EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4104096/2022 and 4104097/2022

Held in Glasgow on 5-7 December 2022

Employment Judge J Young

Ms L Young	**First Claimant** **Represented by:** **Ms S Berry - Solicitor**
Ms A McGhee	**Second Claimant** **Represented by:** **Ms S Berry – Solicitor**
FTS Care Ltd	**Respondent** **Represented by:** **Mr M Ramsbottom - Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgment of the Employment Tribunal is that the claimants were not unfairly dismissed in terms of s98 of the Employment Rights Act 1996.

REASONS

1. In this case the claimants presented claims to the Employment Tribunal complaining that they had been unfairly dismissed by the respondent. The allegations leading to dismissal of the first claimant related to alteration of medication records held for a young person and removing medication from the respondent's premises. The allegation leading to dismissal of the second claimant related to alteration of medication records for the same young person. Each denied any misconduct in these matters. The respondent admitted dismissal but denied that was unfair. It maintained that there was sufficient evidence to conclude that there was gross misconduct by the claimants and so dismissal was warranted.

2. The issues for the Tribunal in respect of each of the claimants were: -

   i. What was the reason for dismissal?

   ii. Was that a potentially fair reason for dismissal?

   iii. If the reason was misconduct, did the respondent believe the claimant to be guilty of misconduct; had in mind reasonable grounds to sustain that belief; and carried out as much investigation into the matter as was reasonable?

   iv. If so, was dismissal for that reason within the band of reasonable responses?

   v. Was there procedural unfairness?

   vi. If the claimants succeed, was there contributory conduct?

   vii. If the claimants succeed on either substantive or procedural unfairness, what compensation should be awarded in respect of the unfair dismissal?

Documentation

3. The parties had helpfully liaised in providing Joint Inventories of Productions for each claimant. The productions for the first claimant were paginated 1-319 (J1-319) and for the second claimant 1-344 (JA1-344).

The hearing

4. At the hearing evidence was given by: -

   i. Pauline Spy who had 12 years continuous service with the respondent and in the last four years held the position of Director of Compliance and HR.

   ii. Derek Scott, a Director and General Manager of the respondent since its incorporation in February 2009.

iii. Kirsty Stuart, Director of Operations for the respondent since August 2019 and who had 13 years experience in care of young people.

iv. Charlene Linning a Residential Care Worker with the respondent and, at date of hearing, on maternity leave as from May 2022.

v. Phil Woodlock, a part-time Childcare Worker with the respondent for approximately 10 years.

vi. Frances Pollock, a Payroll Officer for Greater Glasgow and Clyde NHS and also Unison Steward for that Health Board.

vii. The first claimant who had been employed in the care sector for approximately 40 years and for 11 years with the respondent. In that time with the respondent she had been engaged in management positions but since May 2020 was a Residential Care Worker.

viii. The second claimant who had approximately 22 years experience in the Care sector and been employed as a Residential Care Worker with the respondent for over six years.

Misconduct issues

5. In the ET3 response from the respondent reference was made to allegations concerning cash paid for a birthday meal for a young person on 22 February 2022 involving the first claimant. In the course of the hearing some evidence was canvassed in respect of this matter. However, in the disciplinary outcome letter issued to the claimant by Derek Scott (J224/225) he "*made no specific findings on this matter…*". Additionally, the report following the disciplinary appeal confirmed that the sanction applied to the first claimant was in "*relation to the medication issue*" only. Accordingly, this Judgment deals only with the issues around the medication prescribed for a young person in the care of the respondent and the records pertaining to the provision of that medication.

6. From the relevant evidence led, admissions made, and documents produced I was able to make findings in fact on the issues.

Findings in fact

7. The respondent commenced business in 2010 and provide residential care for young persons in the Falkirk area. They currently maintain three residential care homes providing care for young people between the ages of 8 and 21.

8. The issues of concern in this case arose at a home in Elmbank, Denny which provides accommodation for up to four young people of mixed gender aged between 12 and 20 years. Elmbank supports those with a range of different needs including ASD, ADHD, challenging behaviour, trauma, additional support needs, and learning and communication difficulties.

9. Funding is received from Falkirk Council and the respondent in a mixture of full-time and part-time staff employs approximately 60 people across the services provided at its three residential care home locations.

10. Derek Scott is the General Manager and a Director of the Respondent. His wife and son are also Directors, but do not take any active part in the operation. HR and Compliance functions are conducted by Pauline Spy and Operations by Kirsty Stuart. They are are primarily responsible for the day-to-day running of the residential homes.

11. The respondent is regulated by the Care Inspectorate and the support staff are all registered with the Scottish Social Services Council (SSSC). All staff must also be members of the PVG scheme (Protecting Vulnerable Groups).

12. The first claimant had continuous employment with the respondent from 2 August 2011 until that employment was terminated with effect from 16 May 2022. She has 40 years experience in the care sector. For several years she worked in the positions of Manager and Service Manager with the respondent but since May 2020 had returned to the position of Residential Childcare Worker. For some time prior to termination of her employment she worked 3 nights a week on the night shift at Elmbank commencing 9:30pm through to 7:30am.

13. The second claimant is the niece of the first claimant and had continuous service with the respondent from 4 April 2016 to 16 May 2022. She was

employed as a Residential Childcare Worker and was also engaged, at time of termination of employment, on night shift. She had worked in the care sector for approximately 22 years at date of termination.

Respondent's policies and procedures

14. The respondent employee handbook (J65/107) included a section on "*disciplinary procedures*" (J92/97) which had been reviewed as from January 2020 in terms of the respondent Conduct and Capability Policy and Procedure (J108/121). A Grievance Procedure was also in place (J98)

15. The 2020 policy stated (J110) that: -

    i. "*At every level of the Procedure the employee will be advised of the nature of the complaint against them, is given the opportunity to state their case, and is advised that they can be accompanied by a FTS Care Ltd work colleague or a trade union representative/official*."

16. The policy covered four levels of discipline being from verbal warning to dismissal. An appeals procedure was in place against disciplinary outcomes. In terms of that section entitled "*gathering the facts*" (J113) it was stated: -

    i. "*At investigatory interviews, employees do not have the right to be accompanied; however, if they request a FTS Care Ltd work colleague or trade union representative/official to be present then this is acceptable as a supportive role. A notetaker will be present at the meeting and the employee will be provided with a copy of the note of the meeting.*"

17. A "*Companion"* was defined within the policy (J120) as being a "*FTS Care Ltd work colleague or union representative/official*". It was stated that employees had a right to be accompanied by persons in that capacity at any formal hearing and "*may request a companion to attend as support at any investigatory meeting*".

18. Examples of gross misconduct included: -

i. "*Dishonesty, theft, or fraud including falsifying timesheets or other company records*" and

ii. "*Serious breaches of standards of care as laid down by the Scottish Social Services Council…*" (J118)

19. The respondent had in place a separate Medication Management Policy (J122/132 being the iteration effective from September 2020). That policy indicated (J124) that young persons were encouraged and supported to control their own medication but some would be unable to manage without assistance and in those circumstances "*all residential staff involved in the care of the children and young people are responsible for ensuring their medication is managed appropriately, in accordance with the prescribing practitioner's instruction*" and "*residential staff are responsible for the dispensing, administering, and recording of this medication*". Further (J125) each "*individual colleague administering medication having been deemed competent to do so is responsible for their own actions and omissions*".

20. The administration of all medication (or the refusal to take it) was to be "*properly documented on a Medication Administration Record (MAR)*". Such a record was to be kept for each person and include "*the initials of the person who has administered the medication*". (J127)

21. So far as medication required for home leave, holidays, and school trips "*a record must be kept of stock leaving the premises and, where applicable, being returned*" (J131).

22. Where there was a medication error then that should be reported to the "*Service Manager or appropriate member of management. The error must then be recorded on the medication error recording form which is passed to the Service Manager. The Service Manager is responsible for ensuring that any medication errors are promptly acted upon and investigated appropriately*".(J131) It was also stated that: -

"*All colleagues are responsible for immediately reporting any concerns in relation to medication administration including any error they suspect may have occurred.*"

23. Medication training was to be provided to those involved in medication administration which training could be delivered in house, online, or by external trainers. (J131) Around February 2022 a training link was sent to staff (including the claimants) to update on procedures regarding medication

24. So far as monitoring was concerned it was stated:

"*Nightly medication checks must be carried out by nightshift staff. The Service manager, assistant manager, or senior residential childcare worker is responsible for carrying out weekly quality checks on medication. A monthly assistant manager/senior audit and quarterly service manager's audit is carried out to ensure medication policy and procedures are followed and remain in place.*" (J131)

25. The employee handbook also contained a section for "*whistleblowers*" (J90) and advised that any concerns by an employee should be reported to a "*Senior Manager or Director*" in the first instance.

26. The respondent policies, including the medication policy, were accessed through the respondent's "*Care Drive*".

Medication record sheets

27. Two record sheets are kept in relation to the provision of medication which normally involves one young person per residence. A Medication Administration Record Sheet (MARS) is used by the dayshift (early and backshift) Support Workers. The MARS produced for Elmbank over the period 11/2/2022 – 3/3/2022 (J254/255) demonstrated the process of identifying the person to whom medication is given; the date and time that occurred; together with the dosage given and any comments e.g. AD = administered; R = refused. The sheet also identifies the amount of medication which remained after being administered to the young person. The sheet is then signed off by each of the individuals on shift. Accordingly, the MARS will contain a running

total of the number of tablets left of any particular medication on any given day/time.

28. The MARS sheet for Elmbank disclosed that normally the young person resident there would be administered medication at 9am and 4pm each day being one 100mg tablet of lamotrigine. That medication is utilised to prevent the seizures associated with epilepsy.

29. In the event that a young person was to be away from the residential home for any period (perhaps to stay with family) then an entry would be made to specify the number of tablets given to the young person to take in the period of the anticipated absence so that the supply of medication was continuous.

30. A separate record sheet is kept entitled Nightly Medication Checks which as the title suggests is for use on night shift. The purpose of this record sheet is to identify the date; type of medication which was being prescribed; the number of tablets/quantity of the particular medication which are available; and the date of expiry of the medication. Again there was a call for "*comments*" (which might include a comment on number of tablets taken for absence from the residential home). Again the two staff Support Workers on night shift would initial the record sheet to verify its content (J253).

31. At Elmbank (and generally) no medication was administered during the nightshift and the primary purpose of the record sheet was to identify the medication available on a count by the Support Workers on nightshift.

32. By this process there should be a running record of the medication administered and still available for administration to the young person in the home.

Medication errors

33. In terms of the evidence from Pauline Spy and Kirsty Stuart, any errors on the record sheets (MARS and Nightly Medication Checks) should be reported to management as the welfare of the young person was a priority and any discrepancies would require to be investigated.

34. However, as is not uncommon in a workplace procedure, the practice of what should happen and what does happen differs.

35. Evidence from two support workers and from the claimants was that human error did occur, either because of a miscount; incorrect arithmetic; or misrecording and that support workers would make alterations to those records if they identified an error without alerting management.

36. There was some difference in the evidence as to whether that alteration would only be made by a support worker in respect of their own entries rather than identification of an error which had occurred in an earlier shift by other support workers and altering that entry. Mr Woodlock's evidence was that he would not alter entries made by others where it seemed that an error had been made, but he was aware that other support workers would alter entries made by other workers. Charlene Linning stated that in making any alteration she would involve the person making the original entry. It was also clear that since the incidents involving the claimants training measures had been put in place to point out the risks of making changes and to ensure there should be adherence to proper procedures. From this evidence I accepted that changes were made to medication sheets by support workers with respect to their own errors without reference to management; and by some of the support workers to errors which they identified which were made by their colleagues but without reference to their colleagues or management. It was not clear how often that occurred. The sheets produced show a number of changes, but Ms Stuart did indicate that she had viewed sheets for the period two months prior to the incident which concerned the claimants in March 2022 and had only come across one change. Ms Linning indicated that in her five years with the respondent she had come across "*dozens*" of changes to the medication sheets.

Intimation of concerns

37. On 4 March 2022 the Assistant Manager was approached by Jean Wilson a Residential Childcare Worker regarding concerns over an incident which took

place on the nightshift of 1 March 2022 with repercussions through to 4 March 2022..

38. The issues were recorded in the statement of Ms Wilson of 4 March 2022 (J149). On night shift on 1 March 2022 she had been engaged on the medication count and noted that on the Nightly Medication Sheet there had been a mistaken calculation which had "*put the count out*". She had pointed this out to the first claimant who was on shift with her and they had concluded after reviewing the sheet that the count of lamotrigine tablets was "*two over*" what was recorded. According to Ms Wilson the first claimant then indicated that "*we will just cut two off then, it makes the count right,*" and said, "*I'll put them in my locker in case the young person runs out, but had temporarily put them in her pocket and forgot to remove them to her locker*" The statement continued by indicating that on Thursday 3 March 2022 it had been highlighted that the "*dayshift count was two tablets short so I headed into work at 19:30 to try and sort the medication situation out. I phoned the member of staff and asked her to give the tablets to another member of staff, Alana McGhee, to get them returned to the unit. I was told that she would already have left and that she would bring them in on Sunday*" (J149).

39. Given the information that Ms Wilson had made a call to the first claimant to ask if she could return the tablets to Elmbank through the second claimant the second claimant (who was on duty) was asked to speak with Pauline Spy and the assistant manager on the evening of 4 March 2022. A note of that meeting (JA143/146) was taken and then transcribed.(JA143/146). The second claimant denied that she had any tablets to return to Elmbank or that she was aware of tablets being "*snipped off*" from the medication pack.. She advised that when she had been in on nightshift on the evening of 3 March 2022 she was aware that Ms Wilson and a colleague were confused over the medication sheets and what tablets should be on the premises.

40. On a review of the record sheet, the second claimant was asked if she had removed an entry from the MARS sheet and she advised that she had "*tippexed"* out an entry from the MARS sheet which had been entered by "*Stephanie who had wrote about the missing tablets*" and she did not think

that should have written that on the sheet but entered in another way. There was available a photograph of the MARS sheet showing the entry which had been "*Tipp-exed*" by the second claimant. That photograph had been taken by the Assistant Manager when she was aware of discussion on difficulties over the medication count. That photograph (J1254) showed that the entry which had been deleted read: -

"*3/3/22 – 7x 100mg tabs given for contact to last until Mon 7/3/22, 77 left*"

and was initialled "*SK*".

41. The Nightly Medication Checks sheet (J253) had been amended by the second claimant by inserting the total "*77*" with the comment section being completed by the words "*7 given for contact, two missing tablets*" and having been initialled by "*AM*".

Suspension of first claimant

42. After these disclosures, the first claimant was advised orally and then by letter of 4 March 2022 (J147/148) that she was suspended to allow an investigation to take place. She was invited to attend an investigation meeting on Tuesday 8 March 2022 to seek an explanation for the allegation set out, namely: -

    i. "*During a nightly medication check you removed two of the young person's tablets from the premises in order to get the medication check totals to match*".

43. The claimant was advised that disciplinary procedure may follow the investigation and that she should not attempt to contact anyone connected with the investigation or discuss the matter with other employees. If she considered that anyone could provide a witness statement which would assist in investigating the allegations then she should contact Ms Spy who would arrange for them to be interviewed. There was no reference to any right of the claimant to be accompanied at the intended meeting.

Suspension of second claimant

44. After the discussion on the evening of 4 March 2022 the claimant was advised that the respondent was required to "*carry out an investigation into this allegation*" and, until completed, required to suspend the second claimant from duty with immediate effect. The second claimant was to receive a letter of suspension.

45. The claimant then received letter of 4 March 2022 (JA136/138) which advised her that she was suspended and the allegations against her were: -

    i. "*That you did not inform management that a member of staff had taken medication belonging to a young person off the premises with the purpose of covering up an error.*

    ii. *That you falsified medication records to cover up the error, deleting an entry entered by another member of staff.*

    iii. *That you failed to notify management when you learned of an error that could have led to the harm of a young person.*

    iv. *That you intended to bring the medication back into the workplace when asked to by a member of staff*".

46. The second claimant was advised that to progress the investigation she "*may be required to attend an investigation on…*". No date was given as to when this investigation meeting might take place. It was stated that the purpose of that meeting was to seek an explanation for the allegations and that the meeting would be facilitated by Kirsty Stuart and that the claimant would be advised of the "*date, location, and time if this is required*".

47. This claimant was also advised that disciplinary procedure might follow and that she should not contact anyone connected with the investigation or discuss the matter with any other employee. She was also advised that she should contact Ms Spy in the event that she considered anyone could provide a witness statement which would help in the investigation. No reference was made to any right to be accompanied.

Investigation process of allegation against first claimant

48. On 8 March 2022 Ms Spy conducted interviews with Jean Wilson and the first claimant (J151/154 and J155/161). Prior to the investigation meeting the first claimant had requested that a friend accompany her. She received an email on Sunday 6 March 2022 (J202) which advised that the respondent considered there was no entitlement to bring a friend to the investigation meeting and, while allowed before, it had tended to cause "*more of a hindrance to the process and made a decision that it would not be allowed for the investigation meeting but should there be a requirement for a disciplinary process then a friend would be able to attend".*

49. Ms Wilson explained that on 3 March 2022 her colleague on shift was "*rummaging around looking for the two missing tablets*" and that she knew what had occurred because on the evening of 1 March 2022 there had been a discussion with the first claimant about the count of tablets. At the end of that discussion they could not find the mistake so the first claimant had said "*we'll just cut off two and that makes it right. She cut the pack with scissors and put the two tablets in her pocket*" and that if the young person "*ran out there would be two here for her*". She stated that she saw the first claimant perform that action and put the tablets in her pocket. Ms Wilson was aware at that time that if a mistake could not be fixed then someone required to be notified but she did not do so.

50. She stated that on the dayshift of Thursday 3 March 2022 noticing there appeared to be 2 tablets *"missing"* she had phoned the first claimant on "*the Thursday and asked her to bring the tablets back in. She said she wasn't in 'til the Sunday night. I asked her if Alana could bring them in tonight and she said 'Alana's already left to come into work'*" She also maintained that when the second claimant was on shift with her that night she explained to her what the first claimant had done and the second claimant exclaimed, "*F***…Lorraine what have you done?*" She then maintained that the second claimant looked at the medication book to see if she could find the problem and *"tipp-exed out"* an entry.

51. It was also maintained by Ms Wilson that she had seen the second claimant write "*two tablets missing*" on the Nightly Medication Sheet but "*I refused to sign it.*"

52. At the investigation meeting with the first claimant of 8 March 2022 she denied taking tablets from Elmbank and that there was no cover-up of an error.She advised that on "*Tuesday Jean counted the tablets and she told me there were two wrong. She said if we change there it would tally up. Jean counted them; I didn't. She thought she had found them. I wasn't concentrating. I had personal issues going on. I just took that the count was right. I assumed that she thought she found a mistake.*" She also stated that she had "*changed the medical record, I thought it was the right thing. I thought we had fixed it*" but "*definitely wouldn't remove two tablets from the workplace*." She advised that she had changed the Nightly Medication Sheet (J253) entries of 21 February 2022 through to 24 February 2022) by deleting and substituting certain numbers to "*make them right*". She had not been on shift on those occasions when entries had been made of tablets counted. She advised that because the numbers were wrong she was "*fixing them*" and that that was how they had "*always rectified errors*".

53. She further advised (J159) she had "*jokingly said to Jean that night, 'Oh here you go Jean, I've got two right here in my pocket' and that's why she thinks Jean phoned her asking her to bring the tablets back.*" She said that when Jean called she said, "*Are you having a f***ing laugh? I was only joking when I said I had two in my pocket.*"

54. In this investigation meeting discussion took place also concerning the issue surrounding the birthday meal held for one of the residents and Ms Stuart also asked the claimant: -

"*Did you tell the young person…at Elmbank that he hadn't had all the activity allowance that he was due?*" and the claimant advised that she had not and that he had had all his allowance.

Investigation process of allegations against the second claimant

55. No separate investigation meeting was held with the second claimant. She was not notified on the evening of 4 March 2022 that her discussion with Ms Spy was of the nature of an investigative meeting. That discussion was not followed up by any separate investigative process other than the meeting with Ms Wilson summarised above. There was some confusion in relation to the information recorded on that meeting of the telephone call said to be made to the second claimant by Ms Wilson. The process of recording that meeting was that there were certain pre-prepared questions for Ms Wilson and handwritten notes were kept of the answers. The notes (JA150/151) were then sought to be transcribed into the typed notes (JA152/155 which are in exactly the same terms as J151/154). The confusion which is apparent is the timing of the phone call made to the second claimant by Ms Wilson. From the handwritten notes the record is clear in stating that the phone call from Ms Wilson to Alana McGhee was on Friday 4 March 2022 at 8:55 and lasted three minutes and 27 seconds. The question is noted: -

> "*Can you show me the call log on your phone for Friday morning?*"
>
> with the handwritten note in response.
>
> "*Yes – see the log on 4/3/22 at 8:55 three mins 27 seconds.*"

56. That information is also recorded in handwriting at the foot of the page (JA150).

57. However, within the typewritten notes the call is stated to be on Friday at "*20:55 for three mins 27 seconds*" which is at odds with the handwritten note. There is also some confusion in the notes of meeting as to whether that call was made on the evening of Thursday 3 March 2022. In evidence it was explained that there was an error in the typewritten notes in stating that the call was "*20:55*" on Friday 4 March 2022. That error did to some extent dog the subsequent investigation. In evidence at the Tribunal the second claimant advised that she had received a phone call from Ms Wilson at 8:55am on the morning of Friday 4 March 2022 (referred to later) and which would confirm that the typewritten note was in error and the call was made at 0855 on the morning of Friday 4 March 2022.

Management reports

58. Management reports were prepared in respect of the two claimants. The investigating officer in respect of the first claimant was stated to be Kirsty Stuart and her report (J162/166) recommended that the matter be referred to a disciplinary hearing on the allegation that the first claimant had "*removed 2x 100mg lamotrigine tablets from the service at Elmbank in order to make good the written records of Nightly Medication Checks*".

59. The report for the first claimant reviewed the events disclosed and the evidence. It concluded that it would appear "*LY made no attempt to allow for a management investigation into the extra tablets and gave no consideration or made any checks that the young person had definitely received their medication at each prescribed time…Instead she simply chose to override the previous records of staff counts that she was not present for and did not witness…*"

60. The report for the second claimant was in a similar format and named the investigating officer as Pauline Spy (JA156/161).

61. The allegations were outlined (JA156/7) and in the evidence reviewed it was noted that the second claimant had admitted to deletion of an entry on the MARS and that the count records had been altered.

62. The conclusion reached on the actions of the second claimant were that she was aware of the difficulties for the first claimant in relation to this matter and had attempted to cover it up.

63. Again it was recommended that the matter be referred to a disciplinary hearing.

Disciplinary hearings

64. By letters of 9 March 2022 from Pauline Spy, the claimants were invited to a disciplinary hearing on 11 March 2022.

65. The particular allegations against the first claimant were: -

- "*Falsification of a young person's medication records*
- *Allegedly removing medication from a young person's medication supply, taking it off the premises in order to make the medication count valid.*
- *Failing to recognise that an error in medication records could be highlighting a risk of harm to the young person and taking appropriate action.*
- *Failing to follow FTS medication management policy.*
- *Failing to act with honesty and integrity to a level expected of a registered Residential Childcare Worker.*"

66. Statements obtained together with copies of the relevant MARS and Nightly Medication Checks were included along with minutes of the investigation meetings and appropriate Policies.

67. It was stated that the hearing would be conducted by Pauline Spy and that Kirsty Stuart would also be in attendance as a notetaker. It was stated that the claimant could be accompanied by a fellow employee or companion for support. (J171/172)

68. The particular allegations against the second claimant were :-

- *Falsification of a young person's medication records*
- *Failing to notify management when you became aware of a medication error*
- *Failing to recognise that a error in medication records could be highlighting a risk of harm to the young person and taking appropriate action to check this*
- *Attempting to cover up a medication error by deleting records with Tippex*
- *Failing to act with honesty and integrity to a level expected of a Residential Childcare Worker*

69. Again Minutes of meetings and statements along with relevant record sheets and Policies were provided.

70. In this case the hearing was to be conducted by Kirsty Stuart with Pauline Spy in attendance to take notes. The second claimant was advised she could be accompanied by fellow employee or companion. (JA164/165)

Procedural matters in relation to disciplinary hearing and grievance

71. As the claimants were given only two days notice of the disciplinary hearing they indicated to the respondent that they would not attend as intimation fell short of the seven day notice required by ACAS. That was confirmed by email from Frances Pollock who advised that she would be accompanying each of the claimants at any future disciplinary hearing (J175 and JA167).

72. The meeting was then postponed by the respondent to 16 March 2022 who stated that as Frances Pollock was not a colleague or official trade union representative then she would not be able to accompany the claimants as had been requested.

73. By email of 13 March 2022, the first claimant advised that she would be unable to attend the hearing fixed for 16 March 2022 as her "*mental state is not in a good place at this time*" and indicated she had suffered with mental health issues previously. She wished Frances Pollock to attend her hearing who understood her health issues and that would be a reasonable adjustment. She also maintained that the refusal to allow her to be accompanied at the investigatory meeting was a breach of policy and procedures. Neither did she wish the disciplinary hearing to be taken either by Pauline Spy or Kirsty Stuart as they had been involved in the investigation and she did not consider she would get a fair hearing as the outcome would be predetermined. She wished someone with no involvement in the company to take that hearing. She also asked for witnesses Jean Wilson, Alana McGhee, and Laura Cherry to be available at the disciplinary hearing.

74. The second claimant advised by email of 11 March 2022 that she would be unable to attend the intended disciplinary hearing on 16 March 2022 as she had an emergency hospital appointment with her son at 10:30 and also pointed out that she did not have seven days' notice of that hearing as provided by ACAS.

75. By letter of 14 March 2022 the respondent wrote to the first claimant (J178) advising that the disciplinary hearing would be scheduled for Friday 18 March 2022 at noon and that she would be able to bring Frances Pollock to accompany her on specified conditions.

76. By emails of 14 March 2022, each of the claimants advised that they did not consider they would get a fair hearing at the disciplinary hearing if both Pauline Spy and Kirsty Stuart were involved as they had made investigation and recommended disciplinary action and so the outcome was predetermined. They wished someone who had not previously been involved to take that hearing.

77. By letters of 14 March 2022 (J182 and JA1872) the respondent advised the claimants that the intended disciplinary hearing would take place on 18 March and that Frances Pollock would be allowed to attend but would not be "*allowed to speak, answer questions, address the hearing, sum up your case, or represent you in any other way except to be there as a supportive companion for your mental health*". If the claimants wished to speak with Frances Pollock they should seek an adjournment of the meeting to allow that to happen.

78. It was also stated that there was no right to be accompanied at an investigation meeting and so the claimants were not offered that opportunity. It was not considered there was anything unreasonable asked of the second claimant in asking her to "*have a chat*" when it was explained by Ms Spy "*what I needed to ask you about and you agreed to answer my questions*". The first claimant was advised that Pauline Spy would hold the disciplinary hearing and the second claimant was advised that Kirsty Stuart would hold her disciplinary hearing. The claimants were advised they were not entitled to call for witnesses to be present at the hearing.

79. By further email of 14 March 2022, each claimant advised that they wished to raise a formal grievance under the bullying, harassment, and victimisation at work policy (J180 and JA174). The first claimant reiterated the need to be accompanied and that she did not consider she would get a fair hearing given that both Pauline Spy and Kirsty Stuart had been involved in the investigation. She also repeated the request for witnesses.

80. The second claimant raised the issue of her being taken for a "*wee chat*" being in breach of procedure and that the proposed disciplinary officer was required to be different from those who had investigated the matter.

81. Each of the claimants lodged grievance statements in similar terms (J197/202 and JA176/180) asserting failure to allow accompaniment at the investigatory meetings; failure to consider the impact on mental health in the investigation process and then only allowing Frances Pollock to accompany under certain stringent conditions and that it would be reasonable to have Frances Pollock read out statements at any disciplinary hearing; that no help was offered by the respondent despite the advice of ACAS in supporting those with mental health conditions through suspension; that they were unlikely to get a fair disciplinary hearing given the involvement of Pauline Spy and Kirsty Stuart in the investigation; they had had to "*fight to get the employment rights that I am entitled to*"; that "*barriers are being put up*"; and no witnesses were being allowed at disciplinary hearing contrary to ACAS advice.

82. By letter of 16 March 2022 to the first claimant (J186) the respondent advised that a new chair would be appointed for the disciplinary hearing and that would be arranged for 23 March 2022. However, the first claimant advised that she would not be attending a disciplinary hearing until her grievance had been heard.

83. No disciplinary hearing took place on 23 March but a grievance hearing for each of the claimants was scheduled to be heard on that day by Derek Scott. He wrote to the claimants on 21 March 2022 advising of that position (J188 and JA183/4) It was agreed that Frances Pollock would attend as a companion, but under the same conditions as had been previously detailed.

84. At the grievance hearing the claimants presented their grievance statements (J197/201 and JA176/180) and answered questions. Minutes were kept of the grievance meetings with the claimants (J189/196 and JA185/188) and observations were made on those minutes by Ms Pollock.

85. Each claimant was sent a letter of 31 March 2022 by Mr Scott which did not find sufficient grounds to substantiate the grievances raised (J203/207 and JA198/204).

86. In relation to the complaint by the first claimant that she was not allowed to be accompanied at the investigation hearing, it was stated by Mr Scott that there was no entitlement to be accompanied. It was concluded therefore that the respondent followed policy and did not believe that the ACAS code had been breached in this respect.

87. For the second claimant it was maintained that an initial meeting required to be held on the evening of 4 March 2022 to ascertain the knowledge of the second claimant and sufficient information became available so that a separate investigatory meeting with the second claimant was not required.

Appeal against grievance outcome

88. The claimants intimated that they wished to appeal the grievance outcomes by emails of 4 April 2022. After representation on the chair for these appeals the respondent indicated they would be heard by Pamela Gallagher a Director of Care at a company known as Nurture One as a "*third-party consultant sought to ensure full impartiality due to previous allegations of bias…*" Frances Pollock would accompany the claimants. Detailed grounds of appeal were lodged by the claimants (J293/299 and JA205/209) It was stated that Pamela Gallagher would proceed with the meeting and the outcome would be made by her alone and if she had any further investigation to make following the appeal that would be documented in the outcome letter.

89. The appeal hearings were heard by Pamela Gallagher on 11 April 2022 Minutes of the grievance appeal were produced. The minutes provided by the respondent for the second claimant (JA211/213) were disputed in certain

respects as noted on the comments made for the claimant (JA214/216). The only changes to the minutes produced by the respondent appear to be a note that the claimants requested that the hearing be recorded which was refused; and a note that no response had been given as to why the claimant was denied calling witnesses to the proposed disciplinary hearing.

90. An outcome letter was sent to the first claimant on 22 April 2022 (J211/216). That outcome letter explained: -

i. The claimant's position was that Pamela Gallagher and Kirsty Stuart had previously worked with each other and there may be bias but Ms Gallagher disputed bias stating she and was appointed to hear the appeal to provide independence given the family connection amongst the Directors.

ii. That the appeal was partly upheld in respect of support to the first claimant as the "*choice of support could have been more appropriate*".

iii. That a recommendation would be made concerning email correspondence out of hours.

iv. Otherwise the outcome of the grievance issued by Derek Scott was upheld.

91. The grievance outcome letter for the second claimant issued on 22 April 2022 (JA218/223) explained: -

i. That the appeal was partially upheld in respect of the choice of support which could have been made available to the second claimant.

ii. That a recommendation was made regarding out of hours emails.

iii. That each request for witnesses should be reviewed separately and appropriately by the respondent and that, given that there had been some dispute over written minutes produced, consideration should be given to future meetings being audio recorded to protect both employer and employee.

iv. As far as a further allegation was concerned that the initials of Mr Woodlock had been "*forged*", on the MARS of 3 March 2022 (as he was not on shift that day) management would carry out a separate investigation into that matter.

92. Otherwise the grievance outcome intimated by Mr Derek Scott was not altered.

Disciplinary hearings

93. Disciplinary hearings for both first and second claimant were arranged for 9 May 2022, subsequent to the disposal of the appeal against the grievance outcome.

94. In the correspondence prior to those hearings, both claimants raised the issue of the attendance of witnesses. Reference was made to previous email of 12 March 2022 requesting that Pauline Spy, Jean Wilson, Laura Cherry, and Stephanie Kernachan be made available to attend the hearing as witnesses. At that time the request had been denied. It was also stated that Phil Woodlock was prepared to attend as a witness. These matters were dealt with in an email by Frances Pollock to Derek Scott who was to chair the disciplinary hearing (JA226/228).

95. In the response from Derek Scott of 7 May 2022 (JA/228), he advised that a fair hearing could be provided without witnesses being present and that he had already held a statement by Mr Woodlock in support of the first claimant which had been provided by her and if the claimants wished to present further information that could be done by further statement.

Disciplinary hearing of first claimant

96. The disciplinary hearing with the first claimant took place on 9 May 2022 at 12:30pm and was chaired by Derek Scott. The first claimant was represented by Ms Pollock as a union representative. Both parties recorded the meeting. Minutes prepared by the respondent were produced (J311/319). Within those minutes reference is made Ms Pollock reading out a "*prepared statement on*

behalf of the first claimant and also a statement from Mr Woodlock." An email from the claimant of 13 May 2022 advised that she did not accept the minutes which had been produced but gave no particulars of reasons for dispute at that time (J309). The concern appeared to relate to reference being made to the statement of case (J256/264) which had been prepared by the first claimant with the assistance of Ms Pollock being read out rather than being inserted within the minutes and that no answers had been made to the questions raised in the statement of case

97. In the disciplinary hearing the first claimant advised that on the evening of 1 March 2022 Ms Wilson had recognised a discrepancy in the figures within the Nightly Medication Checks sheet and stated that Ms Wilson "*eventually counted and stated that she knew where the mistake was and she brought a wee bit of white paper over to me and went 'that's where the mistake is, if we change that,' so she gave me the bit of paper and the medication book and I changed it, and she (Jean) noticed again that there were still two tablets missing but then, however, she stated, 'that's it there it's sorted.' I signed the medication sheet, Jean signed it and put it away.*" She advised that once it had been established that there were two tablets missing no check had been made with the young person in case she had missed her medication because when the book was signed "*I thought the medication was sorted that night and there wasn't two tablets short, both Jean and I signed the book.*" She also indicated that when Ms Wilson had "*brought the piece of paper over, we thought staff had only given her one tablet. I think it was so when we sorted it, it came to the right amount and we signed it.*"(J311)

98. The first claimant indicated that she had not removed two tablets from the premises as alleged by Ms Wilson and that she was lying. The phone calls which were made to herself and the second claimant asking about tablets were made to "*cover herself*". She acknowledged that she had made changes to the entries on the Nightly Medication Checks sheet.

99. In evidence the first claimant acknowledged that the statement of case (J256) was in error in stating that she had not counted the tablets on the evening of 1 March 2022 as she could recall that Ms Wilson had come over to her on

that evening "*with the tablets*" and "*tried to work out a mistake*". The minutes of the disciplinary indicate that a count would be by the2 people on shift (J313) Within the Nightly Medication Checks sheet (J253) the claimant advised that she had altered the figures for 26 February 2022 to state 93 tablets; for 27 February 2022 to state 91 tablets; for 28 February 2022, to state 89 tablets; for 1 March 2022 to state 87 tablets. She considered it normal practice to correct errors.

100. In evidence the first claimant stated that she had no MARS available when discussing tablet numbers with Jean Wilson and that she joked with Jean Wilson on the check saying "*if bloody wrong then I will take the two tablets – and she laughed at that*".

101. She also explained in evidence that, when phoned by Ms Wilson regarding returning tablets to the home, she thought that Ms Wilson was "*having a joke with me because of the previous alteration*"; that the call had come out of the blue; and that she thought Ms Wilson was "*kidding on*" as she had never put tablets in her pocket that night. She did not know why Ms Wilson would phone the second claimant if she was carrying out a joke.

102. She disputed making any other changes to the Nightly Medication Checks sheet recognising that at 13, 14, and 15 February 2022 changes had been made but not by her.

103. Following the disciplinary hearing, Mr Scott considered matters and advised the first claimant by letter of 16 May 2022 (J224/225) that she was dismissed with effect from that date.

104. The outcome letter listed the allegations contained within the initial invite to disciplinary hearing (J171/172) and advised that the explanations provided by the first claimant were unsatisfactory. Rather than reporting an inconsistency in the count of tablets it was decided to alter the record and the young person's wellbeing did not appear to be a priority. There were in fact two tablets missing from the count and the explanations given were considered to be "*varied and inconsistent between investigation and disciplinary and note in particular that you have been vague in recollection of your own actions, yet*

resolute when describing those of your colleague Jean". In those circumstances it was decided that dismissal was an appropriate penalty.

105. In evidence Mr Scott advised that he did not believe the claimant when she said that she had not taken the tablets from the premises. He did not see any reason why Ms Wilson would fabricate that position. Neither was it thought that there was any credibility in the statement by the claimant that she was only joking about taking two tablets. The calls made by Ms Wilson, which had been verified, asking about tablets being returned to the premises enhanced belief in Ms Wilson's position that two tablets were taken. Given the changes to the Nightly Medication Checks sheet it was not clear even at disciplinary what figures had been deleted by the first claimant to "*correct*" the record. He was aware from Pauline Spy (as she confirmed in evidence) that she had examined the medication pack and one sheet had been "*snipped*" in a way which was consistent with tablets being cut from a sheet as had been described by Ms Wilson.

Disciplinary hearing of second claimant

106. The disciplinary hearing for the second claimant took place on 9 May 2022 at 11am. Again, Derek Scott chaired the meeting and the second claimant was represented by Ms Pollock as a union representative.

107. Again, prior to the meeting discussion took place regarding witnesses for the hearing and the respondent advised that a fair hearing could be provided without witnesses being present. It was accepted that any further statement from Phil Woodlock would be accepted.

108. The meeting was recorded by each party. At the hearing a statement of the case for the second claimant was read out (JA237/246).

109. Minutes were produced by the respondent (JA230-236) and by email of 12 May 2022 (JA339) contested on the basis that the statement read out for the second claimant wished questions answered and that was not recorded within the minutes. A response was made by Mr Scott (JA4340) to the effect that

the statements provided were attached as an appendix to the notes and therefore were not required within the body of the minutes.

110. At the hearing, the second claimant disputed that Ms Wilson had told her on 3 March 2022 that the first claimant had cut two tablets from the pack on 1 March and put them in her pocket and taken them home. She indicated that Ms Wilson would be lying about that. She also denied making the comment, "*Lorraine, what the f…. have you done*" in front of Ms Wilson on the evening of 3 March 2022. She confirmed that she had made Tipp-ex changes to the medication records but denied that Ms Wilson had said, "*we will get into trouble for using Tipp-ex on the records*".

111. Her explanation of events on 3 March 2022 was that when she arrived on shift the Assistant Manager and Ms Wilson asked her to have a look at the record sheets. She had Tippex-ed out the entry of 3 March 2022, being "*7x 100mg tabs given for contact to last until Mon 7/3/22, 77 left*" because she considered that the MARS (J254/255) should only record when medication had been administered. She considered it was now being "*made out that I Tipp-exed this for this big massive coverup and I don't know what that's about. I genuinely Tipp-exed it out because my thoughts were it should not be on that sheet. I was genuinely trying to help out and find what was wrong with the tablets.*" She advised that she had spoken with the person who had written the comment on the MARS to say that it should not be on that sheet. She acknowledged that unless a photograph had been taken of the MARS prior to being Tipp-exed, no record of the original entry would be available. She was also asked why she had told Ms Spy on the evening of 4 March 2022 that she had only deleted the comments "*two tablets missing*" because "*someone had written it in the wrong place*" and advised that she was taken off guard at that point and was unclear what the original entry had stated.

112. In the statement of case made by the second claimant she indicated that she arrived at shift on 3 March 2022 "*where Jean and Symone (Shaw) were already sitting with medication paperwork on the table…"* thinking they were "*two tablets down*". Ms Shaw left and she and Ms Wilson looked at the medication sheet for the service user. She indicated that she thought that she

had "*worked this out as it said on the sheet that seven tablets had been given to the service user for weekend contact. I thought that should have only been five tablets.*" She said that she then Tippex-ed what had been written and went ahead to rectify the count problem. She also indicated that she had not covered up for the first claimant and counted back the number on the Nightly Medication Checks sheet (J253) and in evidence advised that she had changed the figures from those that had been inserted from 26 February through to 2 March 2022. She could not state how she had got to those figures within the Nightly Medication Checks sheet. She could not reconcile the figures.

113. She confirmed that she had received a phone call from Ms Wilson around 8:55am on 4 March 2022. She had taken a screenshot of the call log (JA326) which she stated had been taken "*on the Friday night after I got suspended*" (JA238).She was in the midst of the school run and, while Ms Wilson had said "*something about getting tablets off of Lorraine to bring into work tonight*" she was concerned about her children running ahead and indicated that she would call her back. She did not call her back as it "*went out of her head*".

114. The second claimant recognised that she should not have Tipp-exed out the entry on tablets given out on the MARS but did not consider that she had done that to cover up for her aunt or had done anything wrong in that respect. She had narrated "7 *given to contact*" on the Nightly Medication Sheet and that there were "*2 missing tablets*".

115. Subsequent to the disciplinary hearing, Mr Scott asked Symone Shaw certain questions in an email of 11 May 2022 (JA247). Specifically he asked whether she had requested or instructed the second claimant to rectify any errors she might find in the medication records. Ms Shaw responded that she did not make any such instruction or request but "*let her know in changeover that Iain had not signed as the count was wrong, but I had notified Laura of this and she was going to look into it in the morning*". She expected the second claimant to "*leave it to Laura in the morning as I notified her that she had been informed*". As the young person was not in the home at the time "*there was no need to touch the medication folder*".

116. Mr Scott also asked Ms Wilson, by email of 11 May 2022 (JA248) to advise whether during the handover from Symone Shaw to herself and Alana McGhee whether she witnessed "*Symone requesting or instructing Alana McGhee to look for errors in the medication record…*". Ms Wilson responded to say "*Symone did not ask Alana to look for medication during the handover. As far as I'm concerned Alana found out about the medication error when I spoke to her and showed her the book after Symone had left.*"

117. By letter of 16 May 2022 Mr Scott advised the second claimant that she was dismissed (JA250-251). The outcome letter identified the allegations initially advised in the invite letter to disciplinary hearing (JA164/165).

118. It was stated that the second claimant had advised that she was unaware at the time that she made the changes of the allegation made against her aunt and that Ms Wilson was lying in relation to her conversation around the actions of the first claimant. While it was stated by the second claimant that she did not consider the remarks to which she had applied Tipp-ex were on the wrong sheet, there was evidence of that type of information being recorded on other MARS and that was where that information should have been provided. She had also stated that Stephanie had advised that the entry should not be written where it was, and it was Symone Shaw who had told her to make the Tipp-ex. She also alleged that Ms Wilson had fabricated her statement. Mr Scott considered these explanations to be unsatisfactory. It was believed that the amendments made by her to the MARS and Nightly Medication Checks sheet were to "*disguise the fact that your colleague Lorraine Young had removed tablets in order to balance the books*". In those circumstances it was decided that the claimant should be dismissed. There was particular concern over the harm that might have come to the young person which had not been checked by the second claimant or reported to management. Dismissal was effective as from 16 May 2022.

119. Each claimant raised the issue of the initials of Mr Woodlock appearing on the MARS for 3 March 2022. It was noted that on the MARS which was photographed (J255 -being the original unamended sheet) there are no initials for Mr Woodlock against the entry of 9:20 on 3 March 2022 whereas, on the

amended version (J254 - being the one which was amended by the second claimant), the initials "*PW*" appear against that entry of 3 March 2022. It was explained that investigation had been made into the issue of how those initials had appeared but no conclusion was reached. The claimants' position was that these initials must have been added on or after the 4 March 2022 and that the document was falsified and so that individual should also have been disciplined. However, the respondent's position was that albeit investigated there was no evidence to suggest who had made that addition.

Appeals against dismissal

120. Each claimant intimated an appeal against dismissal by emails of 17 May 2022 (J226 and JA252). That was met by letters in the same terms from the respondent requesting details of the grounds for appeal and confirming that the arrangements were for an "*appropriate independent person David Brand, Regional Director in Residential Care*" to hear the appeals on 2 June 2022 and that the appeal would be conducted by way of a "*review of the original decision*". The claimants were advised that they could be accompanied by a fellow employee or trade union representative. Then, to accommodate availability, the appeals were rescheduled to be heard on 15 June 2022 and to be conducted by an "*impartial consultant from Peninsula Face2Face named Saragh Reid*" (J227/1 and JA253/262).

121.

Appeal hearing of first claimant

122. Prior to the appeal hearing, the first claimant advised that she would be unable to attend due to her "*ill health both mental and physical*" and asked that the appeal be determined on the papers. Ms Reid asked if the claimant might provide any written submissions in support of her appeal and the claimant provided the statement of case which had been made at the disciplinary hearing. She also submitted an email of 16 June 2022 regarding statements made by Mr Woodlock and the signing of other statements made.

123. Ms Reid then produced her report on the appeal on 21 June 2022 (J233/249). In the report, Ms Reid advised that her role as a "*Peninsula Face2Face consultant*" was not to act as a representative of a business, but to participate in any hearing and write a report once that hearing had been concluded. It was stated that, while there was a commercial relationship between the employer and Peninsula Face2Face in terms of the provision of a human resource function, the consultant was at all times acting impartially and her role was not to dictate what steps the business should take, but to consider the evidence provided, analyse that material, and then make findings in fact based on that evidence to make a recommendation. It was then for the employer to decide whether to adopt or reject that recommendation. The employer had no part to play in the performance of the role of the consultant who was at liberty to make his/her own findings and his/her own recommendations.

124. Ms Reid recommended that the appeal be dismissed. The report noted the grounds of appeal submitted by the first claimant and also noted the response from the respondent to the various points made in support of the appeal (J237/248). The responses from the respondent were provided by Pauline Spy.

125. In essence Ms Reid considered that the first claimant had failed to provide any sufficient new evidence to support her appeal.

126. It was noted by Ms Reid that the information provided by the first claimant was information already considered as part of the original disciplinary hearing and that no new evidence was contained which would appear to influence that decision. In particular, she indicated that the first claimant had failed to provide "*any new evidence that would shed light on why JW provided information that she did in relation to the missing medication which JW states LY removed to tally up the medication count, rather than following the correct protocols and procedures in such a situation.*"(J247)

127. The appeal report was provided to the claimant on 22 June 2022 and the respondent advised that it was accepting the recommendation and upheld the original decision made by Mr Scott (J251)

Appeal hearing of second claimant

128. A similar process was conducted as regards the appeal hearing for the second claimant who also indicated that she would be unable to attend "*due to ill health as you have made clear that you will go ahead without me being there*. *As at previous meetings none of my questions have been answered to date. And I feel this appeal again is not impartial as Peninsula is paid by you this again is not a fair outcome*." Ms Reid responded to that email indicating that she was the consultant allocated to hold the appeal hearing and understood that the second claimant declined the right to attend the meeting and that it would be conducted by written submission. She asked for any written submissions in support of the appeal and was provided with the written submissions which were submitted by the second claimant as part of her disciplinary hearing (JA237/246).

129. In the outcome report of 22 June 2022 (JA278/294) it was stated that the second claimant had failed to produce any new evidence and that the case provided by the second claimant had already been considered as part of the original disciplinary hearing.

130. The outcome report narrated the terms of the statement of case made by the second claimant at the disciplinary hearing (JA283/294) and again added the respondent's comment to the various points made by the second claimant within that statement of case.

131. Within that statement of case it was conceded by the second claimant that she had Tipp-exed out the entry on the MARS which indicated that seven tablets had been given to the service user for weekend contact as she, by her calculation, thought that only five tablets should have been given out for the period mentioned. After Tipp-exing that entry she "*went ahead to rectify the count problem*".

132. The respondent's comment was that only at disciplinary hearing had this matter been raised as previously the second claimant's position had been that she had Tipp-exed the entry in the MARS because she felt it was in the wrong place and should be on the Nightly Medication Checks sheet. In any event, it was not her position to consider how many tablets should have been dispensed given that seven tablets were dispensed. It was to change history by writing over the numbers and reaffirmed the view that she wished to cover up the mistake that had been made.

133. The recommendation from Saragh Reid was that the appeal should be dismissed and that the original decision of dismissal upheld.

134. By letter of 23 June 2022 the second claimant was sent a copy of the appeal hearing report and advised that the respondent accepted the recommendation to uphold the original decision.

Events since termination

First claimant

135. At termination the claimant's gross weekly pay was £513 giving her a net pay of £423 per week. She was not a member of the respondent pension scheme. She received Universal Credit at rate of £64.47 per week for 21 weeks to date of hearing. She also advised that she had obtained sickness benefits from 5 December 2022.

136. A letter from Ibrox Home Medical Centre (J286) advised that the claimant had a history of anxiety symptoms and nervous debility since 1985. The circumstances of her dismissal at work had affected her and she was certified with low mood and stress as from 6 May 2022.

137. She had been unable to find work due to those symptoms. She had hoped to retire from work as from January 2024 when she reached the age of 65.

Second claimant

138. At termination the second claimant was paid at the rate of £415 per week gross giving her a net take home pay of £358. She was a member of the

respondent's pension scheme and put the respondent's contribution at £35 per week.

139. She was unable to secure alternative employment within the care work sector while her registration with SSSC was under investigation as a result of termination of her employment. While she had secured a job with a Social Care Partnership to begin on 10 May 2022, she was advised that as her SSSC membership was under investigation she would be unable to start until that was concluded. She had then found employment working 24 hours per week in a canteen as from 13 June 2022 with net pay of £250 per week.

140. In evidence she advised that she was seeking to secure work with the National Health Service who did not require SSSC registration but had been so far unable to obtain an interview despite application.

Submissions

141. Submission were made on behalf of the claimants and respondent and no discourtesy is intended in making a summary.

For the respondent

142. In the submission for the respondent, summary was given of what was considered to be the material evidence. Essentially, it was maintained that the respondent had reasonable grounds for believing that the claimants were guilty of misconduct.

143. The first claimant had admitted making changes to the nightly medication check sheet. She had 12 years experience with the respondent and should be aware of the proper procedures.

144. The respondent's position was that investigation has shown that there was credibility in the position of Jean Wilson that two tablets had been "*snipped off*". She herself was subject to management action not reporting matters timeously. The explanations given by the first claimant had been confusing and contradictory in the hearings that had taken place and dismissal was the appropriate sanction given the importance of accuracy in medication.

145. It was also the position that the second claimant had admitted to making changes to the MARS sheet and the Nightly Medication Checks sheet and it was the respondent's position that that had been done to try to cover up the error of the first claimant. It was not human error to Tipp-ex the entry of 3 March from the MARS. The evidence was that this young person had suffered a seizure the previous weekend and if there was no record of medication supplied then that was a serious issue.

146. The evidence from the support workers was to the effect that while they knew changes were made to medication that was not their practice and understood the importance of accuracy for the safety and wellbeing of the young persons in the care of the respondent.

147. In each case the claimants made no explanation other than that Jean Wilson was not telling the truth but the surrounding circumstances would substantiate the position for the respondent.

148. The test therefore in *British Home Stores Ltd v Burchell* [1980] OICR303 had been met. The respondent believed the claimant to be guilty of misconduct and they had reasonable grounds for that belief, having carried out as much investigation as was reasonable.

149. Dismissal was in the range of reasonable responses given the terms of the respondent's Conduct and Capability Procedure; Medication Management Policy; and the requirement to uphold professional standards.

150. It was also submitted that a fair procedure had been operated in the investigation; suspension; disciplinary meeting; and appeal.

151. Reference had been made by the claimants to action against Ms Wilson being short of dismissal, but for a claim that this rendered their dismissal unfair there would require to be truly parallel circumstances and it was clear that the actings of the claimants put them in a very different position. from Ms Wilson.

152. While the claimants had sought to suggest that the motive for their dismissal was that they were higher paid than others, that was not borne out by any

evidence. The respondent in evidence had refuted that suggestion indicating that others were paid the same or more than the claimants.

For the claimants

153. For the claimants it was submitted that the test in *Burchell* had not been met as there were no reasonable grounds for believing the alleged misconduct. The level of enquiry and consideration required particular care given dismissal could be "*career ending*" by the loss of registration of SSSC.

154. There was no corroboration of the word of Ms Wilson apart from two phone calls after the event and the respondent had simply not given proper consideration to any motive of Jean Wilson or any question of her being mistaken in her belief. The statement she had given was not clear. Why would she have gone in early to check the medication on 3 March 2022 if she already knew what the position was given that she had been on backshift that day.

155. Why was it that she had waited so long to report the matter if medication had been "*snipped off*." The phone calls were simply to cover her tracks because she knew she had been wrong in the medication count.

156. The Tipp-ex by the second claimant of the wording on the MARS sheet had been done in good faith. It was correct to put the information onto the Nightly Medication Checks sheet. The same information was on that sheet and there was no attempt to deceive.

157. All individuals whose initials appeared on the Nightly Medication Checks sheet should have been questioned about the count and the medication, but that was not done in the investigation.

158. Mr Scott had taken the decision to dismiss and also to decide the appeal after recommendation of the matter by a consultant from Peninsula. The procedure should have been that someone not previously involved should have made the decision on the appeal.

159. The chair of the grievance procedure had been a co-worker of Ms Stuart which was prejudicial.

160. There had also been a failure to tell the second claimant that the meeting with Ms Stuart was an investigation meeting. She was given no time to prepare herself.

161. The respondent had also refused to allow the first claimant to be accompanied at her investigation meeting despite her fragile mental health.

162. The statements that had been taken were brief and insufficient to proceed to a disciplinary hearing.

163. Mr Wedlock had indicated that his statement was inaccurate and that called into question whether other statements were accurate.

164. The failures meant that the claimants were not able to understand and respond to the allegations made. Ms Pollock had been required to make repeated complaints about the fairness of the procedure. The dismissal was unfair for that reason. Also, under reference to *ASLEF v S Brady* [2006] WL1546668, a dismissal can be unfair if it is a pretext for some other reason. In this instance the claimants' position was that they were paid more than others and the respondent would benefit if they were dismissed and replaced by cheaper employees.

165. It was clear there had been amendment of the sheet by other employees but no action taken against them and certainly not action involving dismissal. Reference was made to the case of *Post Office v Fennel* [1981] WL188133 as regards inconsistency of treatment and there being a pretext for dismissal which would render a dismissal unfair.

166. There was simply insufficient evidence to conclude that the first claimant had taken any tablets or that the second claimant was guilty of misconduct.

Discussion

Relevant law

167. In the submissions made there was no dispute on the law and the tests that should be applied. Section 98 of the Employment Rights Act 1996 (ERA) sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages, namely (1) the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) and (2) of ERA; and (2) if the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was unfair or fair under section 98(4). As is well known, the determination of that question:

> "*(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.*"

168. Of the six potentially fair reasons for dismissal set out in section 98 of ERA, one relates to the conduct of the employee which is the reason relied upon in this case.

169. Once a potentially fair reason for dismissal is shown then the Tribunal must be satisfied that in all the circumstances the employer was actually justified in dismissing for that reason. In this regard there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the Tribunal to decide.

170. In a case where misconduct is relied upon as a reason for dismissal then it is necessary to bear in mind the test set out by the EAT in *British Home Stores v Burchell* [1978] IRLR 379 with regard to the approach to be taken in considering the terms of Section 98(4) of ERA:

> "*What the Tribunal have to decide every time is broadly expressed, whether the employer who discharged the employee on the ground of misconduct in question (usually, though not necessarily dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief, that the employers did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly, we think that the employer at the stage at which he formed that belief on those grounds at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating these three matters we think who must not be examined further. It is not relevant as we think that the Tribunal would itself have shared that view in those circumstances.*"

171. The foregoing classic guidance has stood the test of time and was endorsed and helpfully summarised by Mummery LJ in *London Ambulance Service NHS Trust v Small* [2009] IRLR 536 where he said that the essential terms of enquiry for Employment Tribunals in such cases are whether in all the circumstances the employer carried out a reasonable investigation and at the time of dismissal genuinely believed on reasonable grounds that the employee was guilty of misconduct. In that respect the Tribunal should be mindful that it should not put themselves in the position of the employer and consider what it would have done but determine the matter in the way in which a reasonable employer in those circumstances in that line of business would have behaved.

172. If satisfied on the employer's fair conduct of a dismissal in those respects, the Tribunal then has to decide whether the dismissal of the employee was a reasonable response to the misconduct. The Tribunal requires to be mindful of the fact that it must not substitute its own decision for that of the employer

in this respect. Rather it must decide whether the employer's response fell within the range or band of reasonable responses open to a reasonable employer in the circumstances of the case (*Iceland Frozen Foods Limited v Jones* [1982] IRLR 439). In practice this means that in a given set of circumstances one employer may decide that dismissal is the appropriate response, while another employer may decide in the same circumstances that a lesser penalty is appropriate. Both of these decisions may be responses which fall within the band of reasonable responses in the circumstances of a case.

173. Additionally, a Tribunal must not substitute their decision as to what was a right course to adopt for that of the employer not only in respect of the decision to dismiss but also in relation to the investigative process. The Tribunal are not conducting a re-hearing of the merits or an appeal against the decision to dismiss. The focus must therefore be on what the employers did and whether what they decided following an adequate investigation fell within the band of reasonable responses which a reasonable employer must have adopted. The Tribunal should not "*descend into the arena*" – *Rhonda Cyon Taff County Borough Council v Close* [2008] ICR 1283.

174. As was said in *Shrestha v Genesis Housing Association Ltd* [2015] EWCA Civ 94, an investigation should be looked at "*as a whole when assessing the question of reasonableness. As part of the process of investigation the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the* Burchell *test will depend on the circumstances as a whole*."

175. That case concerned what has been defined as possibly "*career-ending*" events. In this case the outcome of the disciplinary action was a report to SSSC which may risk impairing fitness to practice for the individuals concerned. That can be career ending for a care worker and in such cases allegations must be the subject of careful investigation. In *Ilea v Gravett* [1988] IRLR 497, the standard of enquiry will depend on the state of the case against the employee which can "*at one extreme be cases where the*

employee is virtually caught in the act, and at the other there will be situations where the issue is one of pure inference. As the scale moves toward the latter end so the amount of enquiry and investigation including questioning of the employee which may be required is likely to increase…". In *Salford Royal NHS Foundation Trust v Rolden* [2010] IRLR 2721, it was emphasised that it was "*particularly important that employers take seriously their responsibilities to conduct a fair investigation where…the employee's reputation or ability to work in his or her chosen field of employment, is potentially apposite. Thus the touchstone of reasonableness of the enquiry requires to be seen in that context.*"

176. Also in determining the reasonableness of an employer's decision to dismiss the Tribunal may only take account of those facts that were known to the employer at the time of the dismissal – *W Devis and Sons Limited v Atkins* [1977] ICR 662.

177. Both the ACAS Code of Practice on disciplinary and grievance issues as well as an employer's own internal policies and procedures should be considered by a Tribunal in considering the fairness of a dismissal. Again, however, when assessing whether a reasonable procedure had been adopted, Tribunals should use the range of reasonable responses test – *J Sainsbury's PLC v Hitt* [2003] ICR 111.

178. Under *Taylor v OCS Group Limited* [2006] IRLR 613, a Tribunal should not consider procedural fairness separately from other issues arising, but should consider procedural issues together with the reason for dismissal. It was said that they "*impact on each other*" and it is open to a Tribunal (after considering equity and the substantial merits of the case) that, notwithstanding procedural imperfection, the employer acted reasonably in treating the reason as a sufficient reason to dismiss. In *UCATT v Brain* [1981] IRLR 224 it was stated that whether someone acted reasonably was "*always a pure question of fact*" and the matter "*should be looked at in the round without regard to a lawyer's technicalities*." Also, in *Polkey v A E Dayton Services Limited* [1987] IRLR 503, it was stated that an employer having prima facie grounds to dismiss will not act reasonably in treating the reason as a sufficient reason unless and

until he has taken the steps conveniently classified in most authorities as "*procedural*" which are necessary to justify that course of action. In cases of misconduct an employer to act reasonably will need to investigate fully and fairly and hear whatever the employee wishes to say in defence or in explanation or mitigation.

179. These matters are essentially outlined in the ACAS Code of Practice reissued in 2014 advising that an employer should:

i. Carry out any necessary investigation to establish facts of a case.

ii. Inform the employee of the basis of the problem and give an opportunity for them to put their case before decisions are made.

iii. Allow the employee to be accompanied at formal disciplinary or grievance hearings.

iv. Allow an appeal.

180. On any procedural issue, the Tribunal should consider the glitches in procedure in the context of the case as a whole, including the effects on the eventual decision to dismiss. In *Ulster Bus v Henderson* [1989] IRLR 251 it was considered an error of law for a Tribunal to hold that in certain circumstances an employer, in order to act reasonably, was required to carry out a quasi-judicial investigation with confrontation of witnesses and cross-examination. The principal requirement was for the employee to have the opportunity to explain his/her position.

181. Neither is it the case that the ACAS Code enshrines a right of cross-examination of witnesses. The wording within the Code is insufficiently strong to enshrine such a right which would be a material change from previous iterations of the Code. The emphasis is on the employee being aware of the charges faced. When the current Code was first issued in 2009, ACAS indicated that this was not a radical departure from the Codes which had been in place since 1971. [Employment Relations Matters (ACAS, Issue 13, Winter 2009)]

182. Single breaches of a company rules may found a fair dismissal. This was the case in *The Post Office t/a Royal Mail v Gallagher* EAT/21/99 where an employee was dismissed for a first offence after 12 years of blameless conduct and the dismissal held to be fair. Also, in *A H Pharmaceuticals v Carmichael* EAT/0325/03, the employee was found to have been fairly dismissed for breaching company rules and leaving drugs in his delivery van overnight.

183. This all means that an employer need not have conclusive direct proof of an employee's misconduct but only a genuine and reasonable belief reasonably tested.

Conclusions

184. The reason for dismissal in these cases were alleged misconduct.

185. The dismissal letter for the first claimant advised that the issues of concern were:-

i. "*Falsification of a young person's medication records*

ii. *Allegedly removing medication from a young person's medication supply, taking it off the premises, in order to make the medication count balance*

iii. *Failing to recognise that an error in medication records could be highlighting a risk of harm to the young person and taking appropriate action to check this*

iv. *Failing to follow FTS medication management policy*

v. *Failing to act with honesty and integrity to a level expected of a registered Residential Childcare Worker.*"

186. Those were issues which formed the reason for dismissal of the first claimant. (J224/225)

187. The dismissal letter for the second claimant advised the issues of concern were:-

i. "*Falsification of a young person's medication record*

ii. *Failing to notify management when you became aware of a medication error*

iii. *Failing to recognise that an error in medication records could be highlighting a risk of harm to the young person and taking appropriate action to check this*

iv. *Attempting to cover up a medication error by deleting records with Tipp-ex*

v. *Failing to act with honesty and integrity to a level expected of a registered Residential Childcare Worker*"

188. Again, these were issues of misconduct that formed the reason for dismissal of the second claimant. (JA250/251)

189. It is accepted that the respondent believed that there had been misconduct. In the evidence suggestion was made that the claimants had been dismissed not because of misconduct but as an excuse to cut costs as they were the highest paid carers given their length of service. I was not able to make any finding that was the case and, even if it was, that the respondent dismissed from that ulterior motive. The respondent's position was that there were others in the organisation paid equal or more than the claimants and that the claimants' belief that they were the highest paid seemed based on "*grapevine*" information rather than any firm evidence.

190. There was a further suggestion from the first claimant that the respondent through Ms Stuart was concerned that she had encouraged a young person to claim for back payments. A question on this was raised within the investigation meeting with the first claimant which was not in line with a principal enquiries being made and so gave rise to the suspicion that Ms Stuart was exasperated that the claimant may have encouraged claims for back pay. Again it was suggested that was the real reason for dismissal and the alleged misconduct used as a cloak. There seemed no reason for a question on back payments to be raised within the investigation hearing and

so some basis for the first claimant's suspicion. However based on the surrounding circumstances disclosed in connection with the medication and medication sheets, I accepted that in the end that issue was not in mind when dismissal was effected by Mr Scott who made no reference to this matter during the disciplinary hearing or elsewhere.

191. I did accept from Mr Scott that he believed there had been misconduct by both claimants on the issues identified and the real question was whether or not there were reasonable grounds based on reasonable investigation to come to that belief.

Investigation meetings

First claimant

192. The information received from Ms Wilson by the respondent was that on the evening of 1 March 2022 there had been discussion with the first claimant of the medication count. That resulted in two actions by the first claimant, namely: -

i. Altering the Nightly Medication Checks sheet by altering the numbers that had been written and substituting other numbers for entries between 26 February 2022 and 1 March 2022.

ii. To make the medication count match the figures, "*snipping off*" two tablets from the pack and putting them in her pocket stating she would put them in her locker in case the young person needed them but in fact forgetting to do so and taking them off the premises.

193. It was also advised that when Ms Wilson on 3 March 2022 became aware at handover that the dayshift were seeking to reconcile the medication count as it appeared to be "*two tablets short*" she came in at 7:30pm that evening to see if she could sort the matter out and phoned the first claimant at around 7:55pm that evening to ask her to give the tablets to the second claimant to bring in to correct matters. It was explained that Ms Wilson had been concerned about the actions taken and wished to report matters, albeit belatedly. Following these disclosures (J149) the first claimant was

suspended on 4 March 2022 and advised that further investigation would take place.

194. That investigation comprised of a further meeting with Ms Wilson to expand on the information received and also a meeting with the first claimant taken by Ms. Stuart.

195. The claimant had been advised in her letter of suspension of 4 March 2022 (J147/148) of the requirement to attend an investigation meeting on 8 March 2022. Prior to the meeting she had requested that she be accompanied by a "*friend*" and that had been refused by text to her of 6 March 2022 (J202).

196. There is no statutory right to be accompanied at an investigatory hearing. The ACAS Guide on Discipline and Grievance at work issued July 2020 indicates there is no guidance on accompaniment at investigatory hearings other than to indicate that such a right might be allowed under an employer's own procedure.

197. The respondent's "*Conduct and Capability Procedure*" reviewed January 2020 advises (J113) that "*at investigatory interviews employees do not have the right to be accompanied, however, if they request a FTS Care Ltd work colleague or trade union representative/official to be present then this is acceptable as a supportive role*."

198. Also within the procedure (J120) there is a section on "*definition of companion*" which reads: -

> "*Employees have a right to be accompanied by a FTS Care Ltd work colleague or union representative/official at any formal hearing under the conduct and capability procedure, and may request a companion to attend as support at any investigatory meeting*."

199. That definition is restricted in the body of that section to either a work colleague or Union representative/official. There is no right within the terms of the procedure for a "*friend*" to accompany an individual. Ms Pollock advised that at that time and as a consequence of her Union's rules she was not able to attend as a trade union representative/official until later in the disciplinary

proceeding and so the only entitlement would be as a "*friend*" . That was not within the identified categories. Accordingly, there was no breach of the respondent's rules in that respect.

200. The claim by the claimant was that notwithstanding it was a reasonable adjustment for her to be accompanied as she was someone who suffered from anxiety and mental health issues and that had been pronounced by the suspension. There was no evidence such as recent absences on account of anxiety or depression/stress or other mental health issues which would alert the respondent to a need for a companion. The notes of the meeting with the claimant (J155/161) do not show the claimant responding to questions asked of her about the events of the evening of 1 March 2022 in a fashion which would indicate she was under undue pressure or being other than alert and able to respond. There was no evidence that the disability provisions within the Equality Act were being triggered to allow a friend to attend as a reasonable adjustment.

201. Accordingly, I could not find there was any procedural breach within the procedure adopted for the investigatory meeting with the first claimant.

202. At that meeting she disclosed that she had altered the Nightly Medication Checks sheet and thought that was "*right thing" as "we had fixed it*" She denied snipping two tablets off the pack and removing then from the workplace and understood the problem of so doing given the possibility of medication being missed by the young person. She thought she had taken the right action by rectifying the count. She advised that *"Jean counted the tablets and told me there were 2 wrong"* and "*Jean counted them I didn't"* She assumed that if she changed the medication sheet to suit then that solved the issue.

203. She denied stating to Jean Wilson that if the young person required the tablets then they are "*in my locker*". She explained that Jean Wilson had phoned her on "*Thursday night and asked me if Alana would bring the tablets back and I told her I was joking. I asked if she was having a laugh as I did not have any tablets*" (J157). It was also admitted that the claimant had said "*jokingly*" to

Ms Wilson that night "*oh here you go Jean, I've got two here in my pocket*". That was why she was phoned asking for her to return the tablets and that when Jean called she said "*are you having an f**king laugh? I was only joking when I said I had two in my pockets*". She saw nothing wrong in amending the sheets as that was what the staff had "*always done*" on mistakes being made.

204. A further statement was taken from Laura Cherry to whom Ms Wilson had reported the issue and she narrated what she had been told (J167/168).

205. Ms Spy asked for the phone log from Ms Wilson and noted that calls had been made by her around 7:55pm on Thursday 3 March 2022 to the first claimant and a further call the following morning at 8:55am to the second claimant.

206. Also she looked to see if packets of tablets had been "*snipped*" and identified that one sleeve was consistent with being "*snipped*" as it was shorter than the others.

207. An investigation report was prepared by Ms Stuart in relation to the first claimant and recommended a disciplinary hearing (J162/166). For the reasonable employer there would appear to be a need for a disciplinary hearing to take place on the issues disclosed. Neither did I consider there was any procedural unfairness leading to that decision for the first claimant.

Second claimant

208. On the information received the second claimant was asked "*into the sitting room*" of the Elmbank home around 21.30 on 4 March 2022 by Ms Spy in the company of Laura Cherry. She was not advised that this was an investigatory meeting, although clearly it was a discussion regarding the medication totals and tablets within the home for the young person with particular reference to whether or not the second claimant had tablets to return to the home. The meeting was clearly premeditated in that certain questions were typed for answer by the second claimant (JA139/142).

209. At that time the second claimant indicated that she had no knowledge of any tablets being taken away from the home. She acknowledged that she had

Tipp-exed out words from the MARS because she considered the words which were deleted were "*two tablets missing*" and should not have been on the MARS sheet. It was then correct to Tipp-ex out that entry and put it on the Nightly Medication Checks sheet. She was then shown the entry that had been Tipp-exed out which was "*7x 100mg given for contact to last until Mon 7/3/22, total 77 left SK*".

210. On the information provided the second claimant was told she was suspended and would receive a letter giving details. That letter of 4 March 2022 stated that the second claimant "*may be required to attend an investigation meeting on* [blank]". (JA136/137). In fact no further meeting was arranged.

211. The respondent also took further information from Ms Wilson regarding the actions of the second claimant and the call she had made to her on the morning of Friday 4 March 2022 which was stated to be at "*8:55 3 mins 27 secs*".

212. The ACAS Guide advises that it is not always "*necessary to hold an investigatory meeting (often called a fact-finding meeting). If a meeting is held, give the employee advance notice of it and time to prepare.*"

213. In the case of the second claimant, it is clear that this meeting with her on the evening of 4 March 2022 was more than just a "*chat*" but an investigatory meeting into the matters reported by Ms Wilson. The Capability Procedure advises that *"gathering the facts"* will require holding an investigatory meeting with the employee.(J113)The notes show the questions were pre-prepared on a typewritten sheet and the conversation subsequently transcribed into minutes. Those minutes show the discussion was detailed. Ms Spy had the medication records to put to the second claimant. This was a meeting to gather facts. The second claimant should have been given advance notice of that meeting and given time to prepare as indicated within the ACAS Guide so that they could be seen to be acting with the second claimant in a fair and reasonable manner. Also, there was no time for the second claimant to request a companion such as a work colleague or Trade union representative/official which would have been a matter allowed within the

respondent's own procedures. At the same time, the second claimant was able to make answers to the questions which had been raised and denied any involvement with missing tablets. She did indicate that she had deleted an entry on the MARS and that was never a disputed issue. It was not clear what prejudice she suffered as a result of the incorrect procedure being adopted on this investigatory meeting. Whether that rendered the dismissal unfair is a matter which requires to be considered in the round and in light of further investigation which took place.

214. An investigation report was prepared for the second claimant (JA156/1561). It recommended that a disciplinary hearing for the second claimant be arranged for her to give a "*formal account to the investigation*" and determination of whether or not there should be a formal sanction.

215. The information disclosed would justify that recommendation given the alteration of the medication records and the surrounding circumstances.

Disciplinary hearings

216. The respondent sought to call disciplinary hearings with the first and second claimants, but before that took place the claimants instituted the grievance procedure in respect of the matters outlined within their grievance statements. (J197/202 and JA176/180). That grievance temporarily suspended the disciplinary process in order that those grievances could be determined. In each case Derek Scott heard the grievance complaints and provided outcome letters to the claimants. In each case the claimants were accompanied by Frances Pollock as their companion at their grievance hearing.

217. Both claimants intimated an appeal against the grievance outcome intimated to them by Derek Scott who determined the grievances.

218. Those appeals were heard by Pamela Gallagher who was employed by a different organisation. There was criticism of that individual being appointed as she was known to Kirsty Stuart. It was explained that it was not felt appropriate for other Directors to consider the grievance appeal because of the family connection. It was necessary to engage an external consultant.

Pamela Gallagher was a senior person in another care organisation. She was known to Ms Stuart having worked with her in around 2016. I did not consider that this was sufficient to make any finding that the appointment of Pamela Gallagher to the grievance appeal was inappropriate on account of bias that she may show. The appeal hearings were heard on 11 April 2022 with each of the claimants in attendance and each accompanied by Frances Pollock. The outcome letters (J211/216 and JA218/223) disclose a careful consideration of the points raised and there was no evidence of any bias being exercised towards the claimants on account of Ms Gallagher and Ms Stuart being employed by the same organisation some 6 years previously.

219. Subsequent to the disposal of the grievance issues, disciplinary hearings were held with each of the claimants. In each case the hearings were chaired by Derek Scott who made the decision on the allegations of misconduct. Initially, it was suggested that either Ms Spy or Ms Stuart take the disciplinary hearings but, after representation from the claimants, it was decided that these hearings be taken by Derek Scott. It would not have been appropriate for either Ms Spy or Ms Stuart, having investigated the matters, to have taken the disciplinary hearings as was originally envisaged.

220. The question arose of course as to whether Derek Scott was the appropriate person to take the disciplinary hearings given that he had been involved in the grievances raised by the claimants. There was some separation in that the grievances concerned issues around lack of support; procedural matters such as the lack of companion at investigatory hearings; and unfairness in the questioning rather than substantive matters affecting the issue of the alleged misconduct which would be the main focus of the disciplinary hearings.

221. It is necessary to acknowledge the limited management resources available to the respondent to cover the hearings on investigation, grievance and discipline. It would not have been appropriate for either Ms Spy or Ms Stuart or the family members who were co-Directors of Derek Scott to hear the grievances raised and that limited the choice of individual to hear the grievance to Derek Scott. I did not think it was unreasonable for him then to

chair the disciplinary hearings given the limited resources available and the differing issues and focus to be addressed at the disciplinary hearing.

222. In each case the disciplinary hearing was held on 9 May 2022. In each case the claimants were accompanied by Frances Pollock in the capacity of Union representative. For the disciplinary hearing each claimant was provided with the statements from Jean Wilson; copies of the medication logs (daytime and night); statement of Laura Cherry; Conduct and Capability Policy; and Medication Policy. They were also provided with minutes of their meetings with Pauline Spy/Kirsty Stuart.

Issues for first claimant

223. The minutes of the disciplinary hearing disclose the ability of the claimant to engage with the issues arising. Ms Pollock was able to intervene on occasion to clarify matters and the meeting was recorded. The first claimant had presented a statement of case and that was referred to within the disciplinary hearing.

224. The position of the first claimant was that she had altered the Nightly Medication Checks sheet because Ms Wilson had told her of the correct number of tablets which she accepted. On any claim that she had "*snipped off*" tablets from the pack, that was a lie and fabricated by Ms Wilson.

225. The misconduct alleged was principally twofold, namely altering the medication sheets and removing two tablets. The essential finding of the disciplinary hearing in the outcome letter by Derek Scott was that in respect of the medication count "*rather than report the inconsistency as you perceived it, you decided to hide what you believed was a medication error by removing vital medication*".

226. So far as alterations to the medication sheets were concerned, the respondent's position was that this was bad practice and that no alterations should be made to these sheets without reporting to management that there were perceived errors in line with the Medication Policy (J131). Matters could then be investigated before any changes were made. The position from the

two Care Workers who gave evidence stated that if an obvious error was made then there would be an attempt to fix it but they would always involve the person who put in the original entry. If that was done it would not appear management was involved. One of the Care Workers was aware that changes were made by other staff to the medication sheet without involving the person who made the original entry or management but that was wrong practice.

227. On changes to medication sheets there did seem to be at the relevant time, as is often the case, a difference between the written procedure and practice in the workplace. The Nightly Medication Checks sheet which was produced did show that the changes had been made at an earlier time than this particular incident and it would not appear that there had been any involvement by management or investigation. Why there should be errors in the sheet was not clear given the procedures which should be followed in the count of tablets and the recording of medication provided, but evidence was given that over the years a Care Worker might see "*dozens*" of errors and so it was not unusual.

228. The critical issue, of course, for the first claimant (and recognised by Mr Scott in his outcome letter) was the allegation of "*snipping off*" the two tablets and removing them from the premises to make the count correct. There was no dispute that if that allegation were well-founded it was a clear breach of procedure given the harm that might have been caused in not knowing if a young person had in fact received the correct medication.

229. The evidence from Mr Scott was that he believed that had taken place. The issue was whether or not there were reasonable grounds for that belief. The position of the claimant was that this was fabricated by Jean Wilson. The matters taken into account by Derek Scott were that: -

    i. There was no doubt that there was confusion over the correct count and the changes made to the Nightly Medication Checks sheet made it more or less impossible to determine where there was any error. The changes made by the first claimant should not have been made

without her being certain of the count and it was acknowledged by her that she should have counted the tablets to ensure what she was being told was correct on the evening in question.

ii. That Jean Wilson, in her account of events, had stated that there were two telephone calls made, one being to the claimant from Jean Wilson on 3 March 2022 and the second being to the second claimant on the morning of 4 March 2022. The call logs confirmed that those calls were made. The first claimant's position was that, when she was asked for tablets by Jean Wilson, she had responded to say that she was joking about taking tablets away whereas the position of Ms Wilson was that she had indicated she would give them to Alana to return. That had prompted the further call to the second claimant on the Friday morning when the correct count of the tablets was still being discussed. Mr Scott felt that the credibility of Jean Wilson was enhanced by the calls which had been made rather than there being an attempt by her to cover up the mistake.

iii. There was evidence that a sleeve of tablets had been "*snipped off*" from the information provided by Ms Spy.

iv. The activities of the second claimant were consistent with covering up for a mistake by the first claimant rather than the position being fabricated by Jean Wilson.

230. Consideration therefore by Mr Scott of the issues affecting the first claimant were to some extent covered by the issues relevant to the second claimant.

Issues for the second claimant

231. Again, the minutes of the disciplinary hearing show that there was clear opportunity for the second claimant to put her case. She had provided a statement of case to the disciplinary hearing at which she was accompanied by Ms Pollock as her Trade union representative.

232. The minutes of the disciplinary hearing show that the claimant was able to engage appropriately with the hearing and also to refer to her statement of

case (JA237/246). Again, this meeting was recorded. It would appear that Ms Pollock was able to intervene, and question matters or seek to clarify.

233. Essentially the allegations made by Jean Wilson with regards to the second claimant being told that the first claimant had removed two tablets from the sheet were refuted by the second claimant. Also she denied any actions to cover up an error. She did confirm that she had Tipp-exed the entry on the MARS, previously discussed, and had altered count records on the Nightly Medication Checks sheet and written "*2 missing tablets*". At the disciplinary hearing she indicated that she had told others of deletion by Tipp-ex but enquiry after the event of those individuals refuted that position.

234. On an examination of the records it was not possible to determine just where any error may have occurred. The second claimant had scored out previous entries over 26 February – 1 March 2022 (being the already amended entries of the first claimant) and also the entry of 2 March 2022 and inserted different figures .The outcome for the second claimant (JA250/251) found that there had been misconduct in the amendment to the MARS and that her account of events did not demonstrate any "*clear line of thinking or motivation as to your actions*" and that the "*alternative interpretation of the events is that you amended the MAR chart to disguise the fact that your colleague Lorraine Young had removed tablets in order to balance the books*."

235. Mr Scott's position was that he believed there had been an attempted cover up by the second claimant because: -

    i. There should never have been any need for the first claimant to Tipp-ex out an entry on the MARS. It was not a sheet she should have been engaged with.

    ii. On the MARS she had initially indicated that she had deleted an entry stating "*two tablets missing*" whereas, on examination of the photographed copy which had been made of the MARS (unamended) it showed a more detailed entry regarding tablets being provided to the young person while away from the home.

iii. At the disciplinary hearing the claimant had indicated that she had Tipp-exed the entry on MARS was because she thought it was wrong in stating "7" tablets had been given to the young person to take a way and it should read "*5*". That was an amendment to the MARS sheet in relation to what the second claimant thought should be the position rather than that which had been recorded by an individual on a count of the tablets and enhanced attempted cover up.

iv. The various amendments made by the second claimant to the Nightly Medication Checks sheet was consistent with her trying to make the count appear right and cover an error by the first claimant

v. That there was a call made by Ms. Wilson to the second claimant at 8:55am on Friday 4 March 2022. That corresponded to her own call log (JA326). That was the correct timing of the call. That conformed to the position of Jean Wilson who had stated that on the morning of Friday 4 March 2022 she had become concerned about the continuing discussion over missing tablets and had made that call to the second claimant to have tablets returned which she thought were in her possession given discussion with the first claimant. Mr Scott believed that this added to the credibility of Ms Wilson's position.

236. Given these considerations, Derek Scott was of the view that there had been an attempted cover up by the second claimant of the actions of the first claimant.

Reasonable belief based on sufficiency of investigation

237. A matter which concerned the claimants related to their desire to call witnesses to the disciplinary hearing. It would not appear that they wished witnesses called to support their position but for the purposes of cross-examination. The individuals requested were Pauleen Spy, Jean Wilson, Laura Cherry, and Stephanie Kernachan. There is no right enshrined within the ACAS Guidance that a witness is required to attend for cross-examination at a disciplinary hearing. I did not consider that there was a breach of

procedure in this respect. Neither did the respondent's own Conduct and Capability Policy give a right of witness attendance. The procedure advises that copies of witness statements should be provided to the employee and such copies were provided in this case.

238. The test of whether an investigation is sufficient is that of the reasonable employer in the context of the allegations made. It is not for the Tribunal to substitute its view of what would have been an appropriate investigation. The extent of the investigation and the form that it takes will vary according to circumstances. It may be that the circumstances will for the reasonable employer mean that witness attendance is necessary. However given the considerations that the respondent had in mind in weighing the conflicting positions between the statements and circumstances in support of the allegations made and the claimant's position that essentially the principal allegations were being fabricated by Jean Wilson, I considered that the investigation met the test of being within the band of responses of the reasonable employer and that the respondent did have sufficient information to come to a genuine belief in the guilt of the claimants.

239. I considered that, despite the second claimant not being given advance notification of her investigation meeting or intimation that she was entitled to be accompanied by a work colleague or trade union representative, the investigation procedure involved was, in the round, fair. While she may have been caught "*off guard*" at the initial investigatory meeting, that was not the case by the time that the disciplinary hearing took place when she had been in possession of the various papers associated with the matter for some considerable time; had completed a grievance hearing; appealed that outcome; prepared a detailed statement of case; attended a disciplinary hearing. In those hearings she was accompanied by Ms Pollock. There was ample opportunity for the second claimant to have put her case and make all representations on the allegations made.

240. A fair procedure of course would also engage the right of appeal. That was offered to the claimants and they each took the opportunity of appeal. In each case the claimants advised that the appeal should be on the papers disclosed

only and that is the way in which the appeal proceeded. The appeal contained a recommendation to the respondent and it was Mr Scott who accepted that recommendation. The point was made that in these circumstances he was not independent. Again it is necessary to acknowledge the limited resources of the respondent. It would not have been appropriate for Ms Spy or Ms Stuart to hear the appeal and they were the other senior managers. Neither would co Directors be appropriate given the close family connection. The appointment of an experienced consultant was appropriate to make a recommendation given these circumstances and the outcome report did display consideration and apparent impartiality. I did not consider that there was procedural error in Mr Scott accepting the recommendation made.

241. As indicated, the test of misconduct is not whether the allegations were proved on the balance of probabilities (being I understand the test for the SSSC), but whether or not the test in the case of *Burchell* has been met. I consider that the considerations which came from the investigation would have been sufficient for the reasonable employer to come to a belief that there had been misconduct by the first claimant in the act of altering the nightly medication sheets and, of more particular significance, "*snipping off*" two medication tablets. For the second claimant the essential issue was whether she had sought to cover up that matter by making further alteration to the medication sheets and, given the considerations that came from the enquiry made, I considered that the reasonable employer could reasonably have come to that belief.

Consistency

242. A theme that concerned the claimants as matters proceeded was what action was being taken to other individuals who may have amended medication sheets and in particular how it was that the initials of Mr Woodlock (PW) appeared on the nightly medication sheet at a time when he was not on shift. It was explained that enquiry had been made by the respondent into how that had taken place, but no conclusion was able to be reached. In those circumstances there did not appear to be any action that could be taken against any individual for entering false initials.

243. Insofar as action involving Ms Wilson was concerned, she was subject to disciplinary action but short of dismissal. For a complaint to be made that the dismissal of the claimants was unfair due to lack of consistency, it would be necessary for there to be truly parallel circumstances between their position and that of Ms Wilson. There were clear differences between the claimants' position and that of Jean Wilson. She came forward to advise the respondent of the issues; had not removed any medication tablets; had not sought to cover up the position; and, indeed, refused to sign the alterations made to the sheets by the second claimant. It could not be said therefore that there were truly parallel circumstances existing either between the claimants or in comparison with the activities of Ms Wilson.

Sanction

244. The remaining issue was whether or not the sanction of dismissal was appropriate. Again, it is not for a Tribunal to substitute its own view of a sanction, but to consider whether it comes within the band of reasonable responses. One employer may have considered that a final warning was the way to proceed and another dismissal.

245. I could not consider that dismissal was outwith the band of reasonable responses. The dangers of making extensive alteration to a medication sheet and, in particular for the first claimant, a belief that two tablets were taken away to make the count fit was an act which could compromise the safety of the young person. Additionally, a belief that the second claimant had sought to cover up that issue by making alteration to the record were serious issues for the respondent who are subject to regulation through the Care Inspectorate and SSSC.

246. The respondents are required to operate to high standards in relation to the control and use of medication for vulnerable young persons and dismissal in these circumstances could not be said to be outwith the band of reasonable responses of a reasonable employer. In those circumstances I find that there

has not been an unfair dismissal in this case for either of the claimants under Section 98 of ERA.

Employment Judge: Jim Young
Date of Judgment: 26 January 2023
Entered in register: 30 January 2023
and copied to parties