



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms D Pascu

**Respondent:** SHC Rapkyns Group Ltd

**Heard at: London South**  
**On: 5 and 6 April 2023**

**Before: Employment Judge Heath**

## **Representation**

Claimant: In person

Respondent: Mr K Chehal (Peninsula)

# JUDGMENT

The claimant's claim of unfair dismissal is not well-founded and is dismissed.

# REASONS

## **Introduction**

1. The claimant was a Domestic Assistant at a care home operated by the respondent. The respondent dismissed her following allegations that she had breached procedures designed to prevent the transmission of Covid, unacceptable behaviour relating to allegedly speaking rudely and inappropriately to her manager, and for not following management instructions. The claimant claims unfair dismissal. The respondent says it dismissed the claimant fairly for a reason related to conduct.

## **The issues**

2. At the start of the hearing, I clarified with both parties the issues I had to determine. They were agreed to be as follows:

### Unfair dismissal

- a) What was the reason or principal reason for dismissal? The respondent says the reason related to conduct.

- b) 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 decide whether:
- i. the respondent genuinely believed the claimant had committed misconduct.
  - ii. there were reasonable grounds for that belief;
  - iii. at the time the belief was formed the respondent had carried out a reasonable investigation;
  - iv. the respondent otherwise acted in a procedurally fair manner;
  - v. dismissal was within the range of reasonable responses.
- c) 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?
- d) If so, should the claimant's compensation be reduced? By how much?
- e) If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
- f) If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

2. The claimant confirmed that she did not allege a breach of the ACAS Code.

### **Procedure**

3. The claimant was assisted by a Romanian interpreter, Ms Stan, who translated the whole of the proceedings for the claimant.
4. I was provided with a 199 page bundle
5. The claimant provided two witness statements for herself. She told me that the respondent had told her the first one was not appropriate, so she re-did it and the second witness statement covered largely the same ground. Mr Chehal was content for me to read both statements.
6. A statement provided a statement from her daughter-in-law, Ms Florentina Stanicel. The claimant said that her daughter-in-law had childcare issues and might be in difficulty attending the hearing. Mr Chehal confirmed that he would not be challenging her evidence, and so I accepted the witness statement into evidence without the need to call Ms Stanicel. I read her witness statement, which dealt with the impact of the dismissal on the claimant and her family.

7. The respondent provided statements from:
  - a) Ms Jacqueline Revell-Hughes, Hospital Director;
  - b) Ms Gemma Short, Quality Compliance Director;
  - c) Ms Jemma Brooks, Human Resources Manager;
  - d) Ms Vicky Cutter, Group Human Resources Director.
8. Mr Chehal told me that only Ms Cutter would be giving live evidence, as the other witnesses were no longer employed by the respondent. Ms Cutter gave evidence by video link.
9. I did not give any weight to the respondent's witnesses who did not attend to be cross-examined, though I read the documents referred to in their statements.
10. I explained to the parties that if they wished me to read a document in the bundle they must draw my attention to it, and that I would not be reading documents that the parties had not mentioned in statements or asked me to read. Mr Chehal asked me to read a number of pages in the bundle, which I did.
11. Following a question of mine on the first day, the respondent provided a copy of its disciplinary policy on the second day. The claimant had been copied into an email providing it, but a further paper copy was given to the claimant. The claimant was content for this document to be admitted into evidence.
12. It was agreed that I would deal with liability (who won or lost) before dealing with remedy. I confirmed that I would deal with contributory conduct and *Polkey* (which I explained to the claimant) in the first phase of the hearing.

### **The facts**

13. The claimant was employed by the respondent, a care home, as a Domestic Assistant on 23 March 2017. The home caters for the needs of individuals with long-term neurological conditions such as Motor Neurone Disease, Huntingdon's Disease, Acquired Brain Injury and Cerebral Palsy. The claimant's employment entitled her to accommodation provided by the respondent.
14. The claimant has a number of policies regarding the way certain work has to be carried out safely, these include a Housekeeping Policy, a Dilution of Chemicals Policy, an Infection Control Policy Procedure and, from 2020, a Covid-19 Contingency Plan.
15. The Covid-19 Contingency Plan includes the following provisions:

*3.2.4 All persons entering the home are to use the hand sanitiser before entering and then wash their hands for a minimum of 20 seconds at the nearest internal hand washing sink.*

*3.2.5 Staff will have their temperature taken before coming on shift. This will be recorded. Staff will be asked to go home if they have a high temperature (above 37.8).*

16. The Coronavirus pandemic had a significant impact on care homes. One particular issue concerns the vulnerability of care home residents. The government and Public Health England provided guidance for the sector, and care homes have to ensure that staff followed relevant procedures, which included the wearing of masks, the taking of temperatures, hand sanitising and changing clothes on entry to care homes. The rules and guidance mandated very strict measures. Ms Cutter gave evidence, which I accept, that the risks in the case of the respondent of failure to follow these measures generally were life or death risks, not least due to the high vulnerability of the care home's residents.
17. In October 2020 there was an issue between the claimant and respondent concerning the respondent's refusal to sign paperwork in relation to the claimant's eligibility for payments under the Test and Trace Support Payments Scheme. It is not necessary for me to resolve the issues one way or another, but it may have been that this is relevant background in that it may have caused the degree of ill feeling between the parties.
18. The claimant says that in February 2021 she was told in a meeting with her manager, Mr De Lange Stean, that her job was at risk. Again, it has proved difficult determining the truth or otherwise of this, but a perception of job insecurity may well have fuelled further ill feeling.
19. On 9 March 2021 four new cleaners started work at the care home.
20. Throughout the coronavirus pandemic the claimant had adhered to all relevant Covid safety protocols, which she had been made aware of by the respondent. A staff training plan indicated that she had completed hazardous substances training on 21 September 2018, and Infection Prevention and Control on 28 April 2020. There was more regular dissemination of Covid related guidance during the pandemic. Guidance was constantly being updated and cascaded to staff.
21. On 18 March 2021 the claimant arrived at work at the care home. An incident took place as she entered the care home which was later to form the subject matter of a disciplinary hearing which led to her dismissal. It related to her alleged lack of compliance with the relevant Covid protocol.
22. Later that day Mr De Lange Stean emailed HR raising concerns. He alleged the claimant had entered the building and ignored the infection control measures. He said he had called her back to put a mask on but she had gone into a laundry room saying "I'm coming". She was holding a cup of coffee, she did not change her clothes, take her temperature or

put on a mask. Mr De Lange Stean called her back and asked why she was not following the Covid measures. She said "*I'm taking a mask now, I am in your way leaning over now*". He asked her to wait in the queue behind Ms Coates, as others were queueing to have their temperature taken. In this email Mr De Lange Stean went on to relate other instances of the claimant being rude to other staff, hazardous substances not being stored correctly and being decanted into bottles against policy, and her not following guidance in relation to cleaning.

23. Mr De Lange Stean said that he had met the claimant in supervision on 18 March 2021 to try to talk through these concerns. He said she blamed her manager and the previous housekeeper for "*pushing her down*". He said she refused to accept she was not following Covid guidance, though she said she understood what she needed to do as she was signing a form daily about what the requirements were. He related other issues concerning annual leave. Mr De Lange Stean said that he had told the claimant that he was raising the issue of ignoring Covid infection control measures and ignoring his instructions as a disciplinary matter. He also set out that the claimant had left supervision without his being able to resolve any issues about her practice.
24. On 22 March 2021 Mr De Lange Stean again emailed HR to relate further concerns from staff regarding the claimant. He said it she had walked out of a supervision the previous week. He said that ignoring infection control and ignoring direct requests from a manager are conduct issues and that he needed to invite the claimant to a conduct meeting. He said that all other matters were performance related.
25. On 23 March 2021 Ms Coates made a statement which set out that the claimant had entered the care home, walked past a queue of people waiting to have their temperature taken and had gone straight into the laundry room without having her temperature taken or wearing a mask. She said Mr De Lange Stean had asked her to put a mask on and do her temperature, but the claimant said that she was busy and she would do it when she was free. She said that Mr De Lange Stean had insisted, and that the claimant had jumped the line and started taking her temperature and putting on her mask on.
26. On 24 March 2021 Ms Scott, HR adviser, began a disciplinary investigation. On that day she interviewed Ms Prevett, Senior Housekeeper. Ms Prevett described how on 22 March 2021 the claimant had allegedly ignored one of the nurses who had asked the claimant to clean the drugs room. Ms Prevett had subsequently asked the claimant to do so as well, and the claimant apparently said that she would only clean it if it was open. The claimant had been told that as a drugs room it would not be open and she would need to ask the nurse. The claimant had said that she was "*not going to speak to that stupid woman*". She also set out how the claimant had been rude and talked over Mr De Lange Stean at the supervision meeting of 18 March 2021.

27. On 25 March 2021 the claimant was invited by letter to an investigation meeting by Ms Scott the following day. The letter set out that the purpose of the meeting was to give her the opportunity to provide an explanation for three matters. These were allegation of breaching Infection Control Procedures (not taking temperature, hand sanitising, wearing masks) on two occasions, unacceptable behaviour relating to the “stupid woman” comment, and failure to follow a management direction, namely failure to clean the drug room. Ms Scott set out that one possible outcome from the meeting would be further disciplinary action.
28. The meeting took place by Microsoft Teams on 26 March 2021 and was conducted by Ms Gregory, Care Manager. At the start of the meeting the question of whether the claimant needed support during the meeting, such as a translator, was raised, and no support was required.
29. The claimant explained that she was aware of infection control measures when she came into the home, requiring her to take her temperature and wear a mask. She said that she sometimes went to a laundry room which was next to the temperature point if there was a queue. She said she knew that she had to follow government and Public Health England guidelines, and said she had followed rules. She was asked she had been observed a couple of times not following the rules and she spoke about her manager raising his voice at her. She was asked why she had not followed the procedure and she said “*It’s not really right what I have done, I go to the laundry to take my mask then I go back*”. She considered that what she had done was “*not that dramatic*”.
30. The claimant was asked about the drugs room, and she said that if it was unlocked she would clean it, but if it was not she couldn’t clean it and that “*she doesn’t respect me*”. It appears she was talking about the nurse. She said she did not think she had said that the nurse was stupid, but that she was very upset.
31. Ms Gregory had an investigation meeting with Ms Prevett the housekeeper. Ms Prevett indicated during this that the claimant had been breaching the hazardous substances guidance by putting chemicals in other bottles and writing on them. She said that the claimant had been leaving chemicals in a cupboard unlocked. She repeated her evidence about the “*stupid woman*” comment. She also gave evidence about the claimant’s attitude and how she spoke to Mr De Lange Stean, telling him during the supervision that she had no respect for him and that the rules did not apply to her.
32. Mr De Lange Stean was also interviewed by Ms Gregory, and he gave evidence about the claimant’s entry to the care home on 18 March 2021. His evidence was along the lines of his previous email to HR. He added that “*staff read and sign file in each lodge, there is a checklist that each lodge that everyone signs 10 steps*”.
33. Ms Gregory prepared a management report dated 28 March 2021. She set out the allegation she had investigated, and indicated that these

allegations, if proven, could amount to breaches of the Infection Control Policy Procedure Covid 19 Contingency Plan v.24, Dilution of Chemicals Policy and Procedure and Housekeeping Policy and Procedure. Ms Gregory considered the allegations could amount to gross misconduct namely:

- *Refusal to follow reasonable management instruction.*
- *Serious Insubordination*
- *Serious Breach of Health & Safety Rules – Infection Control*
- *Ill treatment and discourtesy to colleagues*

34. it appears that all but the latter are spelt out within the respondent's disciplinary policy in a non-exhaustive list of examples of offences which constitute gross misconduct.

35. Ms Gregory set out the evidence she had considered, pointing out that the procedures for complying with PPE guidelines were clearly set out, and that the claimant had been signing to say she had complied with them previously. She said that she was aware of the procedures and had been carrying them out, and that she agreed that she had not followed the procedures and that what she had done was "*not that dramatic*". Ms Gregory set out that it was considered that these actions potentially could put the people supported by the respondent and her colleagues at risk. Under the heading Mitigation, Ms Gregory highlighted that there was no evidence seen for mitigating circumstances, however, the claimant has commented that some of the issues may be due to English not being her first language.

36. On 12 April 2021 the claimant was invited to a disciplinary meeting by letter from Ms Brooks, Human Resources Manager. The allegations were set out, and supporting evidence in the form of 13 appendices was attached. These included notes from all investigation meetings, statements from Ms Coates and various policies. It was set out that if the matters were proven they would be regarded as gross misconduct which may lead to the termination of the claimant's employment. The claimant was told of her right to be accompanied by a fellow employee or trade union representative. She was told to contact Ms Brooks if she have any queries.

37. The disciplinary hearing took place on 15 April 2021 by Microsoft Teams, chaired by Ms Revell-Hughes, Hospital Director. The claimant attended with her daughter who acted as translator. The purpose of the meeting was explained. The claimant said she had received the pack of information by email.

38. The claimant was asked about the first allegation relating to Covid protocols. She said she had walked past the temperature point because there was a queue. She said that she had gone straight to the laundry room which was only 2 metres away. She did not recall making a comment "*stupid woman*", and said that the nurse had disrespected her. She said that she had not left the meeting, but that Ms Prevett and Mr De Lange

Stean had been talking and saying that they were disgusted, which she thought was about her.

39. At one point in the disciplinary hearing Ms Revell-Hughes asked why the claimant had not waited in the queue when everybody else waited in the queue. The claimant's daughter said that the claimant did not know what happened on that day, but that she should have waited in the queue.
40. It was established during the hearing that there were chemicals left unlocked, and the claimant at the end of the meeting said that she should lock them away. She said that she would wait for everyone in the queue and follow the procedures.
41. Ms Revell-Hughes appears to have filled out a template Disciplinary Workbook which set out the minutes of the disciplinary meeting. Within the template there is a section headed Making a Decision, which poses a series of questions designed to assist in making the right decision.
42. The first question was whether the decision-maker had a reasonable belief that the employee had carried out the actionable breach that was alleged.
  - a) Ms Revell-Hughes set out that the claimant has admitted that she had failed to follow the infection control procedures, although she denied that she had been already in her uniform. She was unable to explain why she felt she could not queue with the rest of the team for temperature checks and admitted walking past the queue.
  - b) Ms Revell-Hughes set out that the claimant admitted raising her voice to her manager, but believed this to be in retaliation. She said she did not speak to the nurse and denied calling her a stupid woman. She set out some allegations of the claimant that the nurse had been disrespectful towards her
  - c) Ms Revell-Hughes set out that the claimant admitted leaving floor cleaner and disinfectant under sinks in unlocked areas contrary to COSHH regulations despite having an understanding of those regulations. The claimant had said that the new housekeeper changed things and that chemicals had always been left under sinks. She admitted decanting chemicals into other bottles.
  - d) Ms Revell-Hughes set out that the claimant was unclear about leaving a supervision meeting before it finished and there had potentially been some confusion about whether the meeting was over. However, there was no evidence that she checked this was the case before walking out.
43. Ms Revell-Hughes set out in the template that she found the allegation substantiated, and proposed dismissal as a sanction. Under the heading Additional Notes Ms Revell-Hughes observed that the claimant:-



*“only appear to offer any suggestion she would behave differently in future when she was asked this directly. She did not appear to understand the seriousness of the allegations or the potential consequences of her failure to follow important health and safety procedures, e.g. not ensuring she was free from infection prior to entering the workplace; refusing to communicate with the nurse in charge resulting in the clinic room not being cleansed; disrespecting the manager and other colleagues leading to failures to follow reasonable management instructions; failure to keep chemicals out of the potential reach of vulnerable adults who we support in the service, risking serious harm or death. DP blamed others for her actions, e.g. the manager, the nurse and the senior housekeeper, with no real justification or evidence. DP has not raised any concerns about other colleagues or the manager in the last supervision or via the Grievance process to our knowledge”.*

44. One of the respondent's staff (believed to be an HR professional) telephoned the claimant on 16 April 2021 to inform her of decision. The claimant said that she understood that some sort of offer of mediation was being made, but it is not easy to determine what this offer was.
45. On 19 April 2021 the claimant arrived in work as she had not received written confirmation of her dismissal. She was asked to leave the premises and was given a disciplinary outcome letter from Ms Revell-Hughes. This outcome letter set out the allegations. It went on to set out that the claimant admitted that she failed to follow the infection control procedures although she denied being in her uniform. It set out that she admitted raising her voice at the manager but said that was in retaliation. It set out that the claimant did not speak to the nurse although denied calling her a stupid woman. The letter set out claimant found the nurse disrespectful. The letter set out that the claimant denied walking out of the supervision and have overheard the manager of the housekeeper saying they were disgusted.
46. Ms Revell-Hughes considered the explanations unsatisfactory and wrote as follows:
- *“You were unable to explain why you felt you should not queue with the rest of the team for temperature checks and admitted walking past the queue into the laundry without doing so. You confirmed that you did not have your mask on when you entered the laundry room. We take infection control extremely seriously at Sussex Healthcare. During the coronavirus pandemic, our paramount priority has been keeping our residents and staff members safe. In failing to follow our infection control procedures, you have put the lives of our residents, your colleagues and yourself at risk and this behaviour cannot be condoned by the business.*

- *The examples you gave me regarding your relationship with the nurse do not justify refusing to speak to the nurse and requiring the senior housekeeper to act as a 'go between' for any requests.*
- *Whilst you may have been unclear regarding leaving the supervision meeting before it had finished, there is no evidence that you checked that the meeting was finished before walking out.*
- *You only appeared to offer any suggestion that you would behave differently in future when I asked you directly. You did not appear to understand the seriousness of the allegations or the potential consequences of your failure to follow important health and safety procedures, e.g. not ensuring you were free of infection prior to entering the workplace; refusing to communicate with the nurse in charge resulting in the clinic room not being cleaned; disrespecting the manager and other colleagues leading to failures to follow reasonable management instructions. You continued to blame others for your actions, e.g. the manager, the nurse and the senior housekeeper, with no real justification or evidence. You had not previously raised any concerns about other colleagues or the manager in the last supervision or via the Grievance process."*

47. The claimant was given a right of appeal which she did by writing to Ms Short. She mentioned that she had requested the decision by email but had had a phonecall from HR instead. She referred to the fact that she would not speak to the nurse, who she felt was disrespecting her. She said she had never admitted raising her voice to her manager but that her manager shouted at her. She made clear she would not want to put anyone in danger and that she followed the Covid guidance. She said she did her job according to her training. She felt that if an employee is thought to be doing wrong, the first step would be to communicate with them and to give the benefit of the doubt and help and support.

## **The law**

48. Under section 98(1) ERA 1996 it is for the employer to show the reason for the claimant's dismissal, and that this is a potentially fair reason under section 98(2) ERA 1996. In this context, a reason for dismissal is "*a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee*" (*Abernethy v Mott, Hay & Anderson* [1974] ICR 323).
49. Potentially fair reasons include a reason relating to conduct (section 98(2)(b) ).
50. The approach to fairness of dismissal is governed by section 98(4) ERA, which provides: -

*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

*(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

*(b) shall be determined in accordance with equity and the substantial merits of the case.*

51. The EAT set out the approach to what is now section 98(4) ERA in *Iceland Frozen Foods v Jones* [1983] ICR 17.

*(1) the starting point should always be the words of [s.98(4)] themselves;*

*(2) in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;*

*(3) in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*

*(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*

*(5) the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each 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.*

52. Where the reason for the dismissal is misconduct, the approach to fairness is the test in *British Home Stores v Burchell* [1980] ICR 3

*"First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And 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."*

53. It is important to focus on the wording of section 98(4) ERA, which does not set out a perversity test. It is for the tribunal to decide how serious the claimant's conduct was on the information available to the employer.

54. In considering a dismissal that is disciplinary in nature, the tribunal will have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures.
55. Under the principal in *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 where there is a failure to adopt a fair procedure at the time of dismissal, dismissal would not be rendered fair just because the procedural unfairness did not affect the end result. Compensation can be reduced to reflect the chance of dismissal taking place had a fair procedure been adopted.
56. Section 123(6) ERA provides that the tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable where it finds that the dismissal was to an extent caused or contributed to by any action of the employee. This involves a finding that there was conduct “deserving of blame” by the employee *Sanha v Facilicom Cleaning Services Ltd* UKEAT/0250/18.

## **Conclusions**

### The reason for dismissal

57. I find that the reason principal reason for the claimant’s dismissal related to conduct. The claimant asserted in her ET1 that she was dismissed in order for the respondent to keep the preferred personnel in her place. In evidence she said it new cleaners had joined shortly before her dismissal, and that the manager was looking to get rid of her.
58. However, there is no documentary evidence supporting that. In her investigation meeting on 26 March 2021 she was specifically asked about her relationship with her manager. She said she was not happy with him because he has a go at her. No mention was made that he was looking to get rid of her. Again, during her disciplinary meeting on 15 April 2021, no mention was made of this. It did not feature in her grounds of appeal or during the appeal hearing.
59. On the other hand, there is the claimant’s admitted failure to follow Covid protocols, and the disciplinary and appeal officers findings in relation to three areas of misconduct. The explanation that best fits the facts is that the reason the respondent dismissed the claimant related to conduct.

### Genuine belief based on reasonable grounds

60. I did not have the benefit of the evidence of the decision-makers in this case, as they had all left the respondent’s employment. However, there was a reasonable contemporaneous paper trail in respect of this decision which sets out the decision-makers’ thinking.
61. The claimant did not advance a case that the respondent did not hold a genuine belief in her misconduct, beyond the assertion in her pleadings about the manager wanting to get rid of her. Again, there is the claimant’s admitted failure to follow the Covid protocols and the findings of

misconduct. There is nothing to suggest that the belief in the misconduct was not a genuine one.

62. Turning next to the grounds for the belief. Ms Revell-Hughes at the disciplinary hearing was provided with an investigation pack consisting of a significant amount of evidence, which included various policies, the claimant's staff training plan, notes of the investigation meeting with Mr De Lange Stean and Ms Previtt, and the claimant, a statement from Ms Coates, a statement from Ms Previtt, and emails from Mr De Lange Stean to HR.

- a) The Covid contingency plan sets out obligations concerning masks, taking temperature and hand sanitising on entry to a home.
- b) Mr De Lange Stean's email set out his description of the incident on 18 March 2021. On the face of it, it shows the claimant ignoring the infection control measures on arrival at the care home. It shows her delaying coming back when he called her and his express instruction to wait in the queue. It also outlines concerns voiced to Mr De Lange Stean by others about the claimant's rudeness and the COSHH policies being breached. He further sets out his recollection of the claimant's conduct during the supervision meeting. This culminated with her leaving the supervision meeting before he had resolved the concerns.
- c) The investigation interview of Ms Previtt outlines her concerns about the claimant ignoring the nurse and not cleaning the drugs room, and not cleaning the drugs room when it is open and not speaking to the nurse to open it. It also sets out Ms Previtt's observation that the claimant referred to the nurse as a "stupid woman". A further investigation interview sets out that the claimant had been putting chemicals in other bottles and writing on them and leaving other cleaning chemicals in cupboards unlocked.
- d) The claimant's investigation meeting notes show the purposes of infection control policies, and that she understands that she needs to wear a mask and her temperature to be taken at the point she enters the home. She admitted she had not queued up to have a temperature taken but had gone to the laundry room first. She said she had gone to the laundry room to get a mask, so she had not been wearing one on entry to the home.

63. At the disciplinary hearing the claimant was given the opportunity to give evidence. Within this meeting there was a clear admission that the claimant "*should have waited in the queue*". There was admission that a floor cleaner, which was a chemical, was unlocked within reach of people supported in the care home.

64. In the circumstances, I find that there was a genuine belief that the claimant had committed acts of misconduct, and that this evidence was

based on reasonable grounds, namely the above evidence put before the disciplinary hearing.

Reasonable investigation and fair procedure

65. The investigation followed the respondent's disciplinary policy. Mr De Lange Stean had raised his concerns with the incident of 18 March 2021 with HR that very day. He and Ms Coates provided a statement the following day. On 24 March 2021 the first investigation meeting took place with Ms Prevett, another took place with Mr De Lange Stean. The following day the claimant was invited to an investigation meeting which took place with the investigator on 26 March 2021.
66. During these investigations the allegations were explored with the witnesses and with the claimant. At the hearing before the tribunal, the claimant at one point said that she had been under pressure during an investigation meeting when she did not have an interpreter and had not fully understood what was said. The claimant does speak English, but this is not her first language and she does not speak it fluently. However, during the disciplinary process no complaint was made that she had not been able to follow the investigation meeting.
67. Ms Gregory prepared a management report on 29 March 2021. This report included as appendices all of the evidence Ms Gregory had compiled.
68. On 12 April 2021 the claimant was invited to a disciplinary meeting. I am satisfied that she was provided the 13 appendices containing all of the evidence in her case when this invitation was emailed to her. This is because at the disciplinary hearing she was asked whether she had received the pack of information including reports and statements, and she replied "*Yes, I have received it on my email address*".
69. At the hearing the claimant was assisted by her daughter who translated for her. Ms Revell-Hughes went through the allegations with her. The claimant was given the opportunity to challenge the allegations and put forward her own account, including any mitigation.
70. After hearing the evidence Ms Revell-Hughes deliberated. The template which she used to record the minutes of the meeting also contains an area in which the decision-maker can set out why they have a reasonable belief that the employee has carried out the misconduct in question. It also sets out an area for additional notes. Ms Revell-Hughes set out her reasoning in these sections, referring to the claimant's admitted failure to follow infection control, raising her voice with the manager, admission to leaving floor cleaners and disinfectant in unlocked areas, and not checking a supervision meeting was over before leaving it. The additional notes section contains the observation that the claimant did not appear to understand the seriousness of the allegations or potential consequences of her failure to follow procedures. It points out that the claimant blamed others for her actions and had not previously raised concerns with others.

Ms Revell-Hughes found the allegations proven and considered that dismissal was the appropriate sanction.

71. The claimant was given the opportunity to appeal, and she set out her grounds in writing. She was invited to an appeal hearing which took place on 27 April 2021. The claimant was given the opportunity to explore the grounds of appeal, and to say anything she wished in relation to her appeal. On 5 May 2021 the claimant was given an appeal outcome which dismissed her appeal.
72. In all the circumstances, the claimant was given a reasonable opportunity to challenge the disciplinary case against her, to put forward her account and any mitigation she might have. This was considered at a disciplinary hearing and an appeal hearing. The evidence covered at this hearing led the disciplinary and appeal officers to the belief that the claimant was guilty of the misconduct alleged against her.
73. I find it such a belief was entertained on reasonable grounds following a reasonable investigation and a fair procedure. I will make one further observation, and that is that the claimant said that she was not given the opportunity to mediate after the disciplinary hearing. It has been difficult to make findings as to exactly what happened, and what was being offered by the respondent. There is nothing to suggest anything improper or anything which might have undermined the process occurred.

Dismissal within range of reasonable responses

74. I stress here that I am not making a decision as to whether I myself would have taken a decision to dismiss, but am assessing whether dismissing in all the circumstances was within the reasonable range of responses open a reasonable employer. Faced with some types of misconduct one employer may choose to dismiss, and that might be a reasonable decision, and another employer would not, which also might be a reasonable response.
75. The primary act of misconduct relates to the Covid protocols. The claimant admits not following the procedures, by coming into the care home, bypassing the queue for the temperature taking point and going to the laundry room to get her mask. She says that this was 2 to 3 m away.
76. The respondent's case is that the protocols are there for a reason and must be strictly enforced. Their case is that there are extremely vulnerable residents living within the care home and that maintaining their safety is paramount. If the protocols are not strictly observed there is a risk that Covid could enter the home and affect staff and residents. The vulnerability of the residents means that this is, quite literally, a life and death situation.
77. The respondent says that the misconduct which the respondent found proven in respect of the claimant was refusal to follow a reasonable instruction, serious insubordination, and serious breaches of health and

safety rules. All of these are listed in the disciplinary example as examples of gross misconduct which will normally lead to summary dismissal.

78. Ms Revell Hughes found that failing to follow the Covid protocols put the lives of the residents and colleagues at risk. The appeal minutes show that Ms Short asked the claimant about the nature of the risk. The claimant understood that failing to abide by protocols created risk of transmitting the virus, but said that she had followed the rules before that. Ms Short was clear that only one breach could lead to the risk of people losing their lives, a risk she described as "*astronomically high*" she said "*by you not wanting to queue, you could have caused somebody's death*".
79. In her additional notes to the disciplinary hearing template Ms Revell-Hughes observed that the claimant only appeared to offer any suggestion that she would behave differently in future when she was asked this directly. She observed that the claimant did not appear to understand the seriousness of the allegations or the potential consequence failing to follow the procedures. She sought to blame others for her actions having never raised concerns about her colleagues before.
80. Ms Short again observed that the claimant did not appear to have expressed a full understanding or a level of remorse in relation to the seriousness of the breach of the protocols. She observed "*there is significant concern that you are likely to repeat the same again*". The claimant's observation is that she had followed the procedure for four years and would not breach the procedures again.
81. One has to look at the context in which this alleged misconduct was happening. The respondent was running a care home housing residents with very significant medical issues. The sector was under significant guidance from the government and Public Health England to ensure that adequate safety measures were being taken to ensure the protection of residents. Within this context I find that the respondent was entitled to treat the sort of breaches of safety protocol that the claimant was found responsible for with the utmost seriousness. They were entitled to find that this was a serious breach of health and safety rules, given the potential consequence of even one breach of the procedures, which constituted gross misconduct.
82. A finding of gross misconduct is not the end of the story, the respondent must consider whether or not the particular finding of gross misconduct justified dismissal. It is clear that it Ms Revell-Hughes considered whether dismissal was the appropriate option in the Additional Information part of her decision template. She was obviously concerned that the claimant only appeared to suggest she would change her behaviour when directly questioned about it. She found the claimant did not have a proper understanding of the seriousness of the consequences of her actions. This could lead to a lack of confidence that the situation might not be repeated. This was also a fear of Ms Short when she heard the appeal.



83. The final paragraph of Ms Revell-Hughes' dismissal letter also makes clear that she considered whether a lesser sanction was appropriate, but decided that it was not in the light of her findings.
84. An employer faced with an employee who does not appear to have a proper understanding of the seriousness of their actions, and who appears only to indicate they will change their behaviour when pushed, and who appears to blame others rather than take full accountability is unlikely to retain "*the trust and confidence necessary to continue the employment relationship*" as is set out in the dismissal letter.
85. In all the circumstances I find that dismissal fell within the range of reasonable responses open to a reasonable employer.
86. I therefore find that the claimant was not unfairly dismissed.

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Employment Judge **Heath**

8 April 2023 \_\_\_\_\_  
Date