support the claimant and I conclude that it was CM who approached the respondent saying she did not wish to support the claimant. I can see no reason why CM would write the email at page 332 if she did not intend that to reflect her true position.

10.55 In any event the disciplinary hearing did not proceed in December 2018 and the claimant did not attend the hearing when it did take place on 3 January 2019. At the appeal hearing on 1 March 2019 the claimant was supported by her sister. I do not accept that the respondent denied the claimant her representative of choice. Rather I conclude that the representative of choice did not wish to undertake the support role.

Submissions

Claimant

11. On behalf of the claimant Mr Flood made oral submissions which are briefly summarised:

11.1 The respondent failed to follow the standards of fairness which are necessary where allegations of gross misconduct are concerned. In particular, there must be an impartial and open-minded investigation, fair and reasonable notice to the claimant of the allegations against her, every reasonable effort must be made to ensure the claimant is able to attend a disciplinary hearing and any such hearing should be logical, impartial and balanced. That equally applies to any appeal hearing. Those central pillars of fairness have not been followed in this case.

11.2 There was insufficient notice given to the claimant of the allegations against her to the extent that, even before the investigatory meeting on 20 November 2018, the claimant was already at a disadvantage. There were no typed notes produced of a four-hour investigatory hearing. After the investigatory hearing, further statements were taken but the claimant was not given the opportunity at any further meeting to make any response to them or to comment on them. The meeting on 11 December 2018 concentrated on what became allegation 4 but did not allow the claimant any opportunity to comment on the further statements relevant to allegation 3.

11.3 The lengthy investigation report was not served until 18 December 2018 very shortly before the disciplinary hearing and that did not amount to reasonable notice or a reasonable opportunity to consider the matter.

11.4 There was a refusal to allow an adjournment of the disciplinary hearing even during the currency of a fit note served by the claimant which clearly showed she was not fit to work. SS, as dismissing officer, had had involvement with an investigation into YP2 in October 2018 and also had dipped his toe into the investigation process before the Report was complete as appears from page 237. The refusal to adjourn the disciplinary hearing on 3 January 2019 compromised the claimant's ability to defend herself.

11.5 RCEO was conscientious in his role and in what he set out to do, but the effect of what he did was at best unfortunate. He did a thorough but a half-baked job. If he was to put right what had gone wrong with the procedure before the re-hearing, he needed to delve into matters in some detail, but he failed to do so. The RCEO cannot escape from the note on page 347 that at the time of the first appeal hearing on 1 March 2019, he did not know the full details of the case.

11.6 SS volunteered in cross examination that IO was key for him at the disciplinary hearing on 3 January 2019 and that she had pulled the case together for him. It must be that IO added information at the disciplinary hearing which was not in the Report and this must also be true of the ultimate appeal rehearing on 26 March 2019. Given the absence of the claimant, IO should have been limited to the contents of the Report. She did not do so as appears at pages 359-360 where she advances a potential rationale for what she characterised as inappropriate behaviour by the claimant. That process was grossly unfair to the claimant.

11.7 In relation to allegation one, SS and RCEO accepted that what had been written in the Report as having been said by members of staff, whom they did not see, had been written by them in good faith. No crosscheck of any kind was made to the myriad documents which were available to check on those matters. There was no corroboration of acts of gross misconduct by bullying: at worst, there was corroboration that the claimant had been somewhat off-hand with members of staff but that is not gross misconduct. The IO has not attended the Tribunal to be cross examined yet she produced the Report which was egregiously one-sided as it failed to include exculpatory evidence such as the full details of the statement from RJ at page 191. The contents of pages 101-106 as to the events in respect of YP2 find no mention in the Report. It is clear that IO found what she wanted to find in respect of the conduct of the claimant.

11.8 In respect of allegation two, it is clear that the officer of the local authority GM was the one who was making the decisions as to what should happen to YP2. The claimant expressed her opinion but was led by those whom she considered had the authority to make the decision in respect of the placement of YP2. In addition, the claimant had kept JS fully aware of what was going on and in the investigation in mid-October 2018 by JS and SS, it was concluded that the matter was closed, and no disciplinary action was taken at that stage.

11.9 In relation to allegation three, there is clear evidence from the statement of SH that the claimant was involved in the instructions given in respect of YP1. However, there were numerous documents which could have been consulted to see what had been recorded

about relevant matters contemporaneously, but this obvious step was not taken. There was a complete failure to do the obvious thing which was to look at the documents and the dismissal was unfair as a result. The failure to produce these documents also makes any assessment of deductions in respect of contributory fault and/or Polkey impossible.

11.10 In relation to allegation 4, it is clear that CM was running the rota and took responsibility for it. In any event, it is accepted by the respondent that this allegation alone would not have resulted in the dismissal of the claimant.

11.11 The claimant does not know and cannot know what lies behind this process. It is clear that the subject matter of allegation 2 was investigated in October 2018 and no action ensued but within days of her suspension, the matter re-emerges as an allegation of misconduct. CM says that she knew before Christmas 2018 that MB was keyed up to replace the claimant as manager of the Home. The claimant cannot put her finger on what went on, but it raises real issues as to the real reason for the dismissal. Taken with all the other matters in respect of which the claimant was treated unfairly, particularly the fact that she was dismissed in her absence when ill and taken with her receipt of legal advice that she should not take further part in a flawed process, then her decision that she had lost trust and confidence in the respondent and should not take further part in the offered re-hearing, was entirely proper.

Respondent

12. For the respondent, Mr Grundy made oral submissions which are briefly summarised:

12.1 The respondent should not be subject to detailed forensic analysis of the type which might apply in a criminal investigation. There was no suggestion made that the investigating officer was not independent or had not done her job properly set out in the claim form. The claim form concentrates solely on issues of procedural irregularity and the respondent has come to meet the case advanced which does not make allegations against IO and hence she has not been called to give evidence.

12.2 There was no suggestion made that IO was up to no good and the claimant indeed accepted that she had spoken to all the individuals she needed to speak to. The truth is that the claimant does not and cannot accept that she did anything wrong or made any mistakes. Her tactics throughout have been to raise procedural issues rather than matters of substance. Only at the final hour on Sunday this week in her latest witness statement was any attempt made to address the evidence which exists in support of the substantive allegations against the claimant.

12.3 The claimant seeks to undermine the investigation by suggesting that, if other documents had been reviewed, matters would have been discovered of assistance to the claimant. The evidence of RCEO should be preferred as he is a very experienced practitioner, and he says it beggars belief that what the claimant says might be recorded in the documents to which she refers would in fact be recorded. There are documents clearly evidencing that the kitchen door was locked against YP1 – for example page 196.

12.4 The matters raised by the claimant are relevant to any assessment under Polkey, if that point is reached. The claimant would still make allegations of conspiracy and would deny wrongdoing on her part and the Tribunal is entitled to find that the outcome would

have been the same in any event. This is also relevant to contributory fault. It is highly unlikely that all that the members of staff say was made up and there is ample evidence on which it can be safely found that the claimant acted inappropriately and contributed to her dismissal. That is especially true of allegation three and there should be 100% contribution in respect of that allegation alone.

12.5 IO was as independent a person as could be found to carry out that role. She was an experienced manager. She did not find any case to answer in respect of the allegation five against the claimant which did not proceed to a hearing and thus the Report is balanced. IO does set out the evidence clearly and there was a clear case for the claimant to answer. If a step is taken back, then it is open to a reasonable employer to investigate matters as this respondent did. It is always possible to find other steps which could have been taken but what the respondent did in terms of its investigation was reasonable. Despite the absence of any typed notes, the claimant was able to give the full statement that she wanted to give on the 20 November 2018. While she may not have been able to remember all the points, the major matters of concern she could remember and did comment on. The claimant's response throughout was that of outright denial of the allegations and allegations of conspiracy. There might have been other documents which could have been consulted, and in a perfect world would have been consulted, but what was done was reasonable. The very experienced IO did not see it as necessary to look at any further documents. The contents of the statements of CD, NC and RJ have the ring of truth to them. These were witnesses whom the claimant named as people who would support her, but they did not. NC and CD were very critical of the claimant in respect of YP1 and YP2 and there are limits to a reasonable investigation.

12.6 In terms of proceeding with the disciplinary hearing, it was open to a reasonable employer to proceed given that the claimant had flown to Tenerife. It would have been possible to postpone but it was not unreasonable to proceed. The claimant was well enough to prepare grounds of appeal on the 11 January 2019 and so could have been well enough to have attended the disciplinary hearing.

12.7 If there were procedural irregularities then they were cured by the offer of a rehearing on 1 March 2019 and then the rigorous rehearing which followed by RCEO. He did not do half a job, he did a full job in the rehearing and it is right to ask why did the claimant not respond to that offer of a genuine rehearing? The claimant does not say she was too unwell to attend but simply that she had lost confidence. She made the wrong choice not to attend. What else could RCEO have done other than to offer a rehearing? What he did fell within the band of a reasonable response.

12.8 There were reasonable grounds for the belief of the dismissing officer and the appeal officer in the misconduct of the claimant. JS was a patently honest witness. The conspiracy allegation is fanciful. In terms of YP2 the wording of the charge is important. The charge related to not allowing YP2 back into what was her home and that was a very serious matter. As soon as the claimant found out that YP2 was back in the Home, she was made to leave. There were reasonable grounds for the dismissing officer to find that allegation proved in particular because the claimant's only response was a denial of what had occurred.

12.9 In relation to YP1, there was ample evidence before the respondent that the claimant had acted inappropriately towards YP1 and there was no need to go trawling for more. In relation to allegation four, there is clear evidence of deceit on the part of the claimant.

12.10 The penalty of summary dismissal fell within the band of a reasonable response. The claimant's length of good service simply does not mitigate the serious misconduct which the respondent saw evidenced.

12.11 If the dismissal is unfair, then the claimant's degree of culpability is very high and should be as high as 100%. If there is procedural unfairness, then it has made no difference to the outcome.

12.12 In terms of the wrongful dismissal claim, there is clear evidence of repudiatory conduct by the claimant and that claim should be dismissed.

13. <u>The Law of Ordinary Unfair Dismissal – Section 98 Employment Rights Act 1996 (the 1996 Act)</u>

13.1 I have reminded myself of the provisions of section 98 of the 1996 Act which read:

"*98(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 in 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) The reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of a kind which he was employed to do;

(b) relates to the conduct of the employee …

(4) In any other case 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 reasons 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".

13.2 I have noted the decision in **<u>British Home Stores Limited v Burchell [1978] IRLR379</u>** and reminded myself that it is for the respondent to establish that it had a genuine belief in the misconduct of the claimant at the time of the dismissal. In answering

this question, I note that the burden of proof lies with the respondent to establish that belief on the balance of probabilities. I remind myself that the other two limbs of the Burchell test, namely reasonable grounds on which to sustain that belief and the necessity for as much investigation into the matter as was reasonable in all the circumstances of the case at the stage at which the belief was formed, go to the question of reasonableness under section 98(4) of the 1996 Act and in relation to section 98(4) matters, the burden of proof is neutral. In considering the provisions of section 98(4), I must not substitute my own views for those of the respondent but must judge those matters by reference to the objective standards of the hypothetical reasonable employer. I have noted the words of Mummery LJ in **The Post Office-v- Foley and HSBC Bank plc –v- Madden 2000 EWCA Civ 3030:**

"In one sense it is true that, if the application of that approach leads the members of the tribunal to conclude that the dismissal was unfair, they are in effect substituting their judgment for that of the employer. But that process must always be conducted by reference to the objective standards of the hypothetical reasonable employer which are imported by the statutory references to "reasonably or unreasonably" and not by reference to their own subjective views of what they would in fact have done as an employer in the same circumstances. In other words, although the members of the tribunal can substitute their decision for that of the employer, that decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer, which they were not".

13.3 I have reminded myself of the decision in **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR23** where the Court of Appeal made it plain that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to any other procedural and substantive aspects of the decision to dismiss a person from his employment for misconduct reason.

13.4 I have reminded myself of the decision in **Ulsterbus Limited v Henderson [1989] IRLR251** where the Northern Ireland Court of Appeal said it was not incumbent on a reasonable employer to carry out a quasi-judicial investigation into an allegation of misconduct with a confrontation of witnesses and cross-examination of witnesses. Whilst some employers might consider that necessary or desirable an employer who fails to do so cannot be said to have acted unreasonably.

13.5 I have noted the decision of **A v B [2003] IRLR405** in which the Employment Appeal Tribunal reminded tribunals that in determining whether an employer has carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and the potential effect upon the employee.

I have noted the guidance of Elias J:

"Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus

no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him".

13.6 I have noted the decision in **Salford Royal NHS Foundation Trust v Roldan [2010] EWCA Civ 522** and in particular the final paragraph of the judgment of Elias LJ which reads:

"The second point raised by this appeal concerns the approach of employers to allegations of misconduct where, as in this case, the evidence consists of diametrically conflicting accounts of an alleged incident with no, or very little, other evidence to provide corroboration one way or the other. Employers should remember that they must form a genuine belief on reasonable grounds that the misconduct has occurred. But they are not obliged to believe one employee and to disbelieve another. Sometimes the apparent conflict may not be as fundamental as it seems; it may be that each party is genuinely seeking to tell the truth but is perceiving events from his or her own vantage point. Even where that does not appear to be so, there will be cases where it is perfectly proper for the employers to say that they are not satisfied that they can resolve the conflict of evidence and accordingly do not find the case proved. That is not the same as saying that they disbelieve the complainant. For example, they may tend to believe that a complainant is giving an accurate account of an incident but at the same time it may be wholly out of character for an employee who has given years of good service to have acted in the way alleged. In my view, it would be perfectly proper in such a case for the employer to give the alleged wrongdoer the benefit of the doubt without feeling compelled to have to come down in favour of on one side or the other".

13.7 I have reminded myself of the words of Wood J in **Whitbread and Co PLC –v- Mills 1988 ICR 776** where he states:- *'It seems to us that in the context of industrial relations those appeal procedures form an important part of the process ensuring that a dismissal should seek to be fair. Secondly as Lord Bridge said in the West Midlands Co-operative Society Limited –v- Tipton 1986 ICR192 at page 202 'both the original and the appellate decision of the employer are necessary elements in the overall process of terminating contract of employment".*

Wood J continued:- *'If it has (ie the acts or omissions of the initial hearing) then whether or not an appeal procedure has rectified the situation must depend upon the degree of unfairness of the initial hearing. If there is a rehearing de novo at first instance, the omission may be corrected but it seems to us that if there is to be a correction by the appeal then such an appeal must be of a comprehensive nature, in essence a rehearing and not a mere review".*

13.8 I have reminded myself of the decision of **Taylor v OCS Group Limited [2006] IRLR613** and particularly noted the words of Smith L.J. at paragraph 47:

"The error is avoided if ETs realise that their task is to apply the statutory test. In doing that they should consider the fairness of the whole of the disciplinary process. If they found that at an early stage, the process was defective and unfair in some way they will want to examine any subsequent proceedings with particular care. Their purpose in so doing will not be to determine whether it amounted to a re-hearing or a review but to determine whether due to the fairness or unfairness of the procedures adopted the

thoroughness or lack of it of the process and the open-mindedness (or not) of the decision maker the overall process was fair, notwithstanding any deficiencies at the early stage".

13.9 I have reminded myself of the decision of **South West Trains v McDonnell [2003] EAT/0052/03/RN** and in particular have noted the words of HHJ Burke at paragraph 36:

"Whilst not only unfair it is incumbent on an employer conducting an investigation followed by a disciplinary hearing both to seek out and take into account information which is exculpatory as well as information which points towards guilt, it does not follow that an investigation is unfair overall because individual components of an investigation might have been dealt with differently, or were arguably unfair. Whilst, of course, an individual component on the facts of a particular case may vitiate the whole process the question which the Tribunal hearing a claim for unfair dismissal has to ask itself is: in all the circumstances was the investigation as a whole fair?"

13.10 I have taken account of the decision in **Strouthos –v- London Underground Limited**. In that case the charge against the dismissed employee came under close scrutiny and Pill LJ commented that in criminal or disciplinary proceedings the charge against an employee should be precisely framed and that evidence should be confined to the particulars given in the charge. I have noted the guidance at paragraphs 38 and 41 of his judgment:
"However, it does appear to me to be basic to legal procedures, whether criminal or disciplinary, that a defendant or employee should be found guilty, if he is found guilty at all, only of a charge which is put to him. What has been considered in the cases is the general approach required in proceedings such as these. It is to be emphasised that it is wished to keep proceedings as informal as possible, but that does not, in my judgment, destroy the basic proposition that a defendant should only be found guilty of the offence with which he has been charged………it does appear to me quite basic that care must be taken with the framing of a disciplinary charge, and the circumstances in which it is permissible to go beyond that charge in a decision to take disciplinary action are very limited. There may, of course, be provision, as there is in other tribunals, both formal and informal, to permit amendment of a charge, provided the principles in the cases are respected. Where care has clearly been taken to frame a charge formally and put it formally to an employee, in my judgment, the normal result must be that it is only matters charged which can form the basis for a dismissal".

13.11 I remind myself also of the decision in **Ladbroke Racing v Arnott 1983 IRLR 154** where it was held that a rule which specifically states that certain breaches will result in dismissal cannot meet the requirements of section 98(4) in itself. The statutory test of fairness is superimposed on the employer's disciplinary rules which carry the penalty of dismissal. The standard of acting reasonably requires an employer to consider all the facts relevant to the nature and cause of the breach including the degree of its gravity. If therefore, an employer has a rule prohibiting a specific act for which the stated penalty is instant dismissal he does not satisfy the statutory test by imposing that penalty without regard to the facts or circumstances other than the breach itself. If that were a legitimate approach to the law, it would follow any breach of rules so framed could constitute gross misconduct warranting dismissal irrespective of the manner in which the breach occurred. In that case there was nothing to indicate that the manager who took the decision to dismiss gave any thought to the provisions of fairness. When considering sanction, previous good character and employment record is always a relevant mitigating factor.

13.12 I have reminded myself of the provisions of section 207A of the 1992 Act which provides that any Code of Practice issued by ACAS shall be admissible in evidence and that a Tribunal shall take account of any provision of such code as appears relevant. The ACAS Code contained the following provision:

"9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct ….and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. …".

13.13 I have reminded myself of the provisions of section 207A of the 1992 Act which provide for an increase of up to 25% in any compensatory award for unfair dismissal if the employer has failed to comply with the Code and the failure is unreasonable.

13.14 In the employment context "gross misconduct" is used as convenient shorthand for conduct which amounts to a repudiatory breach of the contract of employment entitling the employer to terminate it without notice. In the unfair dismissal context, a finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Exactly what type of conduct amounts to gross misconduct will depend on the facts of the individual case. Generally, to be gross misconduct, the misconduct should so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment. Thus, in the context of section 98(4) of the 1996 Act, it is for the Tribunal to consider:

(a) was the employer acting within the band of a reasonable response in choosing to categorise the misconduct as gross misconduct and

(b) was the employer acting within the band of a reasonable response in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, the employee's length of service and disciplinary record are relevant as is his attitude towards his conduct.

13.15 I reminded myself of the provisions of Section 123(6) of the 1996 Act – *'Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the compensatory award by such proportionate as it considers just and equitable having regard to that finding'.* I note that for a reduction from the compensatory award on account of contributory conduct to be appropriate, then three factors must be satisfied namely that the relevant action must be culpable or blameworthy, that it must have actually caused or contributed to the dismissal and it must be just and equitable to reduce the award by the proportion specified. The Tribunal must concentrate on the action of the claimant before dismissal because post dismissal conduct is irrelevant. I have noted the provisions of Section 122(2) of the 1996 Act and the basis for making deductions from the basic award. I have noted the guidance of Brandon LJ in **Nelson –v- BBC (No 2) 1980 ICR 110**:

"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It

includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved".

13.16 I have reminded myself of the provisions of Section 123 of the 1996 Act in relation to the fact that compensation must be 'just and equitable' and have reminded myself of the decision of **Polkey –v – A E Dayton Service Limited 1988 ICR142**. I note that the **Polkey** principle applies not only to cases where there is a clear procedural unfairness but what used to be called a substantive unfairness also. However, whilst a Tribunal may well be able to speculate as to what would have happened had a mere procedural lapse or omission taken place, it becomes more difficult and therefore less likely that the Tribunal can do so if what went wrong was more fundamental and went to the heart of the process followed by the respondent. I have noted the guidance given by Elias J in **Software 2000 Limited –v- Andrews 2007 ICR825/EAT.** I recognise that this guidance is outdated so far as reference to section 98A(2) is concerned but otherwise holds good. I note that a deduction can be made for both contributory conduct and **Polkey** but when assessing those contributions, the fact that a contribution has already been made or will be made under one heading may well affect the amount of deduction to be applied under the other heading. I note that in cases involving allegations of misconduct a **Polkey** assessment is likely to be more difficult than in a redundancy dismissal case and that a misconduct case will likely involve a greater degree of speculation which might mean the exercise is just too speculative. I note that a deduction can be made for both contributory conduct and **Polkey** but when assessing those contributions, the fact that a **Polkey** deduction has already been made or will be made under one heading may well affect the amount of deduction to be applied for contributory fault. I have noted the decision in **Rao –v- Civil Aviation Authority 1994 ICR 485** and the guidance to the effect that a deduction from compensation pursuant to section 123(1|) of the 1996 Act (the **Polkey** deduction) should be first considered and then an assessment made in respect of contributory conduct. The extent of any **Polkey** type deduction may very well in many cases have a very significant bearing on what further deduction may fall to be made in respect of contributory fault.

13.17 I have reminded myself of the more recent guidance from Langstaff P in **Hill –v- Governing Body of Great Tey Primary School 2013 IRLR 274** and as to the correct approach to the Polkey issue.

*"A "**Polkey** deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer **would** have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the*

test: the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand".

Wrongful Dismissal Claim

13.18 The test of the band of reasonable responses has no application to this claim. The issue here is for me to determine whether the respondent has shown on the balance of probabilities on the evidence before me that the claimant was guilty of gross misconduct. It is for me to make my own decision on that and not to evaluate the reasonableness of the respondent's decision.

Discussion and Conclusions

14. I propose to deal first with the claim of unfair dismissal and then to deal with the claim of wrongful dismissal, given that different legal considerations arise in respect of each claim.

Unfair dismissal claim

Reason for Dismissal

14.1 I have reminded myself of the legal provisions and authorities set out above and I turn to the first question for my consideration which is whether the respondent has proved the reason for the claimant's dismissal on the balance of probabilities. In this case, the respondent asserts that the claimant was dismissed for a reason related to her conduct and thus a potentially fair reason within section 98(2) of the 1996 Act. I have considered the evidence of the dismissing officer, and also of RCEO given that he affirmed the decision to dismiss after a re-hearing of the disciplinary hearing.

14.2 There are two facets of the case advanced by the claimant which require careful consideration when considering the reason for dismissal. First, the claimant says that she was the subject of a witch-hunt by staff whilst she was away on holiday and that the allegations against her were trumped up with a view to removing her from post. Linked to that and secondly, the claimant says that her dismissal was engineered in order to bring back MB into the role as manager of the Home. MB was her former deputy who had acted up for a lengthy period in 2017, whilst the claimant was away ill, and who had been considered a success in that role. The claimant alleges that MB was appointed to the role of manager of the Home before the appeal process in respect of the claimant's dismissal had been completed. In short, the claimant alleges a conspiracy to remove her.

14.3 It was at one time, as the hearing progressed, a matter of concern to me that the allegations against the claimant emerged as they did. It is clear that, from the middle of 2018, there was a poor relationship between the claimant and her line manager JS and it was concerning that the complaints against the claimant were raised to JS and at a time when the claimant was not in the workplace. I have considered if JS in some way engineered the complaints – although that was not the case advanced in cross examination. I heard from JS in evidence, and I agree with the description given by Mr Grundy during submissions that she was an impressive witness. She struck me as a truthful and straight forward witness. She did not seek to avoid questions in cross examination and, on more than one occasion, she accepted that the points made to her

by Mr Flood were fair and valid points against her. I was impressed with JS as a truthful witness, and I am satisfied that she was approached by JM with concerns about the claimant and that it was JM who asked MB and SH to contact JS with their concerns. I am satisfied that the respondent did not seek out concerns and complaints against the claimant through JS or any other person for that matter in order to dismiss the claimant. Had that been the respondent's intention, then it could have investigated the claimant more thoroughly in mid-October 2018 in relation to YP2. The respondent limited its investigation at that time to whether or not the relevant local authority was right not to pay for the notice period in relation to YP2. If the respondent, through JS or SS or RCEO, was out to remove the claimant, it had a golden opportunity to do so at that time but did nothing.

14.4 I note and accept that the claimant was replaced by MB after she was dismissed, and I accept that MB was appointed to the role before the claimant's appeal re-hearing was complete. In those circumstances, I can understand the claimant's concerns that the respondent's agenda was to remove her in order to replace her with MB. That factor led me to examine the evidence from SS and from RCEO as to the reason for dismissal very carefully. I accepted the evidence from both those witnesses. They were both impressive witnesses on that point. I was entirely satisfied with their evidence as to the reason they moved to dismiss or to confirm the dismissal, as the case may be. I am satisfied from their evidence that the reason for dismissal was the misconduct of the claimant, as they deemed it to be, relating to her treatment of her staff, the treatment of YP1 and YP2 and her dealing with her line manager JS in respect of the staff rota whilst she was due to be away on annual leave. Both officers of the respondent wondered if there might be a witch hunt of sorts against the respondent. They both investigated that matter and rejected it. I accept that MB had been identified as a replacement for the claimant, but I am satisfied that that was simply commercial reality. The respondent needed someone to manage the Home and MB was an obvious candidate. This factor does not go to the reason for dismissal, but it does go to the open-mindedness or otherwise of RCEO at the appeal stage and I consider it again below.

14.5 I conclude that the reason SS moved to dismiss the claimant, and the reason RCEO confirmed that decision, was because they both genuinely believed that the claimant was guilty of the misconduct alleged against her. Whilst I can understand why the claimant may have thought there were sinister reasons for her dismissal, after careful and thorough consideration, I reject the contention advanced that the claimant was the subject of a witch-hunt by present and former members of her staff, and I reject the contention that the claimant was dismissed in order to make way for MB. I conclude that the respondent has established on the balance of probabilities that the reason for dismissal related to the conduct of the claimant: this is not a case where there is evidence, as opposed to a hunch, that the reason for dismissal is other than that asserted by the respondent. Therefore, the reason for dismissal is established and I move on to consider the questions posed by section 98(4) of the 1996 Act.

The questions posed by section 98(4) of the 1996 Act.

14.6 I have reminded myself again that in answering the questions posed by section 98(4) of the 1996 Act I must not substitute my view for what should have been done but instead, I have to consider whether what the respondent did in terms of its investigation and its

disciplinary and appeal process fell within the band of a reasonable response open to a reasonable employer.

14.7 I have considered the investigation carried out by the respondent. Was the investigation into this matter reasonable? I conclude that the Report was on the face of it a thorough document. The allegations to be investigated were set out as were the details of the allegations taken forward to the disciplinary hearing. There were 32 appendices to the Report, and it amounted to a substantial document. I did not hear from IO but there is clear evidence of an even-handed approach as she decided that the concerns which came to light in respect of the handling of petty cash within the Home should not go forward as allegations against the claimant. On a thorough examination of the Report, it appears reasonably balanced. I reject the description applied by Mr Flood to the Report as being egregiously one-sided. It was nothing of the sort.

14.8 I have concerns in relation to the way the first allegation in respect of bullying of staff was framed. The ACAS Code at paragraph 9 requires an employer to give sufficient information to an employee about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case against her. This allegation against the claimant, as framed, is unreasonably vague. Who did the claimant allegedly bully? When? How? This basic information is missing from the allegation and the claimant is left to trawl through statements from her staff to try to discern the allegations against her. That is not a reasonable way to deal with a serious allegation.

14.9 The ACAS Code requires that the employee should have reasonable time to prepare for the disciplinary hearing. I conclude that the claimant was not allowed a reasonable time so to do by the respondent. The Report was delivered to the claimant on 18 December 2018, and she was originally expected to attend the disciplinary hearing two days later. That is not a reasonable time period to understand and digest such a substantial report. The respondent had taken a decision that the claimant needed to be referred to occupational health ("OH") because of the fit note produced on 20 December 2018 and yet such a referral was not progressed at any time. I conclude that the respondent was concerned that the claimant had gone to stay with her family in Tenerife and concluded, without evidence, that if she was fit enough to fly to Tenerife, she was fit enough to attend a disciplinary hearing and was seeking to delay matters. The respondent overlooked the fact that the claimant's family lived in Tenerife and that it had already concluded that a referral to OH was necessary. Any reasonable employer would have allowed the fit note produced by the claimant to run its course and allow the question of the fitness of the claimant to attend a hearing (as opposed to being fit for work) to be properly investigated before pressing on with a disciplinary hearing which was to consider very serious allegations against the claimant – allegations which by reason of the necessity to involve the DBS were potentially career ending. I note that the more serious the allegations, the more the respondent needed to do to ensure a fair and reasonable procedure was carried out: **A -v- B 2003** (above).

14.10 The failure of the respondent to provide legible notes of the meeting on 20 November 2019 to the claimant was unreasonable. On any view, the notes produced of that meeting were at best very difficult to decipher and, at worst, simply illegible. At the meeting on 11 December 2018, the respondent took notes and produced typed notes very shortly after the meeting for the claimant to review. Why could the same practice not have been adopted for the November meeting? I infer it was laziness, at best, on the part

of HCO or whoever it was who had the responsibility to type the notes. Given the serious matters discussed on 20 November 2018 over 4 hours, any reasonable employer would have provided legible notes to the claimant – especially when she was hearing details of the allegations against her for the first time in what was, on any view, a difficult meeting for her dealing with very serious allegations.

14.11 The respondent through SS made no allowance in the way he conducted the disciplinary hearing on 3 January 2019 for the absence of the claimant. SS interviewed IO and clearly received further information from her. IO "pulled together" the allegations and the investigation for SS. Given the absence of the claimant and if he was intent to press on without her, SS could have raised questions of the claimant in writing about matters discussed with IO outside the Report but instead pressed on with the meeting making no allowance for the claimant's absence. I infer this was because SS had jumped to the conclusion that the claimant was simply attempting to delay or derail the process and that her illness was not a genuine one. I note also that SS did not refer to the claimant's 10 years of service with the respondent and her clean disciplinary record. That was very substantial mitigation which any reasonable employer would at least have considered. SS accepted in cross examination that he had not done so. In addition, SS had had some small involvement in the production of the Report and thus had been involved at the investigation stage which was not a reasonable process to adopt given the desirability of keeping the investigation separate from the disciplinary process. The size and administrative resources of the respondent are such as to make that separation easily achievable.

14.12 Whilst some of those factors alone would not, in my judgment, have rendered the decision to dismiss the claimant unfair, taken together I conclude that the decision of SS to dismiss the claimant was procedurally unfair. It meant that the claimant was dismissed without being given the opportunity to present her case about some of the very serious allegations against her – in particular those which had arisen from the statements of CD, NC and RJ who were all interviewed after 20 November 2018 and whose statements were not discussed with the claimant on 11 December 2018, as they could have been. That central feature of a reasonable procedure was absent.

14.13 I take account of the submission from Mr Grundy that the respondent should not expect its procedures to be the subject of detailed forensic analysis and that all that is required is reasonableness. I note there is a wide band of reasonableness. However, I conclude that at the point of the claimant's dismissal, communicated to her on 7 January 2019, the decision was procedurally unfair and, given the extent of the unfairness at that stage and the absence of an opportunity for the claimant to put forward her full answer to all the allegations against her, that there were no reasonable grounds at that stage to move to dismissal. No reasonable employer would have moved to dismissal at that stage.

14.14 The next important question for my consideration is whether the appeal process, and in particular the offer of a re-hearing from RCEO, corrected the unfairness which tainted the decision made on 3 January 2019.

14.15 I remind myself that I must consider whether the appeal procedure was a reasonable one and I must not now dwell on the question of whether what RCEO carried out amounted to a review or a rehearing. I must consider the fairness of the appeal process and, in particular, whether RCEO approached the matter with an open mind. I

note that the appeal hearing on 1 March 2019 was attended by the claimant. I accept the evidence of RCEO that he was not aware of the full details of the case at that time and was intent only on dealing with the largely procedural grounds of appeal advanced by the claimant. Having delved into what had gone on, it is not difficult to see why RCEO concluded that the only way to cure the evident unfairness was to hear the matter again. Because RCEO was not aware of the details of the case before the appeal hearing began, his decision to do so meant that there needed to be another appeal hearing. At that point, the claimant stated that she had had enough and through her solicitors indicated that she would not attend. That difficulty would have been avoided if RCEO had familiarised himself with the case before the hearing on 1 March 2019 and conducted a full rehearing on that day. Given that I am judging the actions of the respondent at this stage of my enquiry, it is not appropriate for me to consider whether or not the claimant was entitled to withdraw her co-operation at that stage. To correct the unfairness of the past, I conclude that any rehearing needed to be very carefully and thoroughly managed in order to fall in the band of reasonableness. I am not satisfied that the rehearing was dealt with in that way.

14.16 At the end of the hearing on 1 March 2019, RCEO told the claimant that he was satisfied that the process to that point had been conducted in a fair and transparent way but, as the claimant had not had the opportunity to defend herself, he proposed to hear the matter afresh. His stated view that what had transpired to date was fair sits very uneasily with the claimant having had no opportunity to properly defend herself and frankly flies in the face of any reasonable view of the fairness of the process to that date. I have already concluded that the procedure followed to that date fell outside the band of reasonableness and RCEO's statement that the process had been transparent and fair raises serious concerns about the open-mindedness of his approach going forward.

14.17 By the time the rehearing took place, I am satisfied that the claimant still had not received typed copies of the notes from the investigation meeting on 20 November 2018. If an appeal process is to correct previous errors, then those errors needed so far as possible to be put right. That considerable failing on the part of the respondent could have been put right but was not.

14.18 At the rehearing in the absence of the claimant, JS attended and gave further evidence in particular to the effect that she had given an instruction to the claimant to allow YP2 back into the Home on 11/12 October 2018 if she returned. RCEO did not see fit to raise any question with the claimant as to that new evidence on what was a crucial allegation. The claimant was not present, but she could have been written to and asked for her comment on any new evidence, such as that, but that step was not taken. Of course, the claimant may have chosen not to respond but no thought was given to at least allowing the claimant the opportunity of doing so and that raises for me further questions as to the open-mindedness of the approach of RCEO.

14.19 At the hearing before me it was accepted that the claimant would not have faced dismissal for allegation 4 alone as it was not an allegation which amounted to gross misconduct yet in the outcome letter from the rehearing on 28 March 2019, RCEO writes that (page 363): "*I believe, on the balance of probabilities, that you have committed the following allegations of gross misconduct…".* RCEO then goes on to deal with allegation 4 as though it were an allegation of gross misconduct. He sets out his conclusions that go beyond the allegation as framed. Reference is made to the claimant being advised

that a risk assessment needed to have been carried out and that the claimant knowingly had gone against company procedure by allowing one member of staff to work alone on shift with two young people. Those matters had not been discussed with the claimant in that detail and RCEO accepted evidence given to him without seeking to test it. Once again, that evidences a closed mind to the process then being followed which is not what any reasonable employer would have done.

14.20 The outcome letter from the rehearing (pages 363-365) makes no reference to the claimant's length of service and clean disciplinary record which any open-minded process seeking to correct previous errors would have considered. I conclude that no consideration was given to that important factor and that is further evidence of pre-determination of the outcome of the rehearing.

14.21 To correct the unfairness of the procedure followed to the date of the rehearing, there was a necessity for a transparent and fair approach. I am not satisfied that the procedure adopted by RCEO evidenced a procedure which fell within the band of reasonableness. I have concerns also that, by the time of the rehearing, the respondent had appointed MB into the role of manager of the Home, and I conclude that RCEO was simply going through the motions once he was told that the claimant was not to attend.

14.22 Accordingly, I conclude that the unfairness of the dismissal of the claimant by SS was not corrected by the procedure followed by RCEO. Accordingly, the claim of unfair dismissal is well-founded, and the claimant is entitled to a remedy.

Further Findings of Fact

14.23 With that conclusion in place, it is necessary that I set out my own findings of fact as to the conduct of the claimant in order to inform my conclusions on the question of contributory conduct and a Polkey assessment in respect of the unfair dismissal claim and also my conclusion on the claim of wrongful dismissal. I reach my findings of fact on the balance of probabilities.

14.24 In terms of allegation 1, I conclude that the claimant did run a tight ship in terms of her treatment of the staff managed by her in the Home. I accept the evidence from the claimant herself and from JS that there was a high turnover of staff in the Home. That is not an indication of a happy ship. I conclude that the claimant did have certain members of staff whom she preferred over others and that she could be offhand and unpleasant to members of her staff from time to time. However, there is ample evidence before me (through copy text messages and the like attached to the claimant's statement) that the claimant enjoyed good relations with certain members of her staff and that, if she thought she had behaved unkindly, she would apologise. The allegations of bullying advanced against the claimant were vague in the extreme and I do not accept that what the claimant did amounted to bullying towards her staff. She was robust and evinced unprofessional behaviour towards her staff from time to time, but I do not conclude that her behaviour was culpable or blameworthy to the extent necessary to justify a reduction from compensation for unfair dismissal.

14.25 In relation to allegation 2 and YP2, I adopt my findings at paragraphs 10.8 above. In her supplemental witness statement, the claimant provided much more information in relation to the case of YP2 and I broadly accept her evidence. However, the fact remains

that the respondent company exists in order to provide a home for troubled and challenging young people. Before a young person is received into a home, a risk assessment is caried out and a decision taken as to whether to offer a place. That exercise had been gone through in the case of YP2 at the beginning of October 2018 and a place given to her in the Home. The removal of a young person from a home of the respondent is rare – all the more so after so short a stay. I infer that the claimant was unhappy about YP2 coming into the Home in the first place because of the behaviour she had evinced in the past and what the claimant saw take place in relation to YP2 on 11 and 12 October 2018 was a vindication of her view that YP2 should not have been placed in the Home at all. The respondent has procedures in place if a young person is to be removed from a home. I conclude the claimant knew those procedures but did not follow them on 11 and 12 October 2018 in relation to YP2. I accept that the behaviour of YP2 was extreme and that she made threats towards the safety of the claimant's other young residents and her staff. But that is what can be expected, and challenging behaviour needs to be managed. By any standard, to have a young person awoken and removed from her bed and from the Home by the police at 8am in the morning because the claimant had instructed YP2 should not have been re-admitted to the Home was a failure of YP2 by the claimant and the respondent. I conclude that there was mitigation for what the claimant did. She had support from GM in her view that YP2 was not suitable for the Home and thought GM had given clearance for the removal of YP2. However, I conclude the claimant should have known that GM did not have the authority to sanction the removal of YP2 and, if she was unsure, she should have enquired. I conclude that the claimant knew that the correct procedures to remove a young person from the Home had not been followed in respect of YP2. I conclude that with YP2 on the run and being sought by the police, the instruction given by the claimant that YP2 should not be allowed back into the Home was a very inappropriate instruction to have given and was culpable and blameworthy conduct by the claimant. However, once YP2 had returned to the Home and was asleep in bed, I conclude that the claimant's instruction to have her woken up and removed at around 8am on the morning of 12 October 2018 was not merely inappropriate but was culpable and blameworthy conduct by the claimant and it contributed to her dismissal. The return of YP2 offered an opportunity on 12 October 2018 to re-assess the situation calmly and properly but I conclude that the claimant did not take that step as she wished to see her previous instruction carried out without any thought to the welfare of YP2. The claimant was the manager of the Home and she bears a large share of the responsibility for what happened on 11 and12 October 2018 in respect of YP2.

14.26 In relation to allegation 3 and YP1, I conclude that the evidence from the members of staff interviewed by IO is extensive and consistent. I conclude on balance that the claimant did give instructions in mid-2018 in relation to YP1 that, when her behaviour became particularly challenging, she should not be allowed to eat in the kitchen with the other young people but instead should eat alone in the hall or in her room at the Home. I am also satisfied that the claimant did give an instruction that the kitchen of the Home should be locked against YP1 when her behaviour deteriorated. I am satisfied also that the claimant did withdraw privileges from YP1 in an inappropriate way as alleged by SH in her interview with JS. The allegations are corroborated and there is no reason why those members of staff should say such things if they did not occur. I am supported in this conclusion by reference to contemporaneous documents (for example page 518 and page 519) which refer to the kitchen door being locked and I also note that, when eventually engaging with this allegation in her witness statement filed on the day before the hearing of this claim, the claimant does not expressly engage with the substance of

these allegations. I conclude that in acting as she did towards YP1 that the claimant breached her primary duty to safeguard the welfare of YP1 and again a young person in the care of the respondent and the claimant was failed. In reaching this conclusion, I note that the DBS did not consider these matters worthy of further action against the claimant and I factor that into my assessment of the percentage level of contributory fault.

14.27 In relation to allegation 4, I conclude that the claimant did seek to show that the staff rota for the period of her annual leave in October/November 2018 was covered fully when in a small way it was not. I conclude that the claimant took this strange action in order to dissuade JS from introducing staff from other homes into the Home during the claimant's absence. I infer this was a consequence of the poor relationship which had developed between the claimant and JS at the time and the claimant's wish to preserve "her home" from outside interference as she saw it.

Polkey Assessment

14.28 I must consider whether the claimant could and would have faced being fairly dismissed if the procedural flaws identified in the dismissal process had not occurred. In making this assessment I take account of the statement provided by the claimant shortly before the hearing which set out for the first time her answer to the substantive issues raised against her by the respondent.

14.29 I conclude that if the matters set out by the claimant in relation to the dealings with her staff had been considered by the respondent that the chances of her being fairly dismissed for those matters was slight. The allegations were vague and at most demonstrated a need for refresher training as a manager rather than any serious cause for concern. There was some element of misconduct by the claimant but not to any serious extent and I conclude that the claimant would not have faced dismissal for that reason.

14.30 In relation to allegation 4, it was accepted by the respondent that the claimant would not have faced dismissal for that reason alone even if the respondent had concluded that there was an attempt to mislead JS and the respondent in respect of the shift on 2 November 2018. This was minor misconduct at most.

14.31 I consider that if the respondent had been able properly to consider all that the claimant now says about the events leading to the exclusion of YP2 from the Home that there was a considerable chance that she would have faced dismissal but there was considerable mitigation. The mitigation relates to the involvement of GM and the fact that the claimant thought, albeit mistakenly, that GM had the authority to agree to the removal of YP2 from the Home. Mitigation also exists from the fact that it may well have been that YP2 was not a good match for the Home and may well have been moved elsewhere if proper procedures and considerations had been taken into account. The respondent would properly have taken all the extensive mitigating circumstances into account and may fairly have held off from dismissing the claimant in relation to the events surrounding YP1 especially given her length of service and clean disciplinary record. However, there remains a high likelihood that the respondent would have dismissed and dismissed fairly in relation to allegation 2.

14.32 In relation to YP1 the respondent may have taken the view that what occurred revealed an urgent and serious training need on the part of the claimant and her staff and that in fact no complaint had been raised to the respondent by YP1 or anyone on behalf of YP1 in respect of what had occurred in relation to YP1. In addition, I take account of the fact that the claimant had worked for the respondent for 10 years and had a clean disciplinary record – a matter which the respondent had not considered at any stage of the process. Had those matters all been properly considered, then I conclude that there remains a high likelihood that the claimant could and would have faced a fair dismissal in respect of allegation 3 but again, I do not conclude that dismissal was inevitable even when combined with allegation 2 and the matters encompassed by allegations 1 and 4.

14.33 Having considered all relevant matters and doing the best I can, I consider that the chance of a fair dismissal taking place was high. I place that chance as high as 60% and there will be that reduction from any compensatory award to reflect that possibility.

Contributory conduct

14.34 I conclude that the claimant contributed to her dismissal by culpable and blameworthy conduct on her part especially in respect of YP1 and YP2. I will not repeat my findings of fact of what occurred in respect of these two young people as set out above but the conduct of the claimant in relation to both young people was very seriously flawed. I have noted the mitigation available in the case of YP2 and the involvement of GM and the local authority. There was little mitigation available in relation to YP1 other than the challenging behaviour evinced but the respondent exists in order to manage and deal with challenging behaviour of very vulnerable young people and so little account can be taken of that.

14.35 In terms of allegation 1 and given my conclusion above, then I would place a very low percentage on the claimant's level of contribution arising from that allegation. The contribution would reflect the claimant's unprofessional approach to her staff at times which did not, in my judgment, amount to bullying. However, even if not reaching the level of bullying, it was highly inappropriate conduct and it was blameworthy and it did contribute to the claimant's dismissal.

14.36 In terms of allegation 4, again I place the level of contribution at a low level given that I see what happened to be as much a symptom of the poor relationship between the claimant and JS as anything else and given that the respondent failed through SS to give that evident difficult relationship the attention it clearly deserved. The claimant was wrong to do what she did in terms of the shift on 2 November 2018, but I place her culpability at a low level.

14.37 I take account of the reduction of 60% already made from the compensatory award in paragraph 14.33 above. I assess the appropriate level of deduction from remedy in relation to all aspects of the contributory conduct identified at 75%. Absent a Polkey deduction, this deduction would have been higher.

14.38 I will decide at the remedy hearing whether that same deduction should apply to the basic award and I make a comment on that matter below.

The claim of wrongful dismissal

14.39 I conclude that the actions of the claimant in relation to allegations 1 and 4 did not approach conduct amounting to a repudiatory breach of contract. If allegations of bullying had been particularised and substantiated against the claimant, then this conclusion may well have been different, but I conclude the allegations as framed against the claimant did not amount to bullying and the claimant's misconduct in respect of the matters encompassed by allegations 1 and 4 did not approach the level of gross misconduct.

14.40 In relation to the conduct of the claimant in respect to YP1 and YP2, I conclude that the actions of the claimant did amount to acts of gross misconduct both individually and cumulatively. A fundamental term of the claimant's contract was to support the best interest and welfare of the young people placed in her care as manager of the Home. My conclusions above demonstrate that that term of the claimant's contract was breached by her actions in respect of both young people. That amounted to a repudiatory breach of contract by the claimant and the respondent was therefore entitled to terminate her contract of employment without notice,

14.41 It follows that the claim of wrongful dismissal fails and is dismissed.

Remedy Hearing

14.42 At the conclusion of the liability hearing, I set a date for a remedy hearing in case one was required. It turns out that a date will be required. At that hearing I will calculate the remedy/compensation due to the claimant in accordance with the decisions set out above. In case it is of assistance to the parties in any discussions which may take place in advance of that hearing, I make the following preliminary comments on remedy whilst making it plain that I have not reached any conclusion in respect of the matters which follow.

14.43 A question arises as to whether the basic award of compensation for unfair dismissal should be reduced by 75% or a smaller percentage to reflect the conduct of the claimant prior to the dismissal. Ordinarily, I would start from the premise that the reduction for contribution to the basic award and to the compensatory award should be at the same level namely 75%. However, it is important that the claimant is compensated for being unfairly dismissed and if the reduction of 75% to the basic award would reduce that award to such a sum as would not reflect the level of unfairness which I have found in relation to the dismissal, then I would look at a smaller reduction to the basic award. I have reached no firm view on this matter.

14.44 I will consider whether any award of compensation should be increased or reduced by reason of section 207A of the Trade Union and labour Relations (Consolidation) Act ("the 1992 Act"). The respondent followed the ACAS Code in its broad terms. I identify a failure to do so in respect of the wording of allegation 1. If there is to be an increase in compensation because of that breach, it would be very modest indeed. The claimant did not attend the appeal rehearing and that failure could be reflected in a reduction of compensation under section 207A of the 1992 Act. I note the claimant did attend the hearing on 1 March 2019 and it cannot be said that she failed to cooperate at all in the appeal process. Her decision not to attend the hearing on 26 March 2019 was surprising

but her rationale for not doing so is at least understandable. My initial view is that compensation should be neither increased nor reduced under the provision of section 207A of the 1992 Act.

14.45 The claimant brings a claim under the 1999 Act as detailed above. I do not have jurisdiction to hear that claim as it requires a full tribunal pursuant to the provisions of section 4 of the Employment Tribunals Act 1996. I have made findings, as I am entitled to do, in respect of CM as it was relevant to do so in relation to the unfair dismissal claim. The parties may find those findings of assistance in seeking to resolve the claim advanced under the 1999 Act. However, if not resolved, that claim will be heard before a full Tribunal. The claimant will indicate at the remedy hearing her intentions in respect of that claim.

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EMPLOYMENT JUDGE BUCHANAN

REASONS SIGNED BY EMPLOYMENT JUDGE ON 30 March 2021

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REASONS SENT TO THE PARTIES ON

31 March 2021

FOR THE TRIBUNAL

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