EMPLOYMENT TRIBUNALS

Claimant: Mrs Rebecca Tarlow

Respondent: Jewish Blind and Physically DIsabled Society

Heard at: Watford (by video) **On:** 21, 22 February 2023

Before: Tribunal Judge A Jack, acting as an Employment Judge

Representation
Claimant: Mr Tarlow (claimant's husband)
Respondent: Mrs A Ralph (Litigation Consultant, Croner)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claim for unpaid holiday pay is dismissed on withdrawal by the Claimant.

2. The claim for unfair dismissal succeeds.

3. The claimant is entitled to a basic award in the sum of £3,426.

4. It is just and equitable to reduce the amount of the basic award by 33% to reflect the claimant's conduct prior to the dismissal.

5. The claimant is entitled to a compensatory award of £22,345.26.

6. It is just and equitable to reduce the compensatory award by 33% to reflect the extent to which the claimant's conduct contributed to the dismissal.

7. The respondent shall pay the claimant a total of £17,266.74.

8. The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply to the sums awarded.

REASONS

Claim and Procedure

1. The claimant's ET1 was received on 24 May 2022, and brought claims for unfair dismissal and unpaid holiday pay. The respondent's ET3 and detailed Response denied both claims. The claimant withdrew the claim for unpaid holiday pay at the hearing, and agreed that it should be dismissed. The claimant also stated at the hearing that if the claim for unfair dismissal succeeded, she no longer sought reinstatement.

2. The issues were identified by the tribunal, and agreed by the parties, to be as follows:

Unfair dismissal

a. It is agreed that the claimant was dismissed on 15 March 2022.

b. What was the reason or principal reason for dismissal? The respondent says the reason was conduct i.e. that on 27 February 2022 the claimant provided a tenant of the respondent with two paracetamol tablets and a hot water bottle. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

c. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

i. there were reasonable grounds for that belief;
ii. at the time the belief was formed the respondent had carried out a reasonable investigation;
iii. the respondent otherwise acted in a procedurally fair manner;
iv. dismissal was within the range of reasonable responses.

Remedy for unfair dismissal

a. The claimant does not wish to be reinstated to her previous employment.

b. If there is a compensatory award, how much should it be? The Tribunal will decide:

i. What financial losses has the dismissal caused the claimant?
ii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

iii. If not, for what period of loss should the claimant be compensated?
iv. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
v. If so, should the claimant's compensation be reduced? By how much?
vi. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
vii. Did the respondent or the claimant unreasonably fail to comply with it? The respondent says that the claimant failed to comply with it by not appealing.
viii. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
ix. If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?
x. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
xi. Does the statutory cap of fifty-two weeks' pay apply?

c. What basic award is payable to the claimant, if any?

d. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3. There was a bundle of 96 pages. There were also some additional documents: an article entitled "Paracetamol overdose: what you need to know"; the claimant's training record; and some documents relevant to remedy. The respondent had provided a chronology, a cast list and a written opening submission. The following people had provided witness statements, and gave evidence.

i. Ms D. Clarke, a House Manager;

ii. Mr D. Chakimi, chair of the disciplinary hearing, who made the dismissal decision;

iii. Mr A. McCarthy, chair of the suspension meeting;

iv. Ms Y. Ellis, HR;

v. Mr D. Deutsch, a pharmacist;

vi. Mrs R Tarlow, the claimant.

4. Mr Deutsch is a pharmacist and has worked for the Medicine and Healthcare products Regulatory Agency, the body responsible for regulating medicines in the UK. He has no personal relationship with the claimant, who called him. He was not receiving a fee (conditional or otherwise) for giving evidence and confirmed that he was aware that his principal and overriding duty in giving evidence was to the tribunal and not to the claimant. I clarified with him that he would be able to give evidence relating to the level of risk which the claimant had taken, but that it was not

for him to opine on whether or not the administration of two paracetamol tablets exposed a patient to sufficient risk to warrant immediate dismissal. In other words, the final paragraph of his witness statement went beyond what he could properly give evidence on. He confirmed that he understood. In the light of this I considered it appropriate for Mr Deutsch to give evidence as an expert. The respondent put various points to him in cross-examination, including various points relating to the article "Paracetamol overdose: what you need to know".

5. The claimant is not legally represented. When Ms Clarke gave evidence it was not put to her that the claimant had informed her verbally about the incident involving the tenant. So that the tribunal could deal with the case fairly and justly, and so the respondent was not prejudiced by this error, I allowed the respondent to recall Ms Clarke, after the claimant's evidence had ended, to deal with this one specific point.

6. Mr Tarlow represented the claimant. Mrs Ralph was concerned that he was speaking to his wife while she gave evidence. (I was taking notes and had not seen or heard this myself.) Mrs Ralph asked that he be required to leave the room his wife was sitting in. I reiterated to both Mr and Mrs Tarlow that the claimant's evidence needed to be hers alone, and emphasised that Mr Tarlow could not speak to her during her evidence. I did not consider that it would be fair to require him to leave the room, especially since he would be making closing submissions on her behalf and had no other way of connecting to the hearing. I required him to move to the back of the room behind his wife, but to remain clearly visible. There was no suggestion from Mrs Ralph that he spoke during the remainder of the claimant's evidence, and I did not see or hear anything suggesting that he had.

Findings of Fact

7. I start by making key findings. In the next section I make findings about certain other matters, which were put in issue by the parties but which were not explored in the investigation and disciplinary process.

Key Findings

8. The respondent is a charity which provides independent living accommodation and support to Jewish adults who have a physical disability, or impaired vision, or both. It provides apartments to tenants at seven sites. It is not a care organisation and does not provide primary care to its tenants. In particular, it does not provide medication to its clients.

9. The claimant was employed by the respondent from 18 December 2017 to 15 March 2022 as a House Manager. The 2016 disciplinary rules and procedures formed part of her contract of employment (p. 46-47).

10. Her duties included making a twice daily call round, responding to alarms, and care of tenants who were ill e.g. arranging meals on wheels, but not nursing (bundle, p. 49). Her duties also included maintaining a daily log book and day book report in which all relevant incidents were to be recorded and passed on to colleagues (p. 49).

11. The claimant was aware of the respondent's "Professional Boundaries" policy. This is clear that staff are not allowed to administer any medication or fit any medical appliance to service users (p. 57). It also requires a member of staff to inform their line manager if they believe there is a potential breakdown of professional boundaries (p. 55). This policy stated that "Failure to adhere to the policy may lead to disciplinary action" (p. 55). The respondent held regular meetings to remind staff of the policy.

12. The respondent does not accept new tenants who have dementia. However existing tenants do sometimes develop dementia.

13. The claimant had attended *Dementia Information* training on 1 June 2021, and *Dementia Awareness* training on 28 July 2021. These training sessions provided information about, and increased awareness of, dementia. But they did not include training on how to respond to the demands which can be made by people with severe dementia.

14. The claimant worked at the Francis & Dick James Court site on Friday 25, Saturday 26 and Sunday 27 February 2022, providing cover for Shabbat and for the Sunday.

15. An elderly tenant at the Francis & Dick James Court site had developed dementia while a resident, and by February 2022 (at least) she was suffering from severe dementia. She required and received care four times a day from external carers i.e. from qualified carers who were supplied by an agency other than the respondent. An assessment of her capacity had not been carried out at this stage. But she would on occasion not know the time of day, and would on occasion call the claimant at night asking for her carer, even though her carer was already with her.

16. The tenant was in bed and in pain as a result of a fall. Her carers gave her paracetamol. The tenant was not able to take paracetamol herself without help, as the paracetamol was in her kitchen, and she was not mobile enough to get there herself. On Friday 25, Saturday 26 and Sunday 27 February 2022 she repeatedly rang the claimant saying that she was in pain. The claimant refused to give her pain relief on numerous occasions, and the tenant (who suffered from severe dementia) would swear at her when she was not given what she wanted. However on Sunday 27 February 2022 the claimant gave her two paracetamol tablets from the packet in the kitchen, with a glass of water, and a hot water bottle which was also for pain relief.

17. The respondent provides unfurnished flats and takes no responsibility for the safety of tenants' own equipment. However a house manager might on occasion have a cup of tea with a resident, having used the tenant's kettle.

18. A hot water bottle is not a medical appliance. As Mr Chakimi accepted, when the claimant gave the tenant a hot water bottle she was not fitting a medical appliance to a service user.

19. There is no dispute that the claimant gave the tenant paracetamol tablets. The Oxford English Dictionary gives one meaning of 'administer' as 'to give' e.g. to give a drug. When the claimant gave paracetamol tablets to the tenant she was administering medication.

20. The tenant's carer arrived at about 1:30 pm later on the same day, Sunday 27 February 2022. The claimant told the resident's carer that she had given the tenant two paracetamol tablets and a hot water bottle. The carer had given the tenant some paracetamol earlier in the day, as she told the claimant at the time (p. 59).

21. The claimant did not report what had happened to Ms Clarke or to anyone else at the respondent. There is a lack of contemporaneous documentary evidence (which the respondent says is due to the need to protect client confidentiality). However I find that the claimant did not record this incident in the daily log book. Had she recorded the incident, the respondent would have been aware of it earlier than was in fact the case (see below). Nor did she inform her line manager.

22. On Monday 28 February the tenant's niece rang Ms Clarke and told Ms Clarke that she had been told by one of her aunt's carers that the claimant had given her aunt two paracetamol tablets and a hot water bottle. Ms Clarke took this call, and her clear evidence – which I accept – is that she was told that the claimant had given the tenant two paracetamol tablets.

23. A suspension meeting was held on Wednesday 2 March 2022, attended by Mr McCarthy, Ms Ellis (the respondent's HR manager), and the claimant. When asked, the claimant accepted that she had given the tenant paracetamol. She also volunteered that she had given the tenant a hot water bottle. She said that she told the carer that she had given the tenant some paracetamol, and that carer had said that she had given the tenant some paracetamol around 10 am (p. 59).

24. The claimant was suspended on 2 March 2022. Her suspension letter stated that this was pending investigation into the allegation that she had given a tenant two paracetamol tablets and a hot water bottle.

25. The respondent's 2016 disciplinary procedure states that an instance of misconduct might be sufficiently serious in itself to warrant a first and final written warning without a previous written warning having been issued. It also gave a non-exhaustive list of gross misconduct, which included action intended to deceive, behaviour that "potentially brings our charity into serious disrepute", "serious breach(es) of health and safety rules" and "a serious breach of trust and confidence" (p. 53-54).

26. The respondent wrote to the claimant on 8 March 2022 requiring her to attend a disciplinary meeting. Enclosed with the letter were notes from the suspension meeting, the Professional Boundaries Policy and the Disciplinary and Grievance Policy. Also enclosed was a witness statement from a family member of the tenant (p. 63), which is not in evidence. Mr Chakimi did not speak to the carer as part of the investigation to establish her version of events.

27. A disciplinary hearing was held on Friday 11 March 2022. This was chaired by Mr Chakimi, and Ms Ellis took notes. The claimant was accompanied by a work colleague. Mr Chakimi asked the claimant if she responded to a call from the tenant at around 12:45 pm on Sunday 27 February (p. 66). The claimant again accepted that she had given the tenant two paracetamol tablets. She also accepted that she was aware

that this was contrary to the Professional Boundaries Policy, which requires staff not to administer medication to tenants. She also accepted that she had given the tenant a hot water bottle. She stated that she had touched the hot water bottle on the back of her hand and that she had made sure that the bottle was not dripping or faulty. She said that she was aware that the risk associated with giving a tenant a hot water bottle was the risk of burns and scalding. She also stated that she had made sure that this would not happen by making sure that the bottle was not dripping or faulty (p. 68). The claimant also stated that she learns from her mistakes, and that giving into the tenant by giving her paracetamol and a hot water bottle was wrong (p. 69).

28. Mr Chakimi ended the disciplinary meeting by saying that he hoped to give the claimant a decision next week.

29. The meeting reconvened on Tuesday 15 March 2022 and the claimant was summarily dismissed for gross misconduct. Mr Chakimi set out the reasons for the dismissal in detail (p. 70 – 72). The claimant had admitted giving a vulnerable tenant two paracetamol tablets, which was a clear breach of the Professional Boundaries Policy, and put the tenant at risk of an overdose. She had also admitted giving the same tenant "a freshly filled hot water bottle", and Mr Chakimi said that "this put the tenant at risk of burns and scalding" (p. 71).

30. The claimant was also sent a dismissal letter on 15 March 2022 which stated that the claimant had given a vulnerable tenant two paracetamol "putting her at risk of an overdose", and giving the same tenant a hot water bottle "putting her at risk of burns and scalding" (p. 76). It concluded that due to the serious nature of her actions, her apparent lack of appreciation of the possible consequences of her actions for the tenant, her family and the respondent's reputation, her actions were a fundamental breach of trust and confidence amounting to gross misconduct (p. 76).

31. The Oxford English Dictionary defines 'overdose' as "An excessive dose", specifically "a dangerously large dose of medicine, a drug, etc." Part of the reason for dismissal was that giving the tenant two paracetamol was dangerous.

32. Mr Chakimi made the decision to dismiss and I accept his oral evidence (confirmed as it is by the two documents just summarised) that the reason to dismiss the claimant came down to his view that the claimant was capable of pursuing actions that were in breach of the respondent's very clear policies in terms of giving care to a tenant in a way that could have been "very dangerous". She had failed to follow the policy and did not appreciate the risks associated with her actions.

33. In his oral evidence Mr Chakimi said that a further part of the reason to dismiss was the claimant's failure to document what she had done and communicate it to *the respondent* until complaints were raised by third parties. I am satisfied that this was not part of the reason for dismissal, since it is not mentioned in either the note of the reasons given to the claimant in the resumed disciplinary meeting or the dismissal letter.

34. The dismissal letter stated that the claimant had the right to appeal against this decision within 5 working days from receipt of the letter (p. 76).

35. The claimant did not appeal her dismissal. She felt shattered in the days following her dismissal.

36. In her time working for the respondent, the claimant had not received a verbal or written warning.

37. The respondent is a charity. It has 60 employees, and a dedicated HR function.

Other Findings

38. Mr Chakimi said in his evidence that "We will never know if she gave the resident 2 paracetamol tablets or passed her a whole box" (witness statement, para 12). Mr McCarthy and Ms Ellis similarly said that she was alleged to have given the tenant "at least" two paracetamol tablets. However the contemporary documents are clear that what was alleged was that the claimant had given the tenant two paracetamol tablets and a hot water bottle, and that the reason for dismissal was that the claimant had given the tenant two paracetamol tablets.

39. Mr Chakimi said in his evidence that "I was also alarmed that the Claimant had not written down her actions but appeared to have attempted to hide them. … If she had informed us … we would have called an Ambulance for the resident to be checked medically for any signs of overdose" (witness statement, para 12). However the contemporary documents are clear that what was alleged was that the claimant had given the tenant two paracetamol tablets and a hot water bottle, and that the reason for dismissal was that the claimant had given the tenant *two* paracetamol tablets. It was not said that the claimant had attempted to hide her actions, or that her doing so had prevented the respondent calling an ambulance for the tenant.

40. I have found that the tenant's carer arrived at about 1:30 pm on Sunday 27 February 2022 and that the claimant told her that she had given the tenant two paracetamol tablets and a hot water bottle. The respondent suggested in evidence that the claimant had only told the carer this as the carer left, after visiting the tenant, and not as the carer was on the way to see the tenant. This issue was not explored in the suspension meeting or the disciplinary meeting. However the respondent has put it in issue before the tribunal. I find that the claimant told the carer what had happened as the carer arrived to see the tenant, and not only as the carer was leaving. The only direct witness to this conversation before me was the claimant, whose evidence I accept on this point. She waited for the carer to arrive, so that the carer was aware of what had happened before the carer's visit. There would have been no point her waiting until after the visit before telling the carer what had happened: the carer needed to know what had happened before deciding whether or not to give the tenant more paracetamol.

41. As I have already noted, the respondent suggested in its evidence that the claimant had been deliberately trying to conceal what she had done from her employer (although this was not part of the reason for the dismissal). I find that the claimant was not attempting deliberately trying to conceal

what she had done from her employer. Had that been her motive, she would not have informed the carer about what had happened. I do not accept the respondent's case, as it was presented in the evidence, that the claimant was both deliberately trying to conceal the incident and yet also told the carer what she had done. The claimant told the carer what she had done because she thought that the carer ought to know. She must have realised that the carer would report what she had been told, either to the agency which employed her, or to the tenant's family, or both. If she had been attempting to conceal her actions, she would not have told the carer what she had done.

The Law

42. An employee has the right not to be unfairly dismissed by her employer: s. 94(1) Employment Rights Act 1996 (ERA).

43. An employee is dismissed by her employer if the contract under which she is employed is terminated by the employer (whether with or without notice): s. 95(1)(a) ERA.

44. In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for the dismissal: s. 98(1) ERA.

45. The burden is also on the employer to show that the reason is a potentially fair reason, such as a reason that relates to the conduct of the employee: 98(2)(b) ERA.

46. Section 98(4) ERA provides that where an employer has shown the reason for the dismissal and that the reason is a potentially fair reason, the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —

    (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
    (b) shall be determined in accordance with equity and the substantial merits of the case.

47. *Iceland Frozen Foods Ltd v Jones* 1983 ICR 17 is clear that in judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. The tribunal is to determine whether, in the particular circumstances of the case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair: if the dismissal falls outside the band, it is unfair.

48. It is sufficient that the employer genuinely believed on reasonable grounds that the employee was guilty of misconduct e.g. theft. The employer does not have to prove that the employee was in fact stealing: *Aldair Ltd v Taylor* 1978 ICR 445, CA.

49. It is important to distinguish between the question whether the employer has a reasonable belief that the employee has committed the misconduct

alleged from the question whether the conduct alleged is capable of amounting to gross misconduct. The second question will not arise in many misconduct cases e.g. cases involving theft, as stealing is gross misconduct. However in some cases there is no dispute as to whether the act alleged to constitute misconduct was performed. What is at issue is the character of the act. The character of the misconduct should not be determined solely by, or confined to, the employer's own analysis, subject only to reasonableness. The question of what is gross misconduct is a mixed question of law and fact when the question falls to be considered in the context of the reasonableness of the sanction in unfair dismissal cases. Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee or to gross negligence. In such cases the tribunal must consider both the character of the conduct and whether it was reasonable for the employer to regard the conduct as having the character of gross misconduct on the facts: *Sandwell & West Birmingham Hospitals NHS Trust v Mrs A Westwood* [2009] 12 WLUK 559, EAT.

50. Gross misconduct must be either a deliberate and wilful contradiction of contractual terms or be conduct amounting to a very high degree of negligence. In certain cases the tribunal will need to consider whether the misconduct alleged was capable of amounting to gross misconduct or whether it was reasonable for the employer to believe that it amounted to gross misconduct: *Eastland Homes Partnership Ltd v Cunningham* [2014] 1 WLUK 49, EAT, paragraph 37.

Conclusions

51. The claimant was dismissed on 15 March 2022.

52. The reason for dismissal was conduct. It was that on 27 February 2022 the claimant provided a tenant of the respondent with two paracetamol tablets and a hot water bottle.

53. Ms Clarke was told by the tenant's niece that she had been told by one of her aunt's carers that the claimant had given her aunt two paracetamol tablets and a hot water bottle. The claimant accepted that she had done both of these things in the suspension meeting and disciplinary hearing. The respondent reasonably believed that she had done these things. The claimant accepted that she was wrong to have done them. The respondent genuinely believed the claimant had committed misconduct. Misconduct is a potentially fair reason for dismissal.

54. The respondent's view – and part of its reason for dismissal – was that doing each of these things was dangerous. It considered that giving a vulnerable tenant two paracetamol put her at risk of an overdose and that giving her a hot water bottle put her at risk of burns and scaling. Having heard Mr Chakimi's oral evidence, I accept that he genuinely believed that each of these actions were dangerous. But there is an additional question as to whether or not his beliefs were reasonable: based on reasonable grounds, and not just unwarranted assumptions; and taking into account relevant factors, such as what the claimant had said in the suspension and disciplinary meetings.

55. Starting with the hot water bottle, the claimant accepted that she had given the tenant a hot water bottle. She stated in the disciplinary meeting that she had touched the hot water bottle on the back of her hand and that she had made sure that the bottle was not dripping or faulty. She said that she was aware that the risk associated with giving a tenant a hot water bottle was the risk of burns and scalding. She also stated that she had made sure that this would not happen by making sure that the bottle was not dripping or faulty. The respondent was not obliged to accept her account of events. But it did need to consider them and to have a reason for either not accepting her account of what she had done, or for not accepting that the claimant's actions had avoided the risk of scalding. The respondent did neither of these things. In the resumed disciplinary meeting Mr Chakimi simply stated that the claimant had admitted giving the tenant a "freshly filled hot water bottle" and that this put her at risk of burns and scalding. He did not address, or take into account, her version of events. The dismissal letter mischaracterised the claimant's admission by saying that she had admitted "putting the same tenant at risk by giving them a hot water bottle". The claimant had in fact said that although she was aware of the risks associated with giving a tenant a hot water bottle she had, on the particular occasion under discussion, made sure it would not happen. The respondent did not engage with her account of the precautions she took, or take it into account, when concluding that giving the tenant a hot water bottle was dangerous.

56. Mr Chakimi said in evidence that there may be occasions where a house manager makes a cup of tea for a tenant using the tenant's kettle e.g. if the tenant was upset. He said that it would only be advisable if the tenant could safely drink the cup of tea and the tenant was not put at risk. However, he continued, there was a risk of scalding, so this should not be an everyday occurrence. In this case he distinguished between the risks associated with an activity in general i.e. the risk of scalding associated with boiling a kettle and making a hot drink for a tenant, and the risks of performing that activity on a particular occasion, when the risks might be sufficiently reduced by the house manager's action. He did not take that distinction into account when considering the claimant's actions in respect of the hot water bottle. Further, as I have said, the respondent did not take into account the claimant's account of the precautions she took, when concluding that giving the tenant a hot water bottle was dangerous.

57. Turning to the paracetamol, the claimant accepted that she had given the tenant two paracetamol. The respondent considered that this was also dangerous, putting the tenant at a risk of an overdose. The question at this stage is not whether taking two paracetamol tablets is in fact dangerous. It is whether Mr Chakimi had reasonable grounds to consider that taking two paracetamol tablets was dangerous. It is clearly relevant that Mr Chakimi believed that "The carer had already administered paracetamol to this resident who as you know is over 100 years of age and could be particularly vulnerable to any overdose of medication" (dismissal letter, p. 76). It was reasonable to believe that the carer had already administered paracetamol to the resident, since the claimant had herself said in the suspension meeting that she had been told this by the carer (p. 59). The tenant was clearly vulnerable, since she was suffering from severe dementia. Mr Chakimi had a witness statement from the tenant's family, and I accept that he had reason to think that she was over 100.

58. Mr Chakimi was not obliged to accept the claimant's version of events, but he was required to take it into account. The claimant had said in the suspension meeting that the carer had told her that she had given the tenant paracetamol at about 10 am. In the disciplinary meeting Mr Chakimi had asked the claimant about her response to a call from the tenant at around 12:45 pm. So he had reason to think that the gap between the carer administering paracetamol to the tenant and the claimant giving her a further two tablets was about 2 hours and 45 minutes. He was not obliged to accept the Claimant's account, and could reject it if he had reasons for doing so. He could have contacted the carer as part of the disciplinary process to establish her version of events, but did not do so. He was however obliged to take the information relating to the likely timings of the relevant events into account, and to have reasonable grounds for thinking that giving the tenant two paracetamol tablets had been dangerous and had put her at risk of an overdose. Mr Chakimi clearly had reasonable grounds to think that the tenant was vulnerable, since she was known to be suffering from dementia. However Mr Chakimi did not have reasonable grounds to think that her illness made her more susceptible to the effects of paracetamol than other adults. Similarly, although I accept that Mr Chakimi had reasonable grounds to think that the tenant was over 100, he did not have reasonable grounds to think that her age made her more susceptible to the effects of paracetamol overdose than other adults.

59. In summary, Mr Chakimi did not take into account relevant factors, including what the claimant had said in the suspension and disciplinary meeting. And he did not have reasonable grounds to consider that in giving the tenant a hot water bottle and two paracetamol the claimant had acted *dangerously*. That was a key part of his reason, and was an unwarranted assumption rather than something for which he had reasonable grounds. It follows that the employer did not act reasonably in treating the reason as a sufficient reason for dismissing the employee.

60. The claim for unfair dismissal therefore succeeds.

Remedy

Findings of Fact

61. I have already found that the claimant gave the tenant a hot water bottle, and that she said in the disciplinary meeting that before giving the tenant the hot water bottle she had taken steps to avoid scalding. It is relevant to remedy whether or not she acted in a way that was negligent to a very high degree. So it is relevant to remedy whether or not she did take steps to minimise the risk of scalding prior to giving the tenant the hot water bottle. I now find that prior to giving the tenant the hot water bottle, the claimant checked the bottle to ensure that it was not too hot, and to ensure that the bottle was not dripping or faulty.

62. I have already found that the claimant gave the tenant two paracetamol. It is relevant to remedy whether or not doing that was negligent to a very high degree.

63. Paracetamol tablets are available for purchase in supermarkets.

64. The NHS public recommendation for adults is 8 tablets in twenty four hours, but the NHS guidance also states that taking one or two extra tablets is unlikely to cause harm. “Overdose” is the amount of a drug that needs to be taken to produce an adverse effect. Paracetamol is metabolised in the elderly much as it is in children and adults: so age is not itself a risk factor. The amount that the British Medical Journal publish as unacceptable toxicity is 150 mg of paracetamol to 1 kg of a person’s weight. So taking a worst case scenario of an underweight person weighing 50 kg, that is 15 tablets.

65. There is no documentary evidence and no statement from the carers regarding the number of paracetamol that they gave the tenant in the twenty four hours prior to the claimant’s giving her two paracetamol. However the tenant received visits from carers four times a day and she was in pain due to a fall. I find, on balance, that the tenant had received eight paracetamol tablets in the 24 hours prior to the claimant’s giving her two paracetamol tablets. However I also find (on the basis of Mr Deutsch’s evidence) that taking 10 paracetamol tablets over a 24 hour period would not be a cause for concern. Nor would taking 10 paracetamol tablets over a 24 hour period require an ambulance.

66. There is no evidence that the claimant had tenants as Facebook friends or had their phone numbers saved in her personal phone. The claimant accepted in her evidence, and I find, that she had lunch with tenants in their flats on festival Shabbat.

67. The claimant’s basic gross pay was £1,883.44 a month. Her basic contractual hours of work were 35 hours a week (p. 42). However she was also required to cover nights where necessary and was able to work overtime. Hours worked at the weekend were paid as overtime, and nights were paid at the night rate. Her gross income in the year before her dismissal, including nights and overtime, was £32,644.82. Her net weekly pay was £497.34 (p. 82).

68. The claimant obtained part time work nannying starting in the week commencing 9 May 2022. For the first 20 weeks of working part time, she received gross pay of £6,269.78 (p.83).

The Law

69. The amount of any compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal: s. 123(1) ERA. A reduction in the compensatory award may be made where the unfairly dismissed employee could have been dismissed fairly if a proper procedure had been followed: *Polkey v AE Dayton Services Ltd* 1988 ICR 142.

70. In a claim for unfair dismissal, if it appears to the tribunal that the employee has failed to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures, and that that failure was unreasonable, the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any compensatory award it makes to the employee by no more than 25%: s. 207A(3) Trade Union and Labour Relations (Consolidation) Act 1992.

71. Section 123(6) ERA concerns the reduction of compensatory awards due to the claimant's contributory conduct: where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

72. Section 122(2) ERA concerns the reduction of the basic award due to the claimant's conduct: where the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, the tribunal shall reduce that amount accordingly.

Conclusions

73. Starting with immediate financial losses, there were 49 weeks between dismissal and the hearing. The claimant's net weekly pay was £497.34. The claimant earned nothing for the first five weeks: 5 x £497.34 = £2,486.70. She had part time earnings for the next 44 weeks which I estimate to be the equivalent of £16,298 gross annual, and £290.48 net weekly. 44 x (£497.34 - £290.48) = £9,101.84. So the total for her immediate loss of earnings is £11,588.54.

74. The claimant sought future loss of earnings until she obtains a job with an income of £497.34 net weekly. The respondent argued that it is likely that it will take another 6 months for her to secure full time employment, and that her earnings as a nanny should be taken into account when calculating her future losses. I estimate her weekly net losses to be £497.34 - £290.48 = £206.86. The claimant is 56 years old and is likely to find it harder to obtain full time employment than a younger person. I estimate that it will take her a year to find full time employment and that her earnings in the meantime will remain much the same as at present. 52 x £206.86 = £10,756.72.

75. The total compensatory award is therefore £22,345.26.

76. The respondent did not argue that the claimant had not taken reasonable steps to replace their lost earnings. Following her dismissal she obtained part time work and I am satisfied that the has mitigated her losses.

77. The respondent argued that even if I found the dismissal to be unfair, she would have been fairly dismissed anyway.

78. It was asserted in closing submissions that the claimant would have been dismissed fairly anyway as she kept overstepping the respondent's boundaries policy, had tenant's as Facebook Friends, had their phone numbers saved in her personal phone, and had lunches with them in their

flats. There is no evidence that the claimant had tenants as Facebook friends or had their phone numbers saved in her personal phone. The claimant had lunch with tenants in their flats on festival Shabbat but I do not accept that that could have led to her fair dismissal if a proper procedure had been followed.

79. Pharmacologically, taking 10 paracetamol tablets over a 24 hour period would not be a cause for concern and would not require an ambulance to be called. Prior to giving the tenant the hot water bottle the claimant took steps to ensure that the tenant would not be scalded. So the claimant's actions were not negligent to a very high degree. They were not dangerous. With respect to the hot water bottle the risks she took were no higher than those taken by a careful parent who gives their child a hot water bottle (although she was of course taking those risks at work, in a very different context to a parent at home). She could not have been fairly dismissed on the basis of gross negligence.

80. However the claimant did administer medication i.e. two paracetamol, knowing that this was a breach of the respondent's Professional Boundaries policy. This states clearly that the respondent's staff are not allowed to administer any medication. The claimant was aware of the policy, and the respondent held regular meetings to remind staff of this policy.

81. The claimant also gave the tenant a hot water bottle. She accepted in the disciplinary meeting that she was wrong to give the tenant paracetamol and a hot water bottle.

82. The claimant also failed to report what had happened to the respondent. She did not inform her line manager, although the policy requires a member of staff to inform their line manager if they believe there is a potential breakdown of professional boundaries. The claimant did however inform the carer what had happened as the carer arrived to see the tenant, so that the carer was aware of what had happened before the carer's next visit. She was not deliberately trying to conceal what she had done from the respondent.

83. In her time working for the respondent, the claimant had not received a verbal or written warning.

84. The respondent did not argue that regardless of whether or not the claimant's actions were dangerous or very highly negligent, she could have been fairly dismissed simply on the basis that she had breached the strict rules in the Professional Boundaries policy and that, in particular, she had breached the strict rule in paragraph 4.5 of the policy that staff are not allowed to administer any medication to service users. The difficulty with such an argument would be that the policy itself does not state that the rule in paragraph 4.5 is strict. The policy does not warn that dismissal could result for any breach of it, regardless of the level of risk taken by the employee in the particular circumstances of the case, and irrespective of whether this was the first disciplinary action in respect of a breach of the policy. The policy merely says that "Failure to adhere to the policy may lead to disciplinary action".

85. The 2016 disciplinary rules and procedures give a non-exhaustive list of gross misconduct, which includes “serious breach(es) of health and safety rules”. There is no warning that a breach of paragraph 4.5 would be treated as a “serious” breach of health and safety rules, regardless of the level of risk taken by the employee in the particular circumstances of the case, and irrespective of whether this was the first disciplinary action in respect of a breach of the policy. More generally, there is no warning that any breach of the Professional Boundaries policy would be taken to be serious or that any such breach may lead to dismissal.

86. I therefore consider that, in the circumstances as I have found them to be, the claimant could not have been dismissed fairly if a proper procedure had been followed. I therefore make no *Polkey* reduction.

87. The respondent argued that any compensatory award should be reduced by 25% because the claimant did not comply with the Acas Code of Practice on Disciplinary and Grievance Procedures, as she did not appeal against her dismissal. Paragraph 41 states that “Where an employee feels that their grievance has not been satisfactorily resolved they should appeal”.

88. The claimant did not appeal her dismissal. However I do not consider that failure to comply with the Code to have been unreasonable. She had 5 working days in which to appeal and she felt shattered in the days following her dismissal. There was no evidence that she was aware of the ACAS code at the time and, therefore, no evidence that her failure to comply with the code was deliberate.

89. Further, even if I were wrong about that, I do not consider that it would be just and equitable in all the circumstances to reduce the compensatory award on this basis. There is no reason to think that, had the claimant appealed, the outcome would have been any different. The respondent, throughout the tribunal hearing, robustly defended its decision to dismiss (as, of course, it is entitled to do). There is no reason to think that the claimant’s failure to follow the code has prejudiced the respondent.

90. The respondent argued that any compensatory award should be reduced by 100% because of the claimant’s contributory conduct. In the light of my findings, summarised at paragraphs 80 to 82 above, I am satisfied that the claimant’s dismissal was contributed to by the actions of the complainant. I consider that it would be just and equitable to reduce the amount of the compensatory award by 33%.

91. The statutory cap of fifty-two weeks pay does not apply.

92. The claimant’s gross pay in the previous year was £32,644.82 (p. 82). Divided by 52 weeks that is £627.78, which is comfortably above the weekly maximum of £571. I have therefore taken the weekly rate to be £571. The claimant had four years of service above the age of 41. So the basic award is £571 x 4 x 1.5 = £3,426.

93. The respondent argued that any basic award should be reduced by 100% because of the claimant’s conduct before the dismissal. In the light of my findings, summarised at paragraphs 80 to 82 above**,** I consider that it

would be just and equitable to reduce the amount of the basic award by 33%.

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Employment Judge Jack

_____

13 April 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

18/4/2023

NG - FOR EMPLOYMENT TRIBUNALS