



EMPLOYMENT TRIBUNALS

Claimant: Mr A Pawlowski

Respondent: WT UK OPCO Limited
(formerly Gracewell Healthcare 3 Limited)

Heard at: East London Hearing Centre (by CVP)

On: 2,3 and 4 November 2022;
and 24 January 2023 (Tribunal deliberation)

Before: Employment Judge Craft

Members: Mr S Woodhouse
Mr L Purewal

Representation

Claimant: Mr Grecka, Consultant
Respondent: Mr P Chadwick, Consultant

UNANIMOUS RESERVED JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.
2. The Claimant was wrongfully dismissed by the Respondent in breach of his contract of employment with the Respondent.
3. The Claimant's claim of indirect race discrimination is dismissed upon its withdrawal by the Claimant.

REASONS

1. The Respondent provides personal and nursing care for up to 70 residents at the Gracewell Care Home, Bookham offering nursing, dementia, residential and end-of-life care through services which have been rated "Good" by the Care Quality Commission ("CQC").
2. The Claimant, who is Polish, commenced employment with the Respondent at its Gracewell Care Home, Bookham in the position of a Care Assistant on 20 March 2018. He was summarily dismissed by the Respondent for gross misconduct on 1 October 2020. He pursues claims of unfair dismissal, damages for wrongful dismissal and indirect race

discrimination. The Respondent's case is that after it had followed internal disciplinary procedures it found the Claimant had been responsible for gross misconduct and he was summarily dismissed for that reason. It denies the allegation that it discriminated against the Claimant by reason of race by denying an interpreter to him during its internal disciplinary procedures.

3. There was an Agreed Bundle of Documents comprising 490 pages (**Exhibit R1**). The Tribunal received evidence on behalf of the Respondent from four witnesses: Miss N Webster, Clinical Nurse Manager and the Claimant's Line Manager; Mr H Garston, General Manager, Bookham; Mrs M Lamden, General Manager Sunrise Care Home; and Mrs N Hopkins, Regional Director of Operations. These witnesses gave evidence in chief by written statements: **Exhibits R2, R3, R4 and R5** respectively. The Tribunal also received evidence from the Claimant who gave evidence in chief by a written statement: **Exhibit C1**. The Claimant was assisted by an interpreter throughout the hearing.
4. At the end of a three day hearing the Tribunal reserved its Judgment. It directed the parties to submit written representations in advance of its deliberations. These written submissions were duly received: **Exhibits R6 and C2** respectively. At the commencement of the Claimant's written submissions he withdrew his discrimination claim and this claim has been dismissed by the Tribunal by that withdrawal.
5. The Respondent states that the Claimant was dismissed for misconduct. At the Telephone Case Management Preliminary Hearing held on 6 September 2021 it was agreed with the parties that "the Burchell Test" would be the framework in which the Tribunal considered the Claimant's dismissal.
6. The first task for the Tribunal is to determine the reason, or principal reason, for the Claimant's dismissal. If the Tribunal finds he was dismissed for misconduct it then has to consider whether Mr Garston held a genuine belief that the Claimant had been responsible for the alleged misconduct, and if so whether he had reasonable grounds for holding that belief after a reasonable investigation, in which the Respondent had implemented a fair procedure; and, finally, that dismissal was within a range of reasonable responses available to a reasonable employer in such circumstances. In respect of the claim of wrongful dismissal the Tribunal will have to determine, applying a balance of probabilities, whether or not the Claimant was guilty of the gross misconduct alleged against him entitling the Respondent to summarily dismiss him.
7. When the Claimant commenced employment with the Respondent, he had the relevant qualifications, training and experience for the position of Care Assistant at Bookham. He completed his six-month probationary period successfully. He had a satisfactory command of English. There is no evidence before the Tribunal that he encountered any substantial difficulty in undertaking his job as a result of English being his second language. Mrs Webster informed the Tribunal that, until the incidents which resulted in internal and external investigations and disciplinary procedures there had been no problems with the Claimant's work. He had always received positive feedback. He was regarded as a good team

player.

8. On the evening shift which commenced on 20 December 2019 an incident occurred while the Claimant was working with another Care Worker, Mrs Vanessa Vienna, when they were assisting CM, a resident suffering from dementia. The Claimant completed a detailed contemporaneous note of what occurred. He recorded that CM had been aggressive towards him. She hit him on his back and scratched him and then, tried to kick him, and in stepping back to do so lost her balance and fell to the floor.
9. The Claimant immediately notified a nurse to attend on CM. The nurse also completed a contemporaneous note of his involvement. The nurse attended on CM at 22.30. He recorded that when he arrived CM was sitting on the floor and was refusing to be moved to a chair. He then records that she was eventually persuaded to move to a chair and that her two carers assisted her into the chair. The Claimant's note and the nurse's note recorded that an ambulance was requested to attend on CM to take her to the local hospital. The Claimant's note confirms that this ambulance did not arrive until 01.30. The Claimant then remained with CM until she departed in the ambulance. CM had complained of pain in her right arm, wrist and shoulder when attended by the nurse. She was found to have suffered a fractured right wrist, injury to the right shoulder and bruising to her right arm when she attended at the hospital.
10. The Respondent and its staff operate in a highly regulated environment. All relevant procedures were followed and necessary reports prepared in respect of this incident. The incident was also referred to the police and a Statutory Notification was sent to the CQC by the Respondent's Deputy Manager on 23 December 2019. CM's next of kin were also informed as soon as it was possible to do so. There was no information before the Respondent that the Claimant had committed any form of misconduct towards CM during this incident.
11. Two alleged incidents were alleged to have occurred on the nightshift on 5 / 6 January 2020 on the floor on which the shift rota indicated that the Claimant and an agency worker had been on duty. The incidents were reported by residents DB and LB who both suffered from dementia.
12. DB had bruising to the top of her leg. She had complained of pain and had difficulty in walking which was why she had been referred to the hospital for examination. When she was being taken to hospital on 6 January resident DB told a member of staff and paramedics that two men had hit her during the night.
13. On the same day resident LB had been found by the Respondent's Head Housekeeper lying on a wet bed shortly after the end of the night shift. When LB was told that the Head Housekeeper was going to arrange for a carer to come and change her LB responded that she did not want a carer to attend because: "They will shout at me and hurt me".
14. Mr Garston instructed Mrs Webster to investigate these two incidents. He informed the Claimant by telephone that he was suspended pending investigation into two incidents which had been reported on his shift. He did not give any further details to the Claimant about the incidents during

this call. He wrote to the Claimant on the following day to confirm the terms of the suspension. This letter informed the Claimant that if the investigations were not completed within one week then the Respondent would remain in regular contact with him. Mr Garston accepts that such contact was not implemented by him as the suspension moved forward. Mr Garston also contacted the agency who had provided the agency worker who had been on duty with the Claimant on the evening of 5 / 6 January to confirm that the agency worker should no longer attend at Gracewell and would not be allowed to work on site in the future.

15. Mrs Webster explained that it was concluded very quickly at the hospital and supported by LB's GP that the bruising that she had complained of had been caused by anticoagulation therapy rather than mistreatment by her carer / carers on the nightshift on 5 / 6 January 2020.
16. When Mrs Webster visited Gracewell on the evening of 7 January 2020 Mrs Vienna, who was on night duty at that time asked to see her and informed her that she had been working on the same floor as the Claimant on the night that CM had suffered her injury and alleged that the Claimant had pushed CM and that this had resulted in her fall and had caused the injuries which she suffered as a result of the fall.
17. Mrs Webster then telephoned Mr Garston in Mrs Vienna's presence. Mrs Vienna was requested to repeat what she had said to Mrs Webster to Mr Garston and as she did so Mrs Webster typed a statement which Mrs Vienna was then asked to sign. The signed statement was subsequently lost but an unsigned copy was retained by the Respondent.
18. Mrs Vienna's statement typed by Mrs Webster reads as follows:

"On the night that CM hurt her arm, I was in the clinical treatment room and CM was in the room with me, I asked Andrezej to escort CM out of the room as I needed to concentrate on medications.

CM refused to leave the treatment room, Andrezej held her arm and was trying to get her to leave. I asked to him to ensure he was being gentle. CM became agitated and started to hit and scratch him on the back. She then left the clinical room on her own.

A little while later I could hear shouting from the corridor between CM and Andrezej I rushed to see what was happened as I left the clinical treatment room I saw Andrezej push CM, CM then took a few steps backwards and fell to the floor.

As CM went to the floor Andrezej kept on saying he was sorry to CM. I asked Andrezej if he had pushed CM he replied he had not and she just fell. I asked him to write the accident form. At the time I felt I could not say what had happened as I felt intimidated."

19. Shortly after Mr Garston reported the allegations made against the Claimant in respect of CM the police confirmed that they would be investigating that allegation. The police commenced the investigation on 13 January when they attended at Gracewell and were present at Gracewell for a number of days after that. The police requested Mr

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Garston to cease all internal investigations and procedures pending the outcome of the police investigation. He instructed Mrs Webster to take no further steps in her investigation for that reason. The Claimant was not contacted by Mr Garston to confirm that his suspension had been extended to include a further investigation involving CM. He remained on suspension until his dismissal on 1 October 2022.

20. Mr Garston did not contact the police until 5 May 2020 to enquire about the progress being made in their investigation. He was advised that no progress had been made in the investigation to that date. On 23 June the police informed him that the Claimant had not yet been charged but explained that they did not want him to be put on notice that this might be the result of their investigations and so confirmed that the Respondent should not resume its internal investigations. On the next occasion that Mr Garston contacted the police on 9 September 2020 he was informed that the police were content that the Respondent resumed its internal investigations.
21. Mrs Webster wrote to the Claimant on 11 September requiring him to attend an investigation meeting with her on 14 September. He was given the right to be accompanied at that meeting by a work colleague but attended by himself. The letter inviting the Claimant to the investigation meeting gave him no details of the incidents which Mrs Webster wanted to discuss with him which were the incidents involving DB and CM.
22. The meeting notes demonstrate that the Claimant was open and helpful in his discussions with Mrs Webster. He confirmed that he had completed the care notes in respect of DB for the shift which was being discussed. His recollection was that during that shift he had been supported by not one but two agency workers. He confirmed that they had been assisting DB during the night but that he, himself, had not attended on her in her room during the shift. He had sent an agency worker to look after her and explained that when he had looked in on DB at the end of the shift she had told him that she was upset. When asked why she said that she had been woken up during the night. He told Mrs Webster that he had made her a cup of tea and assured her that he would not send the agency carer back to attend on her. He accepted that he had not documented the fact that he had found DB to be upset when he spoke to her at the end of his shift. He thought that his chat with her and providing her with a cup of tea had resolved the situation.
23. His explanation of what happened with CM followed what he had set out in the care note which he prepared after the incident on the night it occurred. He accepted that he had not called an ambulance until the nurse he had asked to attend on CM had completed a clinical examination of her. He indicated that he had enjoyed a very good relationship with Mrs Vienna. However, subsequently, he wrote to Mrs Webster to explain that in his view after considering what had been said at their meeting Mrs Vienna had maliciously changed her description of the version of events which she had agreed had been accurately recorded by the Claimant shortly after the incident had occurred.
24. Mrs Webster made findings of fact in the Investigation Report, which she submitted to Mr Garston. These were that the Claimant was present on

the shift responsible for DB, accepted Mrs Vienna's allegation that the Claimant had pushed CM, recorded that the Claimant had asked for a self-defense course to be arranged for him shortly after the incident with CM and that DB had said that two males had attacked her.

25. Mrs Webster also recorded other evidence, stating as follows: "Looking back at previous distressed behaviours it was unlike both residents to show distressed behaviour and mainly only on the shifts on which AP (*"the Claimant"*) was working". There is no record in the Investigation Report that these other matters referred to were raised with the Claimant at any time. Mrs Webster has also confirmed to the Tribunal that she did not investigate what occurred after CM fell to the ground because it was not part of her remit to do so. Her recommendation to Mr Garston states: "It is my recommendation that this go to a disciplinary hearing". The Investigation Report gave no explanation to Mr Garston of the allegation / allegations which Mrs Webster had concluded the Claimant had a case to answer at a disciplinary hearing.
26. Mr Garston wrote to the Claimant on 28 September inviting him to attend a disciplinary meeting. The purpose of the hearing is described in that letter as: "Alleged abuse of a resident". The Claimant was sent a copy of Mrs Webster's Investigation Report, a copy of the interview notes of his discussion with Mrs Webster on 14 September and other related documents and statements. The meeting convened on 1 October. The Claimant had been given the opportunity to have a work colleague present but chose to attend by himself. Mr Garston was accompanied by an administrator who took notes of the meeting.
27. The invitation to the disciplinary meeting did not identify the resident the subject of the hearing or particularize the alleged abuse the Claimant was accused of. Mr Garston's response when asked about this lack of detail suggested that the Claimant would have been well aware of what was being investigated if he had read the documents which had been sent through to him with the letter inviting him to the disciplinary hearing. He could offer no explanation as to the fact that the Claimant was asked to attend a disciplinary hearing at which his employment was at risk without any indication of the precise allegations of misconduct which Mr Garston was alleging against him.
28. During the course of the hearing with Mr Garston the Claimant gave a full explanation of Mrs Vienna's behaviour towards him. He explained that they had been involved in a relationship for some time and that this had ended acrimoniously when the Claimant discovered Mrs Vienna was seeing another man. He attributed the allegation which she made against him to her malicious behavior towards him as a result of the breakdown in the relationship and her wish to remove him from the Respondent's employment rather than continue to work with or around him at Gracewell.
29. At the end of the disciplinary hearing Mr Garston informed the Claimant that he had concluded that the Claimant had pushed CM causing her to break her wrist in the fall that followed, and in doing so accepted that Mrs Vienna's allegation against him was true. He also found that the Claimant had failed to carry out his duties correctly in not completing the daily care notes for DB accurately and recording that at the end of his shift she was

"fine". He also found that the Claimant had caused DB to become distressed and that this was an abuse of DB, although the proven allegation he sets out in his letter does not refer to such a finding. Mr Garston summarily dismissed the Claimant for gross misconduct and informed him that he had a right of appeal against that decision.

30. Mr Garston wrote to the Claimant to confirm this decision by letter dated 14 October 2020. In this letter Mr Garston sets out the allegations which he has found the Claimant was responsible for. This was an unusual situation in which the Claimant was being advised of the allegations he had faced at the disciplinary after its conclusion. Mr Garston found that the Claimant was responsible for the following misconduct:

"1. *On the night of 20 December 2 19 / morning of 21 December 2 19, a Resident CM may have punched you, but you then retaliated and pushed the resident as well as raised your voice at them. This allegation amounted to abuse of a resident. This push resulted in the resident sustaining a serious wrist injury and being taken to hospital.*

2. *Following the night of 5 January 2020 / morning of 6 January 2020, a resident DB raised an allegation against a Carer matching your description. You stated that the resident in question was upset and claimed to you "someone was horrible to me" however when checking the Daily Care Notes you annotated that the resident in question was "fine".*

31. The Claimant submitted an appeal by way of letter which was supported by a statement written in Polish and English. He submitted that the Respondent had failed to undertake a full investigation into those matters for which he had been criticized, in particular a failure to interview the agency worker or workers who were working with him in looking after DB on 6 January and inadequate notification to him of the disciplinary hearing and the documentation provided to him. He also criticized the Respondent for conducting all meetings with him in English and for accepting the allegations of Mrs Vienna who had not raised allegations at the time of the incident at which she was also present and in circumstances where the Respondent was now aware that the Claimant and Mrs Vienna had been involved in a relationship which had ended acrimoniously and that overall the dismissal was unfair.

32. The appeal was referred to Mrs Lamden, who was then a General Manager at another care home operated by the Respondent. She discussed the case with Mr Garston and sent him a substantial number of questions in respect of how the incidents had been investigated and those who had been involved. Mr Garston replied to Mrs Lamden's questions by email attaching various documents and stating to her, inter alia, as follows:

"Looking back through everything now I can see some glaring mistakes we made in dealing with this over the last ten months..."

33. Mr Garston explained that the police investigation commenced on 13 January 2020 when the police attended at Gracewell for a week taking statements and reviewing relevant documentation. He confirmed that the

police had only given the Respondent permission to continue with its internal investigations on 9 September 2020. He wrote that he had been informed on 15 October 2020 that the Claimant had been charged and how the Respondent could apply for either a copy of, or access to, a video filmed by Mrs Vienna with her camera of the incident which had been provided to the police. He further confirmed to Mrs Lamden that no further statement had been taken from Mrs Vienna and that she had not been interviewed about her relationship with the Claimant because Mrs Vienna left the Respondent's employment before 15 September 2020.

34. He explained that he had not been able to undertake an interview with the agency worker who had been working with the Claimant at the time of the incident involving DB. He had been removed from Gracewell at the same time as the Claimant had been suspended. The Respondent had no record of the agency worker's name or contact details which he understood were confidential to the Agency. He described the failure to interview the agency worker as "*a massive oversight on our part*". He also accepted that a Polish interpreter should have attended meetings held with the Claimant.
35. Mrs Lamden subsequently established contact with the police to ascertain the current position. The police arranged for her to view the video on 1 December 2020. At some time after that viewing, presumably after the Respondent's unsuccessful efforts to obtain a copy of it, Mrs Lamden prepared a statement describing what she had seen. The video lasted 17 seconds. Her statement describes seeing CM kneeling on the floor with her left hand on a small table beside her and right arm hanging down by her side. The audio of the video picks up a male voice speaking to her but that man was not visible on the video.
36. The Respondent was subsequently advised that the Claimant was due to attend trial on 9 August 2021 following which Mrs Lamden decided to proceed with the appeal. On 18 December 2020 the Respondent's HR Department wrote to the Claimant to inform him that they would be proceeding with his appeal hearing stating "*which will be heard as a complete re-hearing of the disciplinary case*". He was informed that this would be scheduled for January 2021 and that he would be contacted as to the arrangements for this hearing.
37. The Respondent then decided that with a criminal trial pending in August 2021 and the potential that the police might be able to release the video under a subject access request to delay the appeal. However, this formal subject access request was not made until May 2021. The Respondent was advised on 16 August 2021 that their request had been refused. Some time before that she had been informed that the police had dropped all charges against the Claimant. The Respondent had written to the Claimant on 18 May to inform him that they were in the process of requesting additional evidence from the police and wrote to him again on 3 September 2021 to tell him that that process had been completed and that they intended to communicate with him as to next steps within the next couple of weeks. The Respondent then decided that as Mrs Lamden had seen the video and made a statement in respect of what she had seen she should step down from chairing the appeal hearing. Mrs Hopkins was then appointed to chair the appeal hearing.

38. The letter inviting the Claimant to attend the appeal hearing, together with accompanying documentation, was emailed to the Claimant on 28 September 2021. This informed the Claimant that another independent manager would be appointed to deal with the re-hearing and attached a copy of Mrs Lamden's statement about the video which she had viewed on 1 December 2020.
39. The Claimant was informed that the appeal meeting would be held remotely on 6 October 2021 and that he was entitled to be accompanied to that hearing by a former work colleague or trade union official. The Claimant replied on 30 September stating that his case was now before an Employment Tribunal and that he had attended five different hearings / meetings at the police station, at the Magistrates' Court and at the Crown Court with interpreters and two meetings with the Respondent without interpreters. He confirmed that he had never seen or heard about the video that had been referred to in the Respondent's letter of 28 September. He also gave details of the solicitor who was representing him in respect of the Employment Tribunal proceedings and stated that he did not really understand the need for a re-hearing when his case was now before an Employment Tribunal.
40. The Respondent replied to the Claimant on 1 October stating that if he decided not to attend then the Respondent would consider written representations if he submitted them. Subsequently, Mrs Hopkins wrote to the Claimant on 19 October 2021 and this letter stated, inter alia, as follows:

"The review that has been completed has identified a clear allegation that needs to be discussed and therefore the re-hearing will be to consider the allegation:

- *That on the night of the 20th / early morning of the 21st December 2019 you neglected to provide appropriate care for a resident who was visibly distressed and in pain from a broken wrist*

This allegation is considered as a serious breach of company care standards and / or gross negligence and is an allegation of gross misconduct"

41. The Claimant did not attend the rescheduled hearing, of which he was notified, that was held on 28 October 2021. This was attended by Mrs Hopkins, Mrs Lamden and an HR Business Partner to take notes and an interpreter. The Claimant was sent a copy of the notes of that meeting and what was termed "the re-hearing outcome letter" by email of 28 October 2021.
42. Mrs Hopkins explains in this letter that she accepted that CM did hit out at the Claimant but has concluded that the Claimant did not push CM. She had found that the Claimant was angry, raised his voice and had then concluded that after CM had fallen over he failed to assist her appropriately to be more comfortable and left her in distress for a period of

time. She had then found that the Claimant failed to document the full version of events which had occurred and that this was a further serious breach of company standards.

43. Mrs Hopkins referred to the video which had been filmed by Mrs Vienna and seen by Mrs Lamden but made no reference to the contemporaneous notes prepared by the Claimant and the nurse who the Claimant had called to assist CM after her fall. Mrs Hopkins made no adverse findings of inappropriate conduct, or dereliction of care towards CM by either Mrs Vienna or the nurse who had both attended on the Claimant at the relevant time, and in the case of Mrs Vienna been able to make a 17 second video recording the scene. Her letter confirms that she had not conducted an appeal hearing in respect of the Claimant's appeal against dismissal in accordance with the Respondent's internal procedures which meant that the Respondent had also failed to follow the ACAS Code. However, Mrs Hopkins upheld the findings of misconduct made against the Claimant by Mr Garston against which he had appealed notwithstanding that she had concluded that the Claimant did not push CM which was one of the findings of misconduct for which Mr Garston had summarily dismissed him.
44. Mrs Hopkins also upheld Mr Garston's summary dismissal of the Claimant on 1 October 2020 but before doing so gave no consideration to the appeal which the Claimant had lodged against Mr Garston's findings. Mrs Hopkins' letter informed the Claimant that he had the right to appeal against her decision. The hearing convened by Mrs Hopkins in the Claimant's absence had taken place over a year after his dismissal. The Claimant was no longer employed by the Company. The Claimant had, by this time, sought advice from solicitors. They had issued employment tribunal proceedings against the Respondent on his behalf and had advised him not to become involved with the Respondent's ongoing internal procedures in which a new allegation had been against him. These are the findings of fact made the Tribunal.

Conclusions

45. When considering a claim for unfair dismissal an Employment Tribunal is required to undertake a two stage enquiry. First, the employer must show that the reason, or principal reason, for the dismissal is of an admissible kind. Conduct is a potentially fair reason for dismissal. Second, it must decide whether it was reasonable of the employer to dismiss the employee for that reason.
46. The essential terms of the enquiry are whether the employer carried out a reasonable investigation, and at the time of the dismissal genuinely believed on reasonable grounds that the employee was guilty of misconduct. If the Tribunal is satisfied with the employer's fair conduct of the dismissal in those respects, it then has to decide whether the employee's dismissal was within a range of reasonable options available to a reasonable employer for such conduct. In undertaking this assessment of the reasonableness of the employer's conduct, the Tribunal must not substitute its view as to what was the right course of action to adopt for that of the employer.

47. The function of the Tribunal is not to determine an employee's guilt or innocence but to consider the behaviour of the employer in terms of a statutory test of fairness. The Tribunal has also reminded itself that natural justice and fairness requires not merely that an employee has a chance to state his / her case. An employee must also know sufficiently in advance the case that he / she is being accused of so that he / she can fully and properly prepare a response to it.
48. The police investigation did not commence until 13 January 2020. The Respondent operates a rigorous regulatory framework which requires immediate investigation of residents' complaints. Mr Garston implemented established procedures to conduct this investigation and he also suspended the Claimant. However, although Mr Garston notified the agency that the agency worker who had been working with the Claimant on the relevant night shift would not be allowed to return to Gracewell he did not inform the agency of the serious nature of the complaint made by DB or give priority to making arrangements through the agency to interview the agency worker.
49. Furthermore, despite the concerns that he and Mrs Webster had about Mrs Vienna's failure to explain how the Claimant had intimidated her, and why she had not reported an alleged assault on CM immediately after she had witnessed it, he and Mrs Webster took no steps to conduct a formal interview with her, following the hurried, and incomplete discussion, with her during a night shift, after which a statement prepared by Mrs Webster, and signed by Mrs Vienna, was lost. The Respondent also failed to ensure that Mrs Webster would be able to contact Mrs Vienna when she left the Respondent's employment before Mrs Webster had been able to resume the investigation. This failure to prioritise these interviews in the period of time available to the Respondent, which a reasonable employer would have undertaken in these circumstances substantially limited the extent of the investigation and compromised the conduct and outcome of the investigation and disciplinary hearing.
50. This is demonstrated when one considers the Claimant's involvement in the investigations and the disciplinary hearing. The Claimant was cooperative in his meetings with Mrs Webster and Mr Garston and was involved in interviews with the police. He gave consistent and plausible explanations of his involvement with DB and CM at the relevant times. There was no evidence from the agency worker to contradict the Claimant's narrative as to his involvement with DB on the relevant night shift. Furthermore, his explanation of what had happened with CM was supported with contemporaneous care notes made by him, and agreed by Mrs Vienna, at the relevant time and corroborated by the care notes made by the nurse who the Claimant had called to attend on CM. Furthermore, the Claimant's explanation of his relationship with Mrs Vienna and the difficulties that ensued after their separation, and why that could have caused her to make an unjustified allegation against him during the disciplinary hearing clarified the allegation he had made about her after his interview with Mrs Webster. This could not be tested by Mr Garston without interviewing Mrs Vienna in circumstances where Mr Garston and Mrs Webster already had concerns about what she had refused to discuss

with them in the short interview which Mr Garston held with her over the telephone.

51. Mr Garston's failure to communicate the reasons for the initial suspension and the investigations that would be involved in that, then not to inform the Claimant at all of his suspension in respect of CM's incident, and then not to keep him informed of the ongoing position in the internal procedures was careless and inconsiderate and must have affected the Claimant's confidence in the Respondent's procedures which had not been fully explained to him as they should have been.
52. The Tribunal has already noted that Mrs Webster's investigations were inevitably limited and compromised by the fact that she could not interview the agency worker or re-interview Mrs Vienna. She also failed to particularise the allegations which she considered the Claimant should face when she recommended to Mr Garston that matters should proceed to a disciplinary hearing.
53. The cases which the Claimant had to answer remained unknown to him even after Mr Garston had invited him to the disciplinary hearing for which Mr Garston could offer no satisfactory explanation. This resulted in a most unusual situation. The allegations which Mr Garston had considered were not explained to the Claimant until he received Mr Garston's letter confirming that he had been summarily dismissed. Even then, Mr Garston omitted from those allegations that he had found that the Claimant had abused resident DB and did not particularize the abuse that he had found had been inflicted upon her and so gave the Claimant no opportunity to respond to it as fairness and natural justice requires. Mr Garston had also been unable to test the Claimant's explanation of Mrs Vienna's behaviour towards him by interviewing her. It is also important for the Tribunal to note that the Claimant faced no allegation in the disciplinary hearing that he had mistreated CM after her fall and no such allegation had been made by either Mrs Vienna or the nurse who was called to examine CM by the Claimant.
54. The Claimant appealed against his dismissal and there is no satisfactory evidence before the Tribunal as to why the Respondent was unable to deal with the appeal for nearly a year after its submission when the police had removed all restraints on the Respondent's internal investigations and procedures from 15 September 2020 onwards. The Tribunal finds this to have been an inexcusable delay which further prejudiced the Claimant.
55. Mrs Hopkins then proceeded to convene a hearing to deal with a new allegation which had not previously been investigated by the Respondent and had not been alleged against the Claimant at the disciplinary hearing. The Claimant was no longer employed by the Respondent. His outstanding appeal had still not been considered. He had not been reemployed as a result of his appeal. The Respondent's decision to embark on such a hearing, which was incorrectly described as a "rehearing" was incoherent and inexplicable. It was a flawed and unfair alteration of the Respondent's published procedures which substantially prejudiced the Claimant by denying him an appeal hearing which, on Mrs Hopkins' own findings as to the Claimant's conduct towards CM, would

have resulted in a successful appeal against Mr Garston's finding that the Claimant had pushed CM.

56. The Tribunal has after due deliberation, concluded that the Claimant was dismissed for misconduct which is a potentially fair reason for dismissal. It has then concluded that Mr Garston's belief in the Claimant's misconduct was not held on reasonable grounds after reasonable investigation for the reasons which the Tribunal has summarised above.
57. The Tribunal has also found that the Claimant was substantially prejudiced by the conduct of the Respondent's disciplinary procedures not least by its decision not to consider his appeal against dismissal but nevertheless to uphold the decision to dismiss him at the disciplinary hearing. The Claimant was unfairly dismissed by the Respondent. The Tribunal also finds that, applying the balance of probabilities test, the Claimant was wrongfully dismissed by the Respondent in breach of his contract of employment for which he is entitled to seek appropriate damages equal to the pay in lieu of notice he was entitled to be paid by the Respondent when he was summarily and unfairly dismissed on 1 October 2020.
58. This case will now be listed for a remedy hearing for which one day will be allocated by the Tribunal. The parties are ordered to agree, and then prepare, a Remedy Bundle containing all documents necessary for the Tribunal's consideration of remedy at the hearing. The Claimant is ordered to prepare a statement setting out all relevant circumstances as to his employment and earnings following his dismissal and to provide an updated Schedule of Loss to which his statement can refer.

**Employment Judge Craft
Date: 30 March 2023**