EMPLOYMENT TRIBUNALS

Claimant Christina Van de Westhuizen

Respondent GGN Limited t/a Golders Green Nursing

HEARD AT: Watford (by Cloud Video Platform)
ON: 12 to 15 and 19, 20 December 2022, 2 March and 3-5 April, 5 and 9 May 2023

BEFORE: Employment Judge J Lewis KC

Representation

For the Claimant: In person

For the Respondent: Ms L Hatch (Counsel)

RESERVED JUDGMENT

1. The claim of unfair dismissal succeeds.

2. The Claimant is ordered to pay a Basic Award of **£1,143.25** (being a reduction of 75% on account of the Claimant's conduct pursuant to s.122(2) of the Employment Rights Act 1996 ("ERA")).

3. The Compensatory Award (which is to be determined at a remedy hearing if not agreed) shall be subject to the following adjustments:

   3.1 In relation to the chance of a fair termination of employment in any event (pursuant to s.123(1) ERA): (a) a reduction of 70% and (b) the period of compensation limited on the basis that the Claimant would have been dismissed in any event after the period of 8 weeks' notice plus such further period if any (to be determined at the Remedy hearing) which would have been required for a fair process to dismiss on notice.

   3.2 A further reduction of 60% in respect of contributory fault (pursuant to s.123(6) ERA).

4. The claim of breach of contract (notice pay) fails and is dismissed.

5. The applications to amend in relation to senior care rates is permitted. The application to amend in relation to pay during suspension is refused.

6. The claims of unlawful deduction of wages fail and are dismissed.

7. The claim under regulation 14 of the Working Time Regulations 1998 for pay in lieu of annual leave fails and is dismissed..

REASONS

1. This was the hearing of the Claimant's claims for unfair dismissal, breach of contract (in relation to notice pay), unlawful deduction of wages and pay in lieu of annual leave. I heard evidence from the Claimant and, on behalf of the Respondent, from Debbie Scola (HR Consultant who dealt with the Claimant's grievance), Ruth Cunningham (HR Consultant, who dealt with the grievance appeal), Michael Matthews (HR Consultant, who conducted the disciplinary investigation), Lynn Irwin (HR Consultant) who dealt with the disciplinary hearing stage and made the recommendation to dismiss, Ben Holt (HR Consultant) who dealt with the appeal against dismissal, and Claudia Alexander, the Respondent's director.

PRELIMINARY MATTERS

2. At the start of the hearing the Claimant explained that she had recently tested positive for covid. She explained that she had felt unwell and dizzy on Friday, and attended hospital and been unwell over the weekend. She explained that she had now been able to get her temperature down and confirmed that she was well enough to continue, that she wanted to do so and did not wish to seek a postponement. The position in relation to the Claimant's state of health was kept under review and adjustments were made. These included taking more regular breaks, including breaking on several occasions when the Claimant wished to do so having become distressed.

3. Directions had been given in this matter at a preliminary hearing on 8 March 2022. Regrettably that timetable had slipped badly. The parties were required to provide each other with their witness statements by 26 July 2022. The Respondent did not serve its statements until 4.36pm on Friday 9 December 2022. The Claimant replied with what she referred to as her witness list which was a reference to earlier statements by others. She did not send a witness statement for herself. Her failure to serve a statement was said at the hearing to be on the basis of a misunderstanding of what was required and ill health. The evidence she would be relying on in chief was identified during the first day by reference to documents in the bundle.

Ultimately in the light of the hearing going part heard I made an order by consent for a written statement to be provided by 31 January 2023.

4. The Claimant stated on the first day of the hearing that due to her ill health over the weekend she had not reviewed the Respondent's statements, which as above had only been served on Friday afternoon immediately before the hearing. The first day of the hearing (which did not start until 11am due to technical difficulties the Claimant had in joining the hearing in a way to enable the other participants to see her) was taken up with case management. To allow time for her to review the statements the tribunal did not sit on Tuesday morning, and I confirmed with the Claimant that she had had sufficient time before proceeding with the witness evidence. As a further adjustment the Tribunal also did not sit on the afternoon of Thursday 15 December 2022. That took into account that the Claimant reported that she had not been able to sleep the night before, and the impact of that on her when she had covid. She had confirmed that she was able to proceed in the morning to deal with the evidence of Mr Holt. The effect was also that the Claimant had the additional preparation time on Friday and over the weekend before Ms Alexander gave evidence. (The Tribunal also only sat on the morning of Tuesday 20 December 2022, but that was in accordance with the position when listing that day on Thursday 15 December, as Ms Hatch only had availability in the morning).

5. The Claimant had been required to serve a schedule of loss by 5 April 2022 setting out her losses, and also in relation to her claims of unlawful deduction of wages, providing details of what was owed to her and from when. In the event the Schedule was not served until 30 November 2022. The delay was in part explained on the basis of the Claimant waiting for disclosure of documentation as to senior care rates, for which she repeatedly chased from 20 March 2022. I refer to this further below. These were finally received on 31 August 2022. (The Respondent contends it sent them on 24 May 2022, but the Claimant disputes receiving them at that time).

6. So far as concerns the claim for unfair dismissal, it set out that there is a claim for compensation for unfair dismissal but did not quantify that claim or give details of any loss of earnings or mitigation (as to which an order for particulars was made when the claim went part heard). However the Claimant put the total claim at £260,079.96, of which by far the largest part was made up of a claim for deduction of wages or holiday pay framed on the basis that she should have been paid as a senior carer at a much higher rate of pay. Detailed schedules were produced as to this with the assistance of the Claimant's accountants. This formed the vast bulk of her claim for underpaid wages of £222,159,46 and underpaid holiday pay of £11,763,20, as to which she relied on schedules that had been prepared by her accountants. An updated schedule of loss was provided on 31 January 2023 pursuant to an Order I made on 20 December 2022 when the case went part heard. This did quantify the compensatory award claimed for unfair dismissal, but on the basis that it would need to be updated if the Claimant's contention that she was entitled to be paid at senior care rates succeeded.

7. In the course of the first day of the hearing the Respondent raised a point that the deduction of wages claim in relation to senior care rates was not covered by the pleaded claim. At the preliminary hearing (where the Respondent was again represented by Ms Hatch and the Claimant was in person) the issue was framed only as whether the Respondent made unauthorised deductions of wages without any further specification of the nature of the deductions in question. Instead there was provision for this to be particularised in the schedule of loss.

8. This lack of particularity may have contributed to a degree of confusion as to what was within the claim and what required amendment. The Respondent was correct that the only case particularised in the Claim Form as to deduction of wages related to shifts which the Claimant had worked but for which a colleague, Ildago, had been paid. The Claimant indicated that if required she sought permission to amend, and identified the terms of the amendment, which I required to be put in writing.

9. The application was due to be heard on the second afternoon. However on reviewing the file I identified that there were a large number of documents which appeared to be relevant to the application which had not been included in the bundle. I provide the parties with a clip of those documents. In overview these showed that from shortly after the preliminary hearing in advance of the date for the schedule of loss the Claimant had been pressing for disclosure of documents showing rate of pay for senior carers. The Claimant had requested this on numerous occasions and it was made clear, at least by 28 March 2022, and repeated thereafter, that she was operating under the understanding that this was part of her deduction of wages claim and required for her to particularise her losses. At no stage prior to the first day of the hearing had the Respondent made any suggestion that this was not part of the pleaded claim. That was so even though the Claimant had indicated she would be paying an accountant to assist with the schedule of loss.

10. It was not feasible to proceed immediately with an application to amend before the parties had an opportunity to consider the clip of documents. Further there was a limited window of availability for the Respondent's witnesses who were HR consultants to give evidence. I therefore concluded, with the agreement of the parties, that the appropriate course was to proceed to hear the evidence (on liability but not quantum) as to whether there was an entitlement to pay and a senior carer rate, on the basis that whether permission to amend should be given would be addressed as part of submissions or at a later juncture having completed the evidence from the HR consultants. I took into account that the Respondent had addressed the single care rate issue in its evidence, and there appeared to be limited evidence on this issue which would not be said to be material to other issues, and to some extent evidence material to time limits would be relevant.

11. A window to address this after completion of the last HR consultant witness (Ben Holt) was lost when the Tribunal did not sit on Thursday afternoon, and

the remaining time on 19 December and the morning of 20 December was taken up with Ms Alexander's evidence. Ultimately it was agreed by the parties that the issue as to permission to amend could be dealt with as part of submissions, and the evidence heard relevant to it without prejudice to whether permission should be given to amend. I proceeded on that basis.

12. A further issue addressed on the first morning related to the nature of the holiday pay claim. This was framed in the preliminary hearing on the basis of being a claim for pay in lieu of annual leave under regulation 14 of the Working Time Regulations 1998. It was not entirely clear how that related to what was set out in the Claim Form or the way this was put in the Schedule of Loss. One issue was whether the Respondent was entitled to credit for rolled up holiday pay (which the Claimant asserted was illegal) against the payment to be made on termination of employment. It was identified that the issue as to that is whether the provision for holiday pay was sufficiently transparent and comprehensible. Subject to that the Claimant confirmed that the only issue as to holiday pay was consequential on her claim that she was underpaid (due to not being paid for the shifts where Ildago was instead paid, and by reason of not being paid at the senior carer rate), which impacted on holiday pay because it was paid as a percentage of hourly pay. It was confirmed that although the Claim Form refers to a breach of the Working Time Regulations in relation not having any leave or off duty periods, the Claimant was not pursuing any claim for this distinct from the underpayment of annual leave in lieu of notice.

13. I recorded the agreed position as to the list of issues in a note which I provided the parties with on 15 December 2022. The parties confirmed on 16 December 2022 that this correctly set out the position. The agreed issues are appended to these reasons.

14. The position in relation to disclosure has also been unsatisfactory. Several further material documents were disclosed by the Respondent since the start of the hearing. The following material was added without an objection being raised by the Claimant

    14.1 On the morning of 14 December 2022, in advance of Ms Irwin giving evidence, the Respondent disclosed an email of 10 March 2021 from Mr Irwin to the Claimant enclosing the documents that she would be considering in the disciplinary process [**322A-H**]. There was no objection raised in relation to this and since these were documents that had previously been supplied to the Claimant, I am satisfied that there was no prejudice to the Claimant.

    14.2 It emerged in the course of Ms Irwin's evidence that there was a transcript of a call which she had with Mr Matthews, which she had thought had been sent with her dismissal decision but was not in fact sent. Nor had it been previously disclosed or included in the bundle. I accept that this was an oversight. It was forwarded by Ms Irwin to the Tribunal and to the parties shortly before midday on 14 December 2022 whilst she was still giving evidence. There was no objection to its inclusion and having regard to the content of the document I am

satisfied that it was appropriate to include it and that the Claimant was not prejudiced by this.

14.3 Also in the course of Ms Irwin's evidence she identified that she had sent an email to G (an individual who as set out below was central to the allegations on the basis of which the Claimant was dismissed) chasing for him to sign and scan back his statement. A copy of this was forwarded by her to the Tribunal at 4.53pm on 14 December 2022, and sent to the parties at around the same time. The email was sent to G at 3.13pm on 18 March 2021 [**337F**]. Given it merely confirmed that she had unsuccessfully sought to chase up G, I am satisfied that there was no prejudice to the Claimant (and she made no objection to its inclusion), though as with the previous documents it was plainly within the scope of the disclosure originally ordered and should have been provided long before it was.

14.4 At 9.26am on Monday 19 December 2022 the Respondent disclosed an email from Ms Alexander to the Claimant of 8.39pm on 12 December 2020 and reply of 5.21am on 13 December 2020.

14.5 The Respondent had included in the bundle excepts from a telephone conversation on 19 March 2022 between Mr Irwin and N (a cousin of the client for whom the Claimant was caring, HF) which was supplied with Mr Irwin's dismissal decision. In the course of the appeal against dismissal, the Claimant queried why there was no signed statement from NG. In response, in the appeal decision Mr Holt stated that there was a signed version and that he was attaching it with his decision. I queried this with the parties since it was not in the bundle. In response the Respondent provided a copy of the signed version on the afternoon of Monday 19 December 2022, and it was included in the bundle. As the Claimant confirmed, it was a document she had received with the appeal decision. In addition to being a signed version, it included substantial passages that had not been included in the excerpts provided with Mr Irwin's decision.

14.6 In the course of questioning of Ms Alexander it emerged that she had sent two text messages to G which were plainly material on 15 and 24 February 2021. She read out what those messages said and a copy was subsequently provided. Both messages should plainly have been disclosed pursuant to the disclosure order originally made by the Tribunal.

15. Whilst the Claimant did not object to inclusion of the above documents, and in some cases they had been seen at the time of the disciplinary process, they should all clearly have been disclosed by the Respondent as part of the disclosure originally given.

16. In addition, on Sunday 18 December 2022, the Respondent provided disclosure of a more substantial bundle of further documents (pages 913 to 982 of the Bundle). For reasons which I gave orally at the hearing, having

heard submissions from the parties and a description of what was to be included, I determined that these should be included in the bundle. This was without prejudice to submissions that may be made as to whether it would be permissible to rely upon them, which I would consider in the light of the evidence in relation to them and testing why they were not produced earlier. Having reviewed the documents and considered the evidence in relation to them I am satisfied that it is open to the Respondent to rely on them to the extent materially relevant. The documents fell into four categories:

16.1 Photographs taken by N on 4 December 2021. It was submitted on behalf of the Respondent that the material relevance of these to the present proceedings only became apparent on reviewing them recently. The relevance was said to be that they showed male and female clothing. In allowing them to be included I took into account that one point raised in cross-examination by the Claimant of Mr Irwin was as to whether there was evidence of any of G's belongings at the property. Ms Alexander commented on these photographs in her evidence. In fact only one of the photographs [**417**] was said to show male clothing. As to the remaining photographs, having reviewed the evidence and considered the evidence in relation to them, and taking into account allegations that were not upheld or pursued in the disciplinary proceedings, I do not consider that they are of any material relevance.

16.2 Photographs taken by N at a subsequent date showing the Claimant's belongings being bagged up. Whilst I do not consider there was any prejudice to the Claimant in including these, I do not consider these to be of any material relevance.

16.3 Photographs taken by the Mr Alexander on Friday 16 December 2022 of HF's house. An issue was raised in questioning of the Respondent's witnesses as to whether HF should have been interviewed. In that context the photographs of the house were relied upon in relation to whether G could have been residing in the property without HF being aware of this. I am satisfied that the Claimant was able to deal with this in questioning of Ms Alexander, and had also had ample time to consider this material before she was cross-examined when the hearing resumed in March 2023.

16.4 Copies of entries made in diaries by the Claimant. Ms Alexander made these copies on Friday 16 December 2022. She noticed them in a box in HF's study when she attended to take photographs of the house. On looking at them they appeared to her to contain relevant entries such as payments for rent. She had not been aware of these earlier. I accept that explanation. Further, being diary entries made by the Claimant, their principal relevance was in relation to cross-examination. As such there was no prejudice to the Claimant who has had ample time to consider them in advance of being called to give evidence.

17. At the outset of the resumed hearing on 2 March 2023, the Respondent made an application to postpone on the basis of a medical emergency (the details of which it is not necessary to set out here). For reasons given orally I was satisfied that there were exceptional circumstances within rule 30A of Schedule 1 of the Tribunal Rules.

18. Certain further case management matters were dealt with on 2 March 2023:

18.1 I canvassed with the parties whether the hearing could usefully be used to deal with the outstanding amendment application or whether, given that there was only the Claimant left to give evidence and there would be evidential issues raised by the application, it would be more conveniently dealt with in final submissions. Both parties' preferred the latter course, and taking that into account I considered it to be an appropriate approach and proceeded on that basis.

18.2 In the Claimant's amended schedule of loss, initially served on 27 January 2023, and in amended form on 31 January 2023, the Claimant had included as claim for underpayment in her wages from 5 December 2020 until 29 March 2020. The Claimant explained that this was prompted by a response given by Ms Alexander to a question I had asked clarifying the basis for the calculation of the sums paid in the notice period (which might in turn have been material to understanding the correct quantification of any claim on dismissal). I raised with the Respondent whether any point was taken that this was not within the pleaded claim. Ms Hatch indicated that the Respondent did take that point and further took an issue that it was not clear as to how the correct average salary was calculated. I gave directions for the Claimant to set out the terms of the amendment that she sought, the basis on which she claimed to be entitled to the sum claimed and the basis of calculation, and matters relied upon as to why she contended that should be permission to amend. At the hearing the Claimant indicated that the figure she had inserted as the correct payment was an average. In fact it was the net payment for those weeks when she worked a full week without a break, the gross payment being £1,566.60.

18.3 I also raised whether the Respondent took any point in relation to the fact that in relation to the claim in relation to the payments made to Idalgo instead of the Claimant, the Claim Form framed the claim as being from October to December 2020, rather than from March 2020 as was the case advanced on the evidence. Ms Hatch indicated that, since she did not have her client with her, she was not willing to concede this point and that it was a point she had been intending to raise. The Claimant made the application to amend verbally at the hearing. This was simply a matter of changing the word "October" to "March" and she made the point that it was an obvious mistake. Ms Hatch accepted that there was no need to put anything further in writing as to the terms of the amendment, but wished to reserve her position further pending being able to take further instructions. At the resumed hearing on 3 April 2023 Ms Hatch confirmed on behalf of the Respondent that there was no objection to that amendment and I gave permission. It was plain that the reference to October rather than March was a straightforward error, and well understood that the claim related to period from March. The balance of prejudice was plainly in favour of permission to amend.

18.4 I made orders for further disclosure, part of which the Respondent had indicated previously that it would provide by voluntary disclosure but which had been overlooked. Various further documents were added to the bundle for the resumed hearing pursuant to that Order, notably including recordings of calls with G and a transcript of those recordings. There was no objection to those documents being added to the bundle.

18.5 Given that the witness statement ultimately served was in quite summary form I clarified whether the Claimant still sought to rely upon the documents identified at the start of the hearing as containing her evidence in chief. The Claimant indicated that she did. In the interests of certainty I identified those documents in the Order made on 2 March 2023.

19. During the hearing on 3 to 5 April 2023 there continued to be various additional breaks needed when the Claimant became upset. I explained to the Claimant that if she felt a break was needed, she should at least inform me first so that we could agree a time for resumption. Unfortunately the Claimant did not always keep to that. The Claimant's evidence was not completed and the two further days were listed for 5 and 9 May 2023. I also flagged up that there were two points that had been raised for the first time in the course the Claimant's evidence that it seemed to me it may be necessary to recall Ms Alexander in order to address (relating to false entries in notebooks and the explanation that clothes at the property which the Respondent has suggested were G's clothes were in fact HF's clothes). I directed the parties that that the Respondent was expected to tailor any further questions for the Claimant so as to enable the evidence to be completed by the end of 5 May 2023 (including if necessary recalling Ms Alexander on the two points identified), and allowing time for questions I may have, and that this would also require the Claimant to focus on answering the question asked. This was done, and the evidence and submissions completed on 9 May 2023.

APPLICATIONS TO AMEND

Legal principles in relation to amendment

20. So far as concerns amendment, the first issue is as to whether an amendment is required. If it is the tribunal is required to consider the balance of hardship and injustice taking into account all the circumstances of the case. Relevant principles were reviewed by the EAT in ***Vaughan v Modality Partnership*** [202] ICR 535 (EAT). Relevant considerations are likely to include:

20.1 The nature of the amendment; where the amendment merely involves a change of label, the amendment will generally be permitted. The more the amendment involves new factual issues the more there might be prejudice caused by the amendment to weight into the balance.
20.2 The application of time limits
20.3 The timing and manner of the application and the reasons for it.

21. The EAT in ***Vaughan*** emphasised that whilst those factors will invariably be relevant they should not be treated as a checklist. They are factors to be taken into account in conducting the fundamental exercise of balancing the injustice and hardship in all the circumstances of allowing or refusing the amendment. In particular this requires taking into account the real practical consequences of either allowing or refusing the amendment.

22. The relevant principles have recently been reiterated in ***Chaudhry v Cerberus Security and Monitoring Services Ltd*** [2022] EAT 172. HHJ Taylor suggested at para 37 that:

> "In case some judges might find a checklist helpful when considering applications to amend a claim form, one could do worse than: 1) identify the amendment or amendments sought, which should be in writing 2) in express terms, balance the injustice and/or hardship of allowing or refusing the amendment or amendments, taking account of all the relevant factors, including, to the extent appropriate, those referred to in ***Selkent***."

23. Provided that the focus remains on the assessment of the balance of prejudice, it is permissible as part of the overall assessment to take into account any clear view as to the merits: see ***Kumari v Greater Manchester Health NHS Foundation Trust*** [2022] EAT 132. That does not however appear to me to be a significant factor at least against permitting an amendment given that I am deciding the matter at the same time as I would be determining the issues on the merits having heard all the evidence. If the claim fails on the merits in any event there is no substantial prejudice in permitting the amendment at this stage.

24. As to the application of time limits:

    24.1 Subject to the extension in relation to ACAS notification, a claim of unlawful deduction of wages must be brought before the end of three months beginning with the date of the payment from which the deductions were made or the last of a series of deductions. If presented outside the primary time limit, the claim can only be brought if it was not reasonably practicable to bring the claim in time, and it is presented with such further period as the tribunal considers reasonable: s.23 ERA.

    24.2 Essentially it is reasonably practicable to being a claim if doing so is reasonably feasible. It would not be sufficient for a claimant to show that it was reasonable to delay bringing the claims; reasonable practicability sets a higher hurdle. Where a Claimant retains a solicitor to act and fails to meet a time limit because of the solicitor's failure to act with reasonable care, those failures will ordinarily be attributed to the claimant. It may be that it can be shown that the solicitor has a reasonable excuse or has acted reasonably such that their failure not be held against the claimant. But otherwise where there are failings on

the part of the solicitor those will typically be attributed to the claimant on the issue of reasonable practicability.

24.3 The question of whether the Claim was brought within a reasonable time thereafter would only arise if I am satisfied that it was not reasonably practicable to present the claim in time. I would then be looking at that issue in the context of the three month time limit.

24.4 The EAT in ***Galilee v Commissioner of Police of the Metropolis*** [2018] ICR 634 held (at 109(a)), after a review of the authorities, that amendments to pleadings in the Tribunal which introduce new claims or causes of action take effect for the purposes of limitation at the time permission is given to amend (or it may be when the application was made), rather than when the Claim Form was first presented. That was in the context of an amendment to add a wholly new claim based on new facts; in that case by adding claims of disability discrimination, harassment and victimisation to an unfair dismissal complaint, whereas in the present case there is an existing claim of unlawful deduction of wages and the application is to advance it on a different basis Further there is a tension between that approach and a line of authorities to the effect that even where it is found that claim would be out of time as a new claim, whilst that is an important factor in relation to whether an amendment should be permitted, it is not necessarily determinative, but that the greater the difference between the legal and factual issues raised by the new claim, the greater the less likely the amendment is to be permitted: see eg ***Abercrombie v Aga Rangemaster Ltd*** [2014] ICR 209 (CA) at [48]. In all it seems to me that the safer and appropriate course is to approach the application to amend on the basis that if I conclude the claim is out of time that is not necessarily determinative but that is a relevant factor to take into account having regard to the extent of differences in the legal and factual issues raised and that if amendment is permitted it may deprive the Respondent of a limitation defence. If I allow amendment it would only be necessary to revisit the impact on time limits if (contrary to my conclusions below) the substantive claim succeeds.

Amendment in relation to senior carer pay rates
(1) Is permission to amend required?

25. I turn first to the claim in relation to senior care rates. In her letter to the Tribunal of 17 December 2022, the Claimant framed her proposed amendment as follows:

> "Amendment sought for Unlawful deductions for failing to pay in accordance with the senior care rates from 1 January 2018 to 29 March 2021 (where senior care rates refers to the claim in relation to pay for time worked and holiday pay or pay in lieu of holiday pay)."

26. The list of issues at the preliminary hearing set out a unauthorised deductions claim without specifying the basis of that claim. Indeed the

directions given can be read as anticipating that the Claimant would particularise this in the schedule that it ordered should be provided which required her to "provide as much detail as possible explaining what is owed from her and from when." [**51**]. However in circumstances where no permission to amend was given at that hearing, the framing of the issues in the preliminary hearing ("**PH**") cannot expand on the claim as set out in the Claim Form. The Respondent is correct to say that there is nothing in the Claim Form which encompasses the claim based on senior care rights. Instead the deduction of wages claim was framed only on the basis of the failure to make payment for the shifts which the Claimant worked but for which a colleague, referred to in the bundle as [I], was paid. Permission to amend is required if the Claimant is to pursue this claim.

27. The way the issue was framed in the PH does however in my view have some relevance when it comes to balancing the hardship and prejudice in relation to whether to give permission to amend. The broad terms in which the issues were framed, without particularising the particular pleaded issue in relation to deduction of wages, made it more likely that the Claimant, as a litigant in person, would not appreciate the need for an application to amend. I will return to this point in considering the aspects bearing on the balance of prejudice in relation to the application to amend, and also weighing the fact that the Claimant, although a litigant in person, has previously had the benefit of legal advice.

(2) Should the Claimant be given permission to amend

28. I turn therefore to whether there should be permission to amend. Whilst I address in turn below each of the factors identified in ***Selkent*** as usually relevant, in doing so I keep firmly in mind that the issue is the balance of hardship and injustice and the need to consider this in all the circumstances of the case.

29. It is convenient to address first the chronology leading up to the making of the application. In a grievance raised by the Claimant on 5 January 2021, one of the issues she raised was under the heading: "My hours: I am a Senior Carer" [**145**]. This did not however raise a claim based on the distinction between the rate of pay for a carer and a senior carer. The issue as to pay was that the Claimant was wrongly paid as a live in carer, whereas it was said that she should have been for 15 hours and a sleeper rate. There was also an allegation in relation to failing to arrange cover for her, and that Ms Alexander falsely stated that a colleague, Ildago, worked shifts instead of the Claimant. In the Claimant's grievance appeal she reiterated that she was a senior carer [**314-316**]. Again, however, there was no complaint based on there being a different rate of pay for a senior carer by comparison to a carer (as opposed to a live-in carer).

30. The issue as to there being a senior care rate ("**SCR**") at which the Claimant should have been paid was first raised by the Claimant in March 2022. This followed on from the Order made at the preliminary hearing on 8 March 2022, requiring the Claimant to provide a Schedule of Loss ("**SOL**") by 5 April

2022 and that, in relation to the deduction of wages and holiday pay claims, this was to set out an explanation in as much detail as possible what was owed to her [**51**]. The Claimant emailed the Respondent's solicitor (copying the Tribunal) on 20 March 2022 in terms which made clear that her SOL would include a claim to be paid at the SCR. She stated that she had all the details to prove she should have been paid as a senior carer, and not as carer, and requested the rates for a senior carer. She stated that her accountants would need this by 23 March 2022 to assist her with the SOL. She also requested copies of notebooks in relation to HF from January 2018 until 4 December 2020, which it was said HF's complex care need and the hours the Claimant worked. Having received no response the Claimant sent a chasing email to the Respondent's solicitor on 25 March 2022.

31. The Claimant then wrote to the Tribunal (copying in the Respondent) on 28 March 2022 seeking these documents. She stated that there had been unlawful deductions in that she had been paid as a junior carer instead of a senior carer and that her solicitor had mentioned that she should have been employed as a senior carer.

32. Having received no response from the Respondent, the Claimant wrote again to the Tribunal on 3 April 2020. She reiterated that she needed the notebooks and the SCR and that she had been advised by her solicitor that her rates were not correct and that she should have been paid as a senior carer from 2018.

33. By a letter of 13 May 2022 from the Tribunal it was said that EJ Maxwell was considering making an order for specific disclosure of documents which the Claimant said she required for her SOL and asked if the Respondent would provide them voluntarily. The Respondent then replied stating that it would voluntarily provide the SCR information but stated that the notebooks covering the majority of the period could not currently be provided as they were not at the time in the Respondent's possession. It appears to have taken the EJ's intervention to elicit a response. However there was no indication of any issue that the Claimant was going beyond the scope of her claim.

34. In a reply of 24 May 2022, the Claimant pressed for an order. She stated that she had never been advised that carers get paid a senior rate when they give complex care but that her solicitors had discovered it in the Respondent's handbook. In an email of 2 June 2022 the Claimant complained that the SCR had still not been provided. She sent further chasing correspondence on 1 and 12 July and 18 and 23 August 2022. The Respondent replied on 31 August 2022 stating that the SCRs had been sent on 24 May 2022 and sending a further copy. The Claimant contends that she has no record of any prior email sending the SCRs. Nor was a copy of the email purporting to send it on 24 May 2022 before me.

35. The position advanced by the Claimant in correspondence was therefore that it was her solicitor who had picked up that she should have been paid as a senior carer. The Claimant explained in the course of cross-examination that

it was her solicitor who first brought to her attention there could be a different rate as a senior carer. The same solicitor assisted the Claimant with drafting her grievance and framing her Claim Form. The Claimant further explained that her solicitor had been asking about this because of the hours that the Claimant did and thought it was a complex rate, and the Claimant stated that she thought there was a senior rate but had never been told of this by the Respondent, and they agreed that she would look into it.

36. Despite this, the claim based on the SCR was not included in the Claim Form. The Claimant put this in the context of the Claimant's poor mental health at that time, when she was struggling to deal with the grievance and disciplinary process and that the point did not come to her mind. Having stated that she had discussed with her solicitor looking into the point about the pay rate, the Claimant stated they had not spoken about it further, that she had not looked into and the point did not come to her mind at the time.

37. I do not regard that as a wholly satisfactory explanation. I accept that the Claimant was suffering with the effects of stress. However she had legal representation at the time of filing the claim and on her own evidence had discussed the issue with her solicitor and they had agreed that the Claimant would look into it. Even if it was an issue to be investigated further, it was open to the Claimant (and her solicitor) to include the point in the Claim Form to preserve the position pending disclosure given the applicable time limits. In any event it was not suggested that any new information had become available, relevant to raising the issue, between the time of filing the Claim Form and the March 2022 when the issue were first raised expressly.

38. In those circumstances I consider that it was reasonably practicable to bring the claim in time. It follow that the claim could not have been presented as a new claim in the Tribunal either in March 2022 when it was first raised or when the application to amend was made. If, as addressed above, that is not necessarily determinative of the issue as to a substantive answer to the claim if amendment is permitted, it is an important factor to take into account in exercising my discretion whether to permit the amendment. It is a claim relying on different factual issues to those relied upon in the pleaded claim. There would be prejudice to the Respondent in that it would lose a time limit defence in the tribunal, though there would still be a claim that could be brought by way of breach of contract in the ordinary courts.

39. The Claimant was not able to identify in her evidence precisely when her solicitors last provided her with advice, but she confirmed that the last involvement from them was on 3 June 2021, and that they were no longer acting by the time that she raised the issue as to the SCR in March 2022. I accept that she did not specifically pick up that this was not part of her pleaded deduction of wages claim and that he point did not come to mind until she was prompted to do so by the need to file the schedule of loss. That was affected by being in poor mental health, having other physical problems including with her heal, and her sister being in hospital with Covid. Indeed in advance of the preliminary hearing she had written to the Tribunal seeking a postponement as her sister had sadly passed away. The context

was of her seeking to cope with all of this as well as continuing to work. I also infer that, as a litigant in person, she did not appreciate until the point was raised by the Respondent at the substantive hearing, that it was necessary to seek permission to amend to raise the point. She had been ordered to explain in as much detail as possible the basis for the unlawful deductions claim, had then repeatedly written in terms which conveyed her understanding that the SCR claim was part of her claim and at no stage prior to the hearing had the Respondent suggested that an amendment was required.

40. The issues identified in the PH were framed in sufficiently broad terms, especially when taken together with the requirement for further particulars, as to give the impression to a litigant in person that they would cover the SCR claim without the need for amendment. Since the Respondent was legally represented it is reasonable to expect that it ought to have framed the issues as to deduction of wages in terms which identified the particular factual issue and avoided this confusion. Further, the parties have a duty to assist the tribunal in furthering the overriding objective. It is in my view inconsistent with that duty if, where a legally represented respondent can see that a litigant in person is operating on a misunderstanding as the scope of the issues, to say nothing about that for many months before raising it as an issue on the first day of the hearing. That is all the more so where, as here, this was not simply a passing reference by the Claimant to a claim based on the SCR. It was a point that was repeatedly raised in correspondence. The failure by the Respondent to provide rates of pay for senior carers was repeatedly raised as being information which the Claimant needed to complete the SOL which she had been ordered to provide. Yet the file of correspondence indicates that time and again the Respondent failed to acknowledge or respond to the Claimant's correspondence asking for this documentation, and when there was a respond (which appears to be in response to the Tribunal requiring a response) it raised no issue as to this being outside the pleaded case. This was despite the express assertion having been made that the Claimant was claiming deduction of wages in this respect. There has been no satisfactory explanation for the failure to do so.

41. Further, the Claimant made clear that she required this information in order to submit to her accountants. The Respondent ought therefore to have been well aware that the Claimant would be incurring expense working on the basis of her belief that this was part of her claim. Yet still nothing was said in response. Whether intentionally or not, the effect was in substance that the Claimant was ambushed by the point being raised at the start of the hearing, without prior warning, as to the need for amendment.

42. This still leaves a question as to why the schedule of loss was served so late. Even if the SCRs were only supplied in August 2022, that still leaves the delay until the end of November 2022 when the SOL was served. The Claimant explained this on continuing to struggle with the injury to her heel, not being able to sleep and trying to cope without solicitors who she could no longer afford and found it difficult to focus. She also needed assistance with the calculation and instructed accountants. The position remains

unsatisfactory given the delays but I accept that these factors provide mitigating circumstances for the delay. They are consistent with the signs of stress and being distraught in the course of this hearing.

43. The above considerations are material when I turn to consider the nature of the amendment. Whilst there is already a claim for unlawful deduction of wages, the amendment raises distinct legal and factual issues. The currently pleaded claim concerns the period since March 2020. The proposed amendment covers the period back to 1 January 2018. Further the amendment raised distinct issues as to the contractual terms and, depending on the conclusion in relation to that issue, factual issues as to whether the nature of the work entailed work of a senior carer. There is also a factual issue, were the Claimant to succeed in principle, as to what was the senior care rate of pay, and whether the disclosure give as to this relates to the rate of pay to a senior carer or the amount charged to the client.

44. It is not however said that the Respondent has been prejudiced in being able to address these matters. Ms Alexander addressed the issue both in her witness statement and in her oral evidence. It was said on behalf of the Respondent that the material in relation to this in Ms Alexander's witness statement was only added in response to the Claimant's schedule of loss which was belatedly served on 30 November 2022. I regard that as a weak point in circumstances where the Respondent has been on notice since March 2022 that the Claimant was seeking to raise this issue and indeed that she appeared to be under the impression that it could be raised by way of setting it out in the Schedule of Loss.

45. I have also considered the point as to potential prejudice to the Respondent if the claim were allowed because there would be the expense of a further claim to deal with quantification of the claim. Again, however, the Respondent bears a large share of the blame for this. It was only in Ms Alexander's witness statement, served shortly before the hearing, that the issue was raised that the document that had been produced in response to the request for the SCR, set out the rates charged to clients rather than that paid to carers. It was clear from the Claimant's correspondence that she was seeking the rate paid to carers. The Respondent should have made its position clear as the nature of the charge out rates when purporting to provide the disclosure requested and either provided the rate paid to the one senior carer it did employ or set out its case as to why such disclosure was not necessary. It did neither.

46. Standing back and taking each of the above matters together, I weigh into account each of the elements of prejudice noted above including the loss of a time limit defence and that the Claimant previously had legal representation. That is balanced in part by the prejudice to the Claimant in losing the ability to have the determination of her claim in the employment tribunal but also by the fact that she has incurred expense on that claim in instructing her accountants on the faith that it was part of the existing claim, in circumstances where in my view any objection by the Respondent that it was not part of her pleaded claim should have been raised far more

promptly. I take into account that the Respondent has been able to address the issue in its evidence and this is not a case in which the Respondent has been able to point to any forensic prejudice such as in relation to availability or quality of evidence due to the matter not being raised earlier. In all I consider that the balance of hardship and injustice is in favour of permitting the amendment.

Amendment in relation to pay during suspension

47. I turn to the claim in relation to pay during the period of suspension. This is a much lower value claim. It was quantified in the Claimant's witness statement as being for £1,711.32 subject to any uplift if based on senior care rates (whereas the total SCR claim was put as being in excess of £222K). The application was made at an even later stage, being after the completion of the Respondent's evidence (subject to Ms Alexander being recalled to address three discrete points). It was prompted by an answer Ms Alexander gave in response to a question from me seeking to clarify the basis for the payments during the period of suspension which was raised at the end of her evidence. However the Claimant had always been aware of the amount that she was paid during the notice period, it was open to her to raise the point earlier, and whilst I take into account her statement of health and that she has for some time been a litigant in person, she was previously represented by solicitors. As such I am satisfied that it was reasonably practicable to bring the claim in time. Again, as with the SCR amendment, the effect of permitting the amendment would be to deprive the Respondent of a time limit defence to a claim in the tribunal (though not to a contractual claim in the ordinary courts). Unlike the SCR amendment there is not the additional element of prejudice in the Claimant having incurred substantial accountant's fees that might have been avoided if the Respondent had promptly raised the objection as to the need for permission to amend.

48. As to the scope of the issues raised by the proposed amendment, the Respondent relies on the Claimant's signed contractual terms and in particular the provision that it was a zero hours contract [**67**]. The Claimant relies on the practice as to hours she in fact worked and that she says it is not correctly viewed as a zero hours contract. However that begs further questions. It is of course well established in this field that the written terms are not determinative if they do not reflect the true agreement between the parties. .However that calls for a broader assessment in all the circumstances of the case. The fact that the Claimant in fact worked long hours is not of itself necessarily inconsistent with the position that there was no underlying obligation to make work available. Further, it would not be sufficient for the Claimant to dispute that there was a zero hours contract. It would be necessary to establish an entitlement to work and be paid for a higher rate than in fact in the suspension period. The basis for this was not clearly identified. It might be said that there was some implied term not to lose out on pay during suspension but that was not specifically argued and raise the issue as to how it fits with the express term as to a zero hours contract. It does not seem to me that the difficulty can be overcome on the basis of the promise that the Claimant would be on "full basic pay" during

suspension (see paragraphs 140 and 152 below). That was communicated at a time when the pattern of what was paid during suspension had already been set. As such it does not seem to me that it could reasonably have been regarded as meaning something different. There might be some other line of arguments advanced based on an implied term

49. I take into account that again the Respondent did not point to any specific forensic prejudice in dealing with this issue. However in my judgment that is fairly to be viewed in the light of the lack of clarity as to the basis of the entitlement beyond disputing that there was genuinely a zero hours contract. Taking that together with the very late stage at which the application was made, the time limit considerations and (whilst taking into account the Claimant's state of health) the failure to raise objection at the time despite being represented by solicitors, I conclude that the balance of hardship and injustice is against permitting the amendment, and I refuse permission.

MATERIAL FACTS

The parties and terms of employment

50. The Respondent is a nursing and care agency which provides private care to mainly elderly clients in their own home. Ms Claudia Alexander has at all times been its sole director and Registered Manager. The Claimant is an experienced carer. It is common ground, and I accept, that she was employed by the Respondent at least from October 2017, when the Respondent states she started working with service user HF (although the SCR claim has been limited to the period from January 2018). I accept that it was from 10 October 2017 that the Claimant started working with HF on a continuous basis. That is the first date in the payment sheets produced by the Respondent and in the Claimant's evidence she indicated that the earliest date she had been able to identify was in October 2017. As evidenced by a reference from HF, the Claimant was also HF's main carer for an earlier two month period in December 2016 and January 2017 [**113**].

51. On 16 May 2012 the Claimant signed a declaration by which she agreed to be bound by the Respondent's terms and conditions of employment ("the T&Cs") [**66-70**]. The working relationship commenced at around that time, albeit there may have been some lapse of time before starting work. There is an issue between the parties as to whether she was an employee at that point, prior to the start of her continuous assignment with HF. The Respondent was one of a number of agencies for whom the Claimant worked up to the point of taking on her role with HF.

52. On 20 July 2012 the Claimant signed a further declaration confirming that she had read and understood "An Induction Guide for Care Assistants" and agreed to work in full accordance with the Respondent's policies and practices [**107**]. The Induction Guidance has also been referred to as the Carer Handbook. The Claimant accepted that she had received a further copy of the handbook in 2015. There was also a 2020 version produced by the Respondent. Whilst the Claimant was not able to trace having received

this, where the provisions from 2012 were still in substance contained in the 2020 version, I infer that they had continued to apply throughout the period.

53. The handbook included provisions that:

53.1 "As responsible service providers, it is absolutely essential that we know exactly what is going on in the client's home." [**78, 1002**]
53.2 "The Care Worker must not bring members of their family or any other unauthorised person into the client's home." [**96, 1007**]
53.3 One of the carer's responsibilities was to: "Take all reasonable steps to safeguard your own safety and the safety of any other person who may be affected by your actions" (paragraph 3 of the Carer's responsibilities) [**100, 1025**]; and
53.4 The care must not "engage in any conduct which may be detriment to the interests of the client" (paragraph 5 of the Carer's responsibilities [**100,1025**]
53.5 The carer confirmed that: "all the information that you provide to Golders Green Nursing be it verbal or written is to the best of your knowledge, accurate true and complete" (paragraph 14 of the Carer's responsibilities) [**101, 1025**]

54. The handbook referred to a list of policies which were stated to be kept in the office [**90, 1016**]. These included a Code of Conduct. Amongst other matters this provided [**73**] that:

> "2. Agency staff must act with honesty, integrity and with respect for the client's home and property.
> 3. Agency staff are expected to carry out their duties so as to promote and safeguard the client's health, well-being and interests. …
> …
> 5. Agency staff must not be involved in any action that may prejudice the Service, or damage the reputation of the Agency, or generally diminish the confidence of the public.
> …
> 8. Agency staff must act totally professionally at all times. ..
> 9. Agency staff must act totally professionally with respect to the relationship with the client. …"

55. In the Claimant's disciplinary hearing, and in her evidence, she disputed that she had seen the Code of Conduct prior to it being provided to her in the disciplinary process. Ms Alexander contended that it was in the Care Handbook. I do not accept that was the case. As noted above, the handbook instead stated that it was kept in the office and available on request. In the absence of evidence of it having been sent to the Claimant prior to the disciplinary process I do not accept that it was. However the above standards were obvious and I accept that they would have been implicit requirements in any event.

56. In addition it was an implied term of the contract that the Claimant would not, without reasonable and proper cause or excuse, act in a manner likely to

destroy or seriously damage the relationship of trust and confidence ("the implied term of trust and confidence").

57. As to terms of payment, the handbook set out the hourly rate of pay for carers [**97, 1022**] and also provided that the Respondent's obligations included to:

> "Advise you of the hourly rate of pay for the assignment (pay rate). Golders Green Nursing will use all reasonable endeavours to pay you at the pay rate within nine business days of you delivering a duly completed time sheet for the hours worked in the previous week." [**99, 1024**]

58. In relation to holidays, the handbook provided that the holiday year was from 1 April to 31 March [**101, 1026**]. It further provided that:

> "Holiday pay will be calculated and paid on a weekly basis and added to your due payment. No further holiday pay will be owed by the Agency and staff is therefore advised to save their holiday pay for when they take annual leave." [**102, 1026**]

59. In the section of the handbook on the rates of pay for carers it was specified that:

> "Holiday pay of 12.07% will be added to the hours rates and paid on a weekly basis."

60. In accordance with this provision the Claimant' payslips showed a payment being made for holiday pay on a weekly basis.

Carers and senior carers

61. There were four types of carers. Carers, live in carers, senior carers and live in senior carers. However the Care Handbook referred in terms only to "Carers" and "Senior Live-In Carers". The only rates set out were for carers, with a day rate, a night duty rate, a flat sleepover rate and a live in rate. The Respondent did not employ any senior live in carers. It had one person treated as a senior carer from 2018 until the end of 2021. She looked after a woman in her mid-80s who had had an extended period in hospital after a road traffic accident. A senior care rate was specifically agreed with the family in that instance. The Respondent no longer employs any senior carers.

62. In response to the request for senior care rates the Respondent disclosed rate sheets for 2018 and 2020 showing hourly rates for "senior auxiliary staff" [**487-488**]. I accept that these were the rates chargeable to clients rather than to be paid to the staff. I take into account that it was clear from the correspondence in which the Claimant sought specific disclosure of these rates that she was seeking disclosure of the rates to be paid to the carer and that it was no until Ms Alexander's witness statement that the argument was made that what was disclosed was the rates charged to the client. However the sheet refers to the rate at which visits will be "charged". It would make

no business sense for the charge out rate and the hourly rate paid to be the same, since that would leave no profit margin for the Respondent. Similarly it refers to clients being invoiced regularly and to sums being added to the invoice. Whilst it also makes reference to including holiday and pension payments, that is explained on the basis that these costs were being passed on to the client. Further, consistently with these being rates charged to the client, they were not contained in the staff handbook or communicated to staff. Instead it was contained in a brochure provided to new clients. The client would not be informed of the rate paid to the senior carer. In all I accept that it sets out the charge out rates, and not the hourly rates paid to the senior carer.

Lock down and payment to Ildago instead of the Claimant

63. Prior to lockdown at the start of the pandemic, the Claimant's regular weekly working pattern (apart from the Christmas week where she did not work on Christmas Day or Boxing Day) was either:
    63.1 15 hours (total 105 hours) and 7 sleepers – meaning from 7am to 10pm each day plus a sleeper (10pm to 7am) each day (although in fact she would often be up with HF during the hours of the sleeper and would be up at 6am preparing breakfast and HF's medication); or
    63.2 A slightly shorter week consisting of around 90 hours but sometime slightly more or less, consisting of:
        (a) Five days working 15 hours plus a sleeper; and
        (b) One shorter day where she either worked 10, 12 or 13 hours and then no sleeper, and then on the following day worked either two or three hours (ie returning at 7 or 8pm that evening) plus a sleeper.

64. In the course of a grievance raised by the Claimant, she said that she had not been paid an hourly rate at all and had instead been paid a flat rate. That was not the case. It was based on the fact that the payment sheet which accompanied the Claimant's pay slips did not show a break down by hours for each day paid. Instead, at least latterly, it showed the days for which payment was made with a single rate for the day. However the single rate was calculated on the basis of the total hours worked – calculating a full day as 12 hours of day duty (at £10.50 per hour weekday and £10.60 weekend), 3 hours of night duty (£10.60 weekday and £10.70 weekend) and a flat sleeper rate (£65 weekday and £67 weekend). This equated to the total of £222.80 (12 x £10 for a weekday and £226.30 for a weekend shown in the time sheets.

65. Prior to lockdown, the relief for the Claimant was usually provided by a colleague, Ildago. The relief times were generally arranged directly between the Claimant and Ildago. This changed from around the start of lockdown. Apart from the week ending 1 November 2020 and the week ended 6 December 2020 (when the Claimant was suspended after four hours claimed for Saturday), neither Ildago nor any other relief carer came to the property. In terms of the hours claimed by the Claimant there was a regular pattern (apart from the week ending 1 November 2020), of claiming alternately for:

65.1 a round the clock week (seven 15 hour days and seven sleepers) and;
65.2 a week with 89 hours and six sleepers, with five days of 15 hours and a sleeper, but with 12 hours and no sleeper on the Thursday followed by 2 hours and a sleeper on Friday.

66. The claim submitted in the 89 hour weeks did not reflect the true situation. During those weeks neither Ildago nor any other relief carer attended to relieve the Claimant other than on one occasion at the end of October 2020. Ms Alexander was aware of this.

67. However the Claimant was only paid broadly in accordance with the hours she submitted. She submitted her hours for the week by an email to Ms Alexander. However in the short weeks she only claimed for 14 hours and one sleeper over the Thursday and Friday. She was not paid precisely in accordance with this. Instead she was not paid for the Thursday, but paid in full for the Friday of those weeks – which equated to 1 hour more than the hours claimed. This was on the basis of simplicity for the client so that in so far as possible the time charged was shown as a single one day block.

68. There were a total of 17 days paid to Ildago on that basis. In addition in the week ending 15 November 2020 there was a further weekday shift and one further weekday hour [**867**] for which the Claimant was not paid despite having put in a claim by email for 89 hours and 6 sleepovers [**912**]. Ms Alexander was not able specifically to explain this in her evidence but said, and I accept, that it is likely that it was meant to reflect an overpayment elsewhere. It may be that it is at least in part reflective of the discrepancy noted above between the fact the Claimant claimed 14 hours (plus a sleepover) over two days in the short weeks but was in fact paid for an extra hour. That would explain the additional 16 hours paid but not claimed up to that point. In any event no specific claim was made in relation to the additional time not paid in this week.

69. In addition to not claiming for her full hours worked in the email submitted to Ms Alexander, the Claimant also created a false record in the notebooks that were used to record her activities whilst working for HF. So far as concerns the relevant period (from the start of lockdown) the material before me only included notes from 6 May 2020 to 4 July 2020. In the period covered by the notes, in each week claimed as a short week the Claimant ended her note for the Thursday by recording “Handover to Ildago”. She then left the rest of the page and the next page (or sometimes two pages) blank before beginning the Friday note with an entry at 8pm stating “Handover from Ildago”. She did this on 14, 15, May 2020 [**N547-549**], 28, 29 May 2020 [**N565-567**], 11 and 12 June 2020 [**N583-585**], 25 and 26 June 2020 [**N601-604**]. The entries were knowingly false.

70. As the Claimant accepted in her evidence, she had not been told to make these entries by anyone else. She did so because it was her understanding that the CQC would regard it as impermissible for her to be there without a break. As she put it in her evidence, she did not want to take the blame if the CQC came to check. The entries were dishonest and designed to mislead

the CQC were the notebooks to be checked. The Claimant's contention was that she had been put in an awkward position by Ms Alexander who she contends was not providing her with any cover and Ms Alexander had said that the CQC would not allow her being there without a break. I return to my findings in relation to those contentions below.

71. Although the Claimant was not asked to make those false entries in the notebooks, she made them knowing and expecting that they would be reviewed by Ms Alexander. Indeed when Ms Alexander attended the property for HF's birthday in August 2020 she asked the Claimant why the notes were not up to date. However Ms Alexander only checked the last entry to see whether the notes were up to date and therefore did not pick up the false entries made in relation to handover to and from Ildago.

72. In the course of investigating this allegation, the grievance appeal officer, Ruth Cunningham, interviewed Ildago on 19 April 2021 [**445-446**]. Ildago stated that she stopped going to HF's house in March 2020 at the Claimant's direction. She explained that she worked in a hospital in the City and was reliant on public transport to get around and that as such the Claimant thought it would be too risky for her to come to HF's house. She accepted that she was aware that in lockdown the Claimant submitted short hours and that Ildago was paid for the days Ildago did not do. She understood this to be the Claimant's idea, and it was on her instruction that Ildago claimed for 24 hours every other week. She said that:

> "Christa told me she didn't want to seem like a live-in carer as they are paid differently and she would be worse off if she was paid as a live-in carer. I didn't want to do this but Christa brought it up on more than a couple of occasions, she was constantly checking with me that I had submitted my timesheets. It felt wrong to me, I don't want to take a penny if I have not worked for it." [**446**]

73. I accept that the Claimant's understanding was that there was a distinction between an hourly paid carer and a live-in carer as to what was required for compliance. Consistently with this, when it was put to the Claimant in cross-examination that the CQC had suggested that carers were locked down with their clients, in the Claimant's response she drew a distinction between live-in and hourly paid carers. She contended that she could not have been a live-in carer because of HF's complex needs and the consequent demands on her including being up in the night with him.

74. I infer that the Claimant's understanding was that the arrangement of falsely giving the appearance of having a shift off every other week would or might not be needed if she was a live-in carer. That was an unattractive option because she would be paid less as a live-in carer, and the Claimant may also not have regarded it as a permissible option. In any event it was not something that was discussed with Ms Alexander. It was an aspect of the Claimant's understanding of the reason for the arrangement relating to paying Ildago as part of giving the appearance of compliance to the CQC, not an alternative or distinct explanation.

75. I accept also that it was the Claimant that agreed the arrangement with

Ildago. That is also consistent with the Claimant's WhatsApp message to Ms Alexander of 27 March 2020 in which the Claimant stated:

> "[Ildago] won't come for the time being but we agreed she will put her hours in because she need it. Her sister is getting weaker
>
> And she doesn't have a voice so couldn't work"

76. The message indicates that it was the Claimant who had the discussion with Ildago as to the arrangement put in place. Further the situation was to apply "for the time being", indicating that there was not a specific time frame agreed.

77. I also accept that it is likely to be correct that, as Ildago contended, the Claimant brought up the arrangement with her on more than a couple of occasions and would check whether she had submitted her time sheets. The steps taken to see that Ildago acted in a manner consistent with the appearance that she worked the shift is consistent with the Claimant having created false entries in the notebook to give the impression that Ildago had done so.

78. I turn to my findings in relation to the genesis of the arrangement in relation to paying Ildago for the Claimant's shifts. At the start of lockdown, or when it was approaching, there was a discussion between Ms Alexander and the Claimant as to what they should do, given the concern to protect HF from the risk of Covid. Part of the context was also that Ildago was unable to work her shifts with HF at that time. Ildago's recollection in her statement in the grievance appeal was that she stopped going on her shifts because she was working in a hospital in the City and reliant on public transport to get around and the Claimant felt that it was too risky for her to come to HF's house having been exposed to so many people [**445**]. The Claimant's recollection was that was mentioned but only at a later stage. I accept that is more likely to be correct, and that it was the shared understanding of Ms Alexander and the Claimant that it was because she was caring for her sister who was seriously ill. That accords with the recollections of both Ms Alexander and the Claimant, and the reference to Ildago's sister in the WhatsApp message of March 2020. However little turns on this in my view.

79. In any event, both the Claimant and Ms Alexander were in agreement as to not having another carer coming into the property when they were locking down. It was agreed that they would carry on without this for the time being. Little in my view turns on the dispute as to whether the Claimant or Ms Alexander suggested this. It was agreed. If it was suggested by the Claimant it was agreed by Ms Alexander as being consistent with the approach generally taken as a result of the pandemic that where possible staff were either locked in with the client, as occurred in a couple of additional instances apart from the Claimant, or had their shift patterns extended to minimise contact. She would not have wanted another carer coming in even if Ildago had been able to do so. If it was suggested by Ms Alexander the Claimant raised no objection and made no request for someone to come to relieve her

other than in relation to the occasion when she sought cover in September to attend training. On either basis, and of relevance to the disciplinary allegations, there was a mutual recognition of the importance in order to protect HF of restricting who came to the property in the light of the pandemic.

80. As explained in Ildago's statement in the grievance appeal, she was due to go back to HF in September 2020 when lockdown was partially eased and because the Claimant had mentioned that there was something that she wanted to do. However she was unable to come back then because her sister had passed away.

81. The Claimant and Ildago then arranged that Ildago would attend for two days at the end of October 2020. By that stage the concern as to Ildago travelling on public transport and working shifts in a hospital was therefore not seen as a bar to her attending. In the event she only stayed for a day and a night because the Claimant was present anyway and told her that there was no point in her staying to look after HF when the Claimant was there. Following this there were two further weeks (ending 15 November 2022 and 29 November 2022) when the Claimant only claimed for 89 hours instead of 105 hours, and Ildago claimed for the balance.

82. I also accept that the arrangements for Ildago to attend at the end of October were made directly between the Claimant and Ildago. That line of communication is consistent with the text of March 2020 showing the Claimant reporting back to Ms Alexander on her communication with Ildago.

83. There is a dispute as to how this led to the arrangement of paying Ildago instead of the Claimant. Ms Alexander's account is that the Claimant said that she wanted to try to help Ildago to recover lost earnings due to Covid and her sister's ill health and asked that once a fortnight the Respondent pay Ildago, instead of the Claimant, to help support her until her return to work. The Claimant's contention is that Ms Alexander stated that they would pay Ildago for some of the Claimant's hours as they could not show the Claimant as working all the time, referring to the view that the CQC would not allow it.

84. As set out above, I accept that it was the Claimant's understanding that she could not be shown to be working all the time because the CQC would regard this as impermissible. It does not follow that the understanding came from Ms Alexander. I accept on balance that it is more likely that was not the case and that it was the Claimant who made the suggestion of payment to Ildago. As to this:

    84.1 The Claimant informed Ildago that she did not want to be seen as a live-in carer. That provided a reason not to expressly raise with Ms Alexander the concern as to CQC compliance so as not to prompt a discussion about becoming a live in carer.

    84.2 I accept the evidence that Ms Alexander considered that she was acting in accordance with CQC advice by following the approach that

either all staff were locked in with their clients or had their shift patterns extended to minimise contact. There was an obviously exceptional situation at the time where there was a need to take such steps as possible to minimise the risk to elderly and vulnerable clients.

84.3 The Claimant accepted that she did not make the notebook entries either at Ms Alexander's request or in discussion with her. Had there been an express discussion of the concern as to the CQC's approach the obvious course would have been to check with Ms Alexander what she would write, rather than simply making the entries and being ready to explain them if questioned about them by Ms Alexander.

84.4 I regard the WhatsApp message as more consistent with Ms Alexander's evidence on this issue. I do not regard this as conclusively showing that it was the Claimant's initiative to pay Ildago. It is also possible that the Claimant was approaching Ildago to see if she would agree to accept payment because that was implementing what had been suggested by Ms Alexander. However it is consistent with reporting back to Ms Alexander an agreement reached with Ildago. I take this together with Ildago's own understanding expressed in the grievance appeal that it was the Claimant driving the arrangement. In one sense that is understandable because it was the Claimant rather than Ms Alexander who was discussing it with Ildago. However if it was a situation in fact being driven by the Ms Alexander it is more surprising that instead of any indication that was the case, the Claimant explained her concern as to being seen as a live-in carer.

84.5 The WhatsApp message also provides support for the rationale that Ildago should not lose out by being unable to work her shifts at a time of personal difficulty for her.

85. However even if Ms Alexander did state that they could not show the Claimant working round the clock, and if it was Ms Alexander who suggested paying Ildago, this was agreed by the Claimant. Her own account in the grievance appeal hearing was that her response at the time to the proposal was that she said "fine" but that she did not know that the arrangement would last nine months as a result of Ms Alexander failing to find a replacement for Ildago [**373**]. However if she had in mind that it would only be for a short time, that was not communicated to Ms Alexander. A failure to find a replacement for Idalgo, if one was requested, might be a separate breach of the employment contract, but would not mean there was no agreement as to paying Idalgo for the shifts.

86. Further, even aside from whether it was agreed in the course of the discussion with Ms Alexander, the agreement was objectively communicated (a) by the Claimant's WhatsApp message of March 2020 and (b) by the Claimant's emails in putting in her hours worked. It was not suggested that there was any threat made by Ms Alexander as to what would happen if she refused. Nor did the Claimant raise any objection or explore any alternatives. In those circumstances I do not consider that it can be said that

the Claimant was left with no alternative but to agree.

87. Although the Claimant's account of the position was set out most clearly in the grievance appeal, it is also in my view relevant to have regard to the way it was put previously. In the Claimant's grievance of 5 January 2021 [**145**], she complained that:

> "You failed to get a replacement for me and falsely put in that [Ildago] worked my 'off duty periods', you paid her and not me for the work I did. I want this rectified and my payments made to me. This is an unlawful deduction of wages."

88. The Claimant elaborated in response to questions raised in response to her grievance that:

> "It is Claudia responsibility as the manager to ensure the welfare of her employees. Instead she paid [Ildago] for the hours that I worked, to make it appear that I had a break. … She is well aware that the CQC would have not approved of my working 24/7 for 9 months." [**174**]
> …
> "I did the work, Claudia falsified records to show that I had time off and [Ildago] got paid for the work I did. [Ildago] got paid for 9 months.
>
> … I was meant to have Thursday evening and Friday off. However, in reality I was forced to work, and Claudia paid [Ildago]. This was for Claudia to evidence that she was giving me days off, this is a false record." [**177**]

89. I note that there was no acknowledgment in the above account that the situation in terms of Ildago being paid for one of the Claimant's shifts every other week having been discussed with the Claimant, and of the Claimant saying this was "fine". Indeed in the grievance appeal letter of 10 March 2021, the Claimant denied that there was any such arrangement with Ms Alexander [**315**]. However this was then acknowledged in the grievance appeal hearing. Despite the allegation as to deliberately falsifying records, it was the Claimant that had created a false records in the notebooks and submitted hours worked to fit in with a relief carer attending when that was not the case.

Events leading to the Claimant's suspension

90. I turn to the circumstances which culminated in the Claimant's dismissal. In doing so I keep in mind that there is an important difference here between material that is relevant to unfair dismissal, where I am concerned with the reasonableness of the process and decision, and breach of contract or contributory fault where I will need to make findings as to whether there was blameworthy conduct rather than whether the Respondent could reasonably conclude that he was.

Concerns raised with N and J

91. The disciplinary process concerned allegations that G (who was the Claimant's lodger) and B (HF's housekeeper) had been carrying out the Claimant's caring duties for her without authorisation having been sought from the Respondent. Relevant background in relation to this was set out in in an interview conducted with N by Ms Irwin on 19 March 2022, within the disciplinary process. N and J were HF's cousin's and his closest family.

92. Despite having requested this in her detailed submission for the appeal [**443**, the Claimant only received the full version of the note of this interview with the appeal decision. As such she had no opportunity to comment on it during the disciplinary process. She was provided with an extract from the note with the decision to dismiss [**378**], and therefore only had an opportunity to comment on it in the appeal.

93. Within around the two weeks prior to 29 November 2020 the Claimant had been contacted by Haringey Social Services ("**HSS**"), who had in turn been alerted to a concern by HF's bank, First Direct. The Claimant gave HSS J's telephone number as the next of kin and she contacted J to inform him that he should expect a call from HSS. A document compiled by J on or about 1 December 2020, apparently for the purposes of reporting a concern, records that C relayed that someone had made a complaint against her. The Claimant's contention in evidence was that the issue was not directed against her but was a security issue in relation to the account. I am not satisfied that it was understood by the Claimant to be a complaint against her. That is not what is noted as having been said when J was contacted by HSS. The Claimant did not report the matter to Ms Alexander. Her understanding was that she had dealt with it by contacting J and it was then resolved.

94. In N's interview with Ms Irwin she explained that on 29 November 2020 J received a call from a woman calling herself an intermediary who made allegations relating to HF, following which, at the request of N and J, certain photographs and videos were sent. Those videos (other than of the call with G on 1 December) have not been produced in these proceedings or in the disciplinary proceedings. Nor were the allegations made by the intermediary relied upon before me or in the disciplinary proceedings, and this part of the note of the interview was only provided to the Claimant with the full signed version of the interview produced with the appeal decision. In those circumstances I do not place any weight on the report of what was alleged by the intermediary or the assertion of what was contained in the videos. [**337A**]

95. The intermediary stated that the Claimant would be out on Tuesday 1 December 2020, and that N and J should come over to HF's property then and that the cleaner (B) would let them in to talk to HF. They both attended HF's property on 1 December but there was no answer at the door. Again this was in the part of the interview note only provided with the appeal decision.

96. G called J on the evening of Tuesday 1 December 2020. N was also present and she recorded the call. There was a transcript made of that call [**1102-1107**]. The recording and transcript were ultimately disclosed in accordance with an Order I made on 2 March 2023. However neither the recording nor the transcript was disclosed in the disciplinary proceedings. This was despite the Claimant having requested a copy of the recording in her detailed grounds of appeal [**442,443**] and in her meeting with Mr Holt [**422**]. Ms Alexander was sent a copy of it by N on or around 17 March 2021 and forwarded it to Mr Irwin on the following day.

97. In the interview with Ms Irwin (and within the excerpts of that interview provided with the dismissal decision), N recounted that in the call on 1 December 2020, G had stated that prior to lockdown he had been HF's gardener and was also the Claimant's tenant at her house in East London. When lockdown came he lost his job as a chef, and the Claimant asked him to move in to help look after HF and he had been there ever since [**335, 337B**].

98. In the interview with Mr Irwin, N also said that in the call on 1 December G had explained that the reason N and J had not known G was living in the house and had not seen him on their regular zoom calls with HF was that every time someone came to the house he was told by the Claimant to take the dog for a walk, go upstairs or leave the house. [**335, 337B**] That was not included in the transcript of the 1 December call. It is likely that this was confusing what was said on 4 December 2020 (as addressed further below), and was later repeated in the disciplinary investigation.

99. In a part of the interview with Ms Irwin that was not provided until the appeal decision, N also recounted that G had made further allegations against the Claimant which were not the subject of the disciplinary proceedings. Nor were they relied upon before me. N also alleged (again only in the full note provided with the appeal decision) that it had come out that the Claimant had pushed them away from HF, that she had not wanted people to be too close to him and that whenever they were there or even on a call she never left HF alone with them for a moment, and that J and N felt she was very overpowering and controlling and everything was about what she wanted. It is not clear on the material before me what information this was based on.

100. Within the full interview with N, but not the extract provided with the appeal decision, N also stated that her impression was that both G and B were scared of the Claimant and that B "sounded scared". She stated that G was scared that he would be "out on the streets", since he was the Claimant's tenant. [**337B**] G had expressed this concern in the call on 1 December 2020 [**1102**] and had also alleged that B was scared of the Claimant.

101. In the transcript of the call with G on 1 December 2020 G said that he cooked for HF every day, breakfast, lunch and dinner, and that every time they went out he, and not the Claimant, pushed HF, and that the Claimant did nothing for HF, and that if it was not for G and B, HF would stay in bed all day. He said he had time off every two weeks to attend the dentist. He

claimed that there were times when the Claimant did something wrong for HF, and they started fighting and that G told her that she needed to go out. He claimed that the next day she would tell him that he needed to go home and he did so for about a week, but that she would call him back saying that she needed his help.

Police attendance on 4 December 2020

102. J and N called the police on Friday 4 December 2020. Whilst they were in the course of making a report, the police officer said that a unit had been despatched to HF's house. (This was again in the part of the interview first provided with the appeal decision).

103. The police did attend HF's house on 4 December 2020. The Claimant referred to this visit in her interview with Joshua Karl on 5 January 2020, where she mistakenly stated that she thought this was on 2 December 2020 [**284**].

104. As N explained in her interview with Ms Irwin (in the part supplied with the dismissal decision), whilst the police were at HF's house, G sent J a text claiming that when the police arrived the Claimant had told B and him to go upstairs. J and N relayed this to the police officer to whom they were in the course of making their report, who in turn told the police who were at HF's house to go upstairs where they found G. It was N's understanding that they had also found B there. One of the police officers spoke to G in Polish [**337C**].

105. In her evidence the Claimant stated that B has been upstairs ironing when the police came. She denied that she had asked G to go upstairs. She stated that G had been there to look after Grace who had had surgery, and she had asked him to be with Grace whilst she concentrated on HF. However she stated that G was not supposed to be in the house and she had not been aware that G was upstairs. She suggested that he had probably gone upstairs because he panicked and explained how he could quickly have got upstairs from the patio outside without going through the kitchen where she and the police would have seen him**.** However in the Claimant's interview with Mr Karl she had stated that:

> "he [G] was in the property the day when the police arrived because he came to help me with my dog, my dog had surgery and it was cold outside and I asked [HF] if he can go upstairs and be upstairs …" [**280**]

106. The Claimant's explanation to Mr Kline was therefore inconsistent with the contention in cross-examination that the G was not permitted to be in the house.

107. The police then came round to J's house which was nearby. Whilst the police were at J's house, G called and said that the Claimant was out and they should come round now. As N explained in her interview with Ms Irwin, they did so and spoke with HF, but he said there was nothing wrong. The

reference to this in the interview was redacted from the version supplied with Ms Irwin's decision and therefore not revealed until the full note was provided with the decision rejecting the appeal [**337C**]. Nor was there evidence (either in the disciplinary process or before the tribunal) as to what questions were put to HF.

Events of 4 December 2020 involving Ms Alexander

108. Also on 4 December 2020, Ms Alexander received a call from the police asking whether the Claimant was still employed by the Respondent. It was a short call, and no further information was given as to any police concerns. This was the first that Ms Alexander knew of the police involvement. Nor had she previously been informed of the matters reported to N and J.

109. Following the call Ms Alexander contacted the Claimant to ask for the mobile number for J and N. She did not give the real reason for asking for the number, instead saying it was to update her records [**440**]. It is unsurprising that Ms Alexander did not want to reveal to the Claimant the fact of having received a call about her from the police, at least before making further enquiries of her own.

110. Ms Alexander then called J, who said he was at HF's house with his sister N and that the Claimant was out. Ms Alexander then went over to HF's house which was no more than 10 minutes away. There she met with N and J. The Claimant was out.

111. N and J stated that HF's bank had contacted Social Services as they had noticed large amounts of money coming out of HF's account.

112. G and B were also present in the house when Ms Alexander arrived. G said he had been the Claimant's lodger and claimed that he had moved into HF's house in March 2020 to help the Claimant care for HF. He claimed that he had helped every day and was being paid cash in hand. N and J had also not met G before, although as noted above G had called them on 1 December 2020.

113. In her witness statement Ms Alexander claimed that G said he was paid in cash by the Claimant nearly £1,000 per day. I do not accept that was said on that occasion, rather than only in the subsequent interview with Mr Matthews. In her appeal interview with Mr Holt, Ms Alexander stated G did not mention having been paid any amount and that she only learnt later of what he was being paid.

114. B informed Ms Alexander that since March she had been working 12 hours a day 7 days a week and was being paid £1,000 per week in cash by the Claimant [**270, 464**]. In her appeal interview Ms Alexander added that B had said that this started in March and then stopped for a few weeks, before the Claimant brought her back [**463**].

115. When asked by Ms Alexander why she had never seen them before, B said

that if there were visitors they were told by the Claimant to go upstairs, although because of lockdown this did not occur often [**465,468**].

116. In her appeal interview Ms Alexander also said that she had been told that B and G said that between them they had been doing everything for HF and that C had been going out all the time [**464**]. I accept that they said this. It is consistent with the gist of their allegations.

117. In N's interview with Ms Irwin she recounted that G had also said that the Claimant did nothing to care for HF, that she was on the phone all day, and had a massage three times a week, that G cooked for HF and that B fed him and whenever they went out G pushed the wheelchair [**335, 337C**]. That also appeared in the extracts from the interview provided with Ms Irwin's decision.

118. Ms Alexander had been aware that B was a cleaner for HF but had understood that she only came a couple of times a week for a few hours to do the cleaning. In her interview with Ben Holt in the context of the appeal against dismissal, Ms Alexander added (and I accept) that there had been no sight of anyone when she was present at HF's property on his birthday on 3 August 2020 [**468**].

119. Although the Claimant had been in regular contact with the Claimant over lock down she had made no mention of G to Ms Alexander. Ms Alexander informed G that he had to leave the house immediately.

120. One issue raised in evidence before me, but not in the disciplinary proceedings, was as to whether G had any clothes at the property. This was raised by the Claimant on the basis that if he did not that was inconsistent with the contention that he resided there. I regard the evidence as to this as inconclusive. Photographs taken by N on 4 December 2020 of clothes upstairs did include some apparently male clothes. C's contention was that they belonged to HF. In her oral evidence before the tribunal Ms Alexander said that she told G to collect his belongings and leave now. She said that she then went to see HF and therefore did not see whether G left with any belongings. That is a possible explanation as to why there was no evidence as to any belongings having been sent on to G or a request from him to do so. However I regard Mr Alexander's evidence on this issue with caution. There had been no previous mention in any of Ms Alexander's interviews or statements of having told G to collect his belongings or of not seeing him leaving. It is possible that this was because its relevance only became apparent when the issue was raised as to whether G had belongings at the property or that this may have triggered a further recollection on Ms Alexander's part. But it may also have been an attempt to rationalise the position after the event rather than being based on any reliable recollection.

121. I accept that in considering whether there was an adequate investigation, it is relevant that no enquiry was made as to whether there were any of G's belongings at the property, in the light of the evidence that the Claimant's belongings were bagged up and returned to her, but there was no such

process followed in relation to G. It was a relevant factor to take into account had it occurred to those investigating or deciding the disciplinary issues. However in assessing the weight to be given to this, I also take into account that it was available to the Claimant to raise this issue and she did not do so.

122. There was a dispute before me, though not at the time of the disciplinary hearing, as to when Ms Alexander was at the property on 4 December 2020, and whether the Claimant returned whilst she was still there. In Ms Alexander's evidence she stated that when she received the call from the police it was already dark outside and she estimated that the call was received at around 5.30 to 6pm. This was not something that was mentioned during the disciplinary process. In the appeal interview, but not before (and therefore not provided to the Claimant before the appeal decision), Ms Alexander stated that she was at the property for between 1.5 to 2 hours. She stated that the Claimant did not return in that time. [**462, 463**] Ms Alexander did not expressly state in her initial statement that she had not seen the Claimant on 4 December 2020. However I regard that as having been implicit in her initial statement that she agreed with N and J that as HF was not in any danger she would return the next day and speak with the Claimant then [**270**].

123. It was common ground before me (having initially been raised in Ms Alexander's oral evidence) that there was a second call between the Claimant and Ms Alexander on the Claimant on 4 December 2020 when Ms Alexander called to ask where the Claimant was. The Claimant stated that she was in Muswell Hill. Ms Alexander did not have a recollection of the time of that call or as to how long she had stayed after that call but her evidence was that she waited until around 7.30pm, with the N and J saying that they would be there (and with B also there). Her contention was that she left before the Claimant came back. She did not want to remove the Claimant at that stage so that she could arrange for a carer to come in to replace her.

124. The Claimant did not suggest during the disciplinary process that she had met with Ms Alexander on that day. In the interview with Mr Kline she noted that she was out when Ms Alexander came on that Friday [**285**]. She did say that Ms Alexander was there when she returned. Indeed when asked if she had spoken to her on that day, the Claimant said she could not remember [**286**]. Nor did she address this in her witness statement. However in her oral evidence she contended that Ms Alexander was there when she arrived back. She contended that she had gone out that afternoon at about 3.30pm for treatment on her heels to a clinic which was about 20 minutes drive away. The appointment was for about 30 or 40 minutes and she had gone for a walk afterwards. She contended that in all she had been our for between 90 minutes and 2 hours. She had been returning when she received the second call, which she said was at about 4.30pm, and had only been ten minutes away in the car. She contended that at the house Ms Alexander was still there but G, B and N and J were no longer there. She contended that Ms Alexander told her she had had a call from the police and that it was serious and that the Claimant should have called her about it. The Claimant gave her understanding that it was about a matter that social services had looked

into and was closed and not an issue. She contended that Ms Alexander had looked at that notebook, asked about a blister pack and medication and when to see HF briefly, then said that they would continue the discussion and left.

125. I prefer Ms Alexander's evidence on this issue that she left before the Claimant returned on 4 December. Given that the Claimant had no recollection of any such meeting or discussion when speaking with Mr Kline just a month after that day, and did not mention it during the disciplinary process, I regard her recollection as to this in her oral evidence, some 2.5 years later, as unreliable and possibly reconstructed based on her recollection that there had been a call when she said she was at Muswell Hill. As noted above, I regard Ms Alexander's account as consistent with her initial note to the effect that she agreed with N and J that she would return to the following day and speak with the Claimant. Whilst the Claimant may have been only a matter of ten minutes or so from the house at the time of the second call, the fact that he Ms Alexander left before the Claimant's return is consistent with the fact that she wanted to speak to the Claimant about the matter on the following day, by when she could have cover in place. Ms Alexander's recollection as to what happened at the time of her appeal interview was still relatively fresh and more likely to be reliable. Further, if the Claimant had seen Ms Alexander on 4 December 2020, it is likely in my view that would have stuck in the Claimant's memory at the time of the disciplinary process and she would have made a point as to the contrast between the discussion on 4 December and what happened on the morning of 5 December.

126. The Claimant had a dog, Grace, who stayed with her at the property. A further point raised by Ms Alexander, in the appeal interview but not before, was that Grace was not present when Ms Alexander attended on 4 December 2022. This was relevant because the Claimant's contention was that G came to the house primarily as a dog-walker. Further the Claimant had said that the reason G was in the property on 4 December 2020 was that Grace had had surgery, and was unwell and it was cold outside, and so she had asked G to come in and help look after Grace and had cleared that with HF. Ms Alexander pointed out that this was inconsistent with Grace not being there [**464**].

127. In her oral evidence the Claimant maintained that Grace had been at the house. She did not state this during the disciplinary process, but nor was she specifically asked about this. I accept Ms Alexander's evidence that she did not see Grace whilst she was at the house. Again, having been raised in the disciplinary process, albeit only on the appeal (in response to the explanation which the Claimant gave for G's presence) I consider that her recollection is more likely to be reliable. It is possible that Grace was upstairs in the house and remained there throughout the time that Ms Alexander was there. As Ms Alexander accepted, if that had been the case she would not have seen Grace. However I do not consider that is a likely explanation. The Claimant's own evidence was that Grace would tend to come up to visitors and that to the extent that she had usual resting places

they were downstairs. It is more likely that the reason that the reason that there was no sign of Grace was because she was not there, and was with the Claimant who, on her own evidence, had gone for a walk after her appointment before returning to the house.

5 December 2020

128. Ms Alexander returned to the property on Saturday 5 December 2020. She informed the Claimant that certain allegations had been raised and that the Claimant was required to leave the house whilst they were investigated. She did not give any information as to what the allegations were. Although in her witness statement Ms Alexander stated that the Claimant was suspended pending an investigation into the stranger she had brought into the house, she did not say that to the Claimant. Ms Alexander's own oral evidence was that it was only later that she decided on the scope of the investigation. Indeed in her interview with Joshua Karl, Ms Alexander instead said that she had told the Claimant that the police had phoned her and that allegations had been made about financial abuse (rather than referring to an allegation brought a stranger to live in the house). [**322F**] In all I accept the Claimant's contention (as set out in her appeal points) that she was given no information other than that there would be an investigation of some sort and that it was better if the Claimant left.

129. Nor do I accept that the Claimant was informed at that stage that the suspension would be on full pay. In Ms Alexander's oral evidence she asserted that she informed her of this in the kitchen of HF's house on the day she was suspended. However this was not mentioned in the initial statement about the events of 5 December [**270**] or in the initial follow up email, as would be expected if a decision had already been made to this effect. I accept the Claimant's evidence that it was not said. Indeed in an email of 9 December 2020 the Claimant asked Ms Alexander for confirmation that she would be paid whilst on suspension and how much. In Ms Alexander's reply she stated that she was still checking these things out and would update as soon as possible. I regard that as inconsistent with the contention that the Claimant had already been told the suspension would be on full pay.

130. Most of the Claimant's belongings were left at the property to be collected later, and what she took with her was checked by Ms Alexander. She was asked about a credit card which it was identified was missing. She said she believed it was in the house and was never used.

131. When the Claimant returned home she found G there. At that point he was still her lodger (whether he was staying there or at HF's house). He moved out on that day. In N's statement she said that G had called J on 5 December 2020 and had claimed that the Claimant had come back to the house on 5 December 2020 with 16 diary books and what looked like bank statements ripped up. He claimed that he persuaded the Claimant not to burn them and retrieved them from the recycle bin. He brought these round to HF's house in black bin bags. J and N confirmed that there were 16 "diary books" in the black bags, and paper ripped to pieces that looked like bank

statements. [**337C-D**] However in Ms Alexander's appeal interview with Mr Holt she noted that she had watched what the Claimant took out and that this had included diaries and papers from HF's office but "nothing that [she] could see of [HF]'s at all [**466**]. That would appear to be consistent with the Claimant's contention that the diaries and papers were not HF's. Whilst G might have believed otherwise, they were the Claimant's own diaries.

132. G also returned the missing credit card. He claimed that he had found this and the papers in the kitchen in the Claimant's home. He claimed that he had said to her that it was not right and that he would return them, and that he then contacted J and then returned them to him. [**293**]

133. When the Claimant was first interviewed (by JK) she was unaware that the credit card had been returned. She explained that she thought it was an old card, and that it was probably in the office. [**286-287**] In a subsequent interview, with Mr Matthews, by which time she had been informed of the allegation of unauthorised removal of the card [**291**], she stated that it must have fallen into the black bag in which she was hurriedly collecting her stuff and had not been taken on purpose. [**301-302**].

134. By the time of the disciplinary hearing there was an allegation as to unauthorised removal by the Claimant or retention of the credit card "and other confidential items belonging to the client from his home." In a statement for the disciplinary hearing, she stated that G had taken her personal belongings out of her house without her consent when he had been taking his own belongings out in the course of moving out of the house, and that the paperwork was her own paperwork and not HF's. [**333, 349-350**]. She added in the disciplinary hearing that there had been a period of 40 minutes where she had been out walking her dog when he must have gone through her stuff and that she had noticed the next day that her paperwork was missing.

135. I consider that G's assertion that he told the Claimant that it was not right that she had the card and the paperwork and that he would return them as improbable. As noted above, the Claimant would not have been permitted by Ms Alexander to remove documents belonging to HF, and I accept that the diaries belonged to the Claimant. As such had G said he was returning HF's documents it is likely that she would have made that point and demanded the return of the diaries if informed they were being taken to HF's family. I also regard the Claimant's contention that G must have gone through her things when she was out as deriving some credibility from the fact that G had taken photographs of HF without his consent. Whether or not he considered that he had good reason to do so to evidence his concerns, it indicates a willingness to act in an unscrupulous manner at least in gathering evidence in support of allegations he was making.

Initial communications after suspension

136. By an email sent at 10.54pm on Sunday 6 December 2020, Ms Alexander informed the Claimant that she was suspended following allegations of

"suspected gross misconduct". No other information was provided as to the nature of the allegations and nor was she told at that time whether the suspension would be paid or unpaid. [**131**] Nor did the email make clear that the investigation would be an internal one. Indeed I infer that Ms Alexander was herself not clear that would be the case at that early stage. Instead the email referred to an investigation "by the relevant authorities" and that Ms Alexander would contact her to arrange a meeting once the investigation was finished.

137. The email also informed the Claimant that she was not permitted to go to HF's house or to contact the client or any members of staff. I do not accept the Claimant's complaint in relation to this. It was a reasonable step to avoid interference with an investigation and a normal approach in the event of a suspension pending a disciplinary investigation.

138. Following an email exchange on 9 December 2020 in which, amongst other matters, the Claimant sought confirmation that she would get paid whilst on suspension, Ms Alexander emailed the Claimant on 12 December 2020 stating that she was concerned that she had not heard from the Claimant. She suggested that the Claimant come into the office for a meeting, and asked her to make contact so this could be arranged. The Claimant replied on the following morning asking for a day or two in order to confirm a date or time [**132:1**]. In the event there was no meeting at that time. The Claimant was signed off work from 14 to 28 December 2020 due to "stress at work", by a fit note of 14 December 2020 [**249**].

Appointment of Ms Irwin and notification of gross misconduct allegation

139. On or around 16 December 2020 Ms Alexander appointed Lynne Irwin (external HR consultant) to assist her with managing the disciplinary process. The Claimant was not at that stage informed further as to the nature of the allegations, as Ms Alexander and Ms Irwin first sought to identify someone to carry out the disciplinary investigation.

140. Ms Alexander then wrote to the Claimant on 28 December 2020, informing her that her suspension was on "full basic pay" pending an investigation by Mr Karl (who had been sourced by Ms Irwin) to investigate allegations of gross misconduct [**134**]. Though little turns on this, it may be (as appears to be indicated by an email from the Claimant of 4 January 2020) that there had been some prior communication in response to the Claimant's email of 9 December 2020 that the suspension would be on full basic pay. In any event the payments were shown in the Claimant's payslips. The last payslip for which there was a corresponding payment sheet showing work done was that dated 13 December 2020, for the week ended 4 December 2020 [**684, 870**]. For each subsequent payslip, starting with that dated 20 December 2020 [**685**], the Claimant received basic pay of £1,343 (plus holiday pay) which equated to pay for 6 days work. In context, therefore, it was apparent that this was what was meant by full basic pay. As Ms Alexander explained in her evidence, she did not think that to pay for 7 days was warranted and did not think that less than 6 days was fair, so she went for what she

regarded as "the middle ground"

141. The Respondent's letter of 28 December 2020 also reiterated that the Claimant should not contact any clients or work colleagues. However this was now qualified as being subject to having obtained prior written consent. [**134**]

142. At this stage the Claimant had still not been provided with any details of the allegations. This was first provided in a follow up letter from Ms Alexander on 31 December 2020 in response to what Ms Alexander said was concerns raised by the Claimant with Mr Karl as to what was referred to in the letter as "lack of clarity" as to the allegations (whereas in fact there had been no information as to them) [**135**]. The letter identified the allegation as being that:

> "During the current pandemic there had been an unauthorised individual, unknown to Golders Green Nursing, residing and working at a client's property."

143. The letter added that other concerns may arise during the course of the investigation. In all it therefore took nearly four weeks (26 days) from the initial suspension before the Claimant was informed of the outline of the allegation against her. Even then she was not informed that the allegations included that the Claimant was paying G (and B) in cash for work that the Claimant should have been doing. Further the allegation only related to an unauthorised individual (singular). In context this was a reference to G, though he was not expressly mentioned. There was no allegation raised at that stage in relation to B. That was consistent with the thrust of Ms Alexander's own statement in relation to the events of 4 and 5 December [**270-271**].

144. The delay in providing the allegations was in spite of the Claimant having been pulled out of working for a client without any explanation of the allegations. Clearly the matter needed to be given a priority. Ms Alexander's summary in her initial statement was not long and in the final paragraph identified that her "issue is simple" before summarising the concern.

145. I accept however that there were mitigating factors in relation to the delay. The Respondent did not have its own HR department and some time was taken in identifying HR support for the process, which was sought from Mr Irwin. For her part Mr Irwin had some other commitments to deal with, and needed to understand the allegations. In addition the Christmas period intervened and there was some time taken finding an investigator at that time of year. Ms Irwin considered it was appropriate to deal with matters in one go including the identity of the investigator. Even if the allegations had been notified earlier it is unlikely that this would have speeded up the process as a whole, since there was still the need to source an investigator in order to proceed with the investigatory process. Further, although the Claimant stated in her emailed response of 4 January 2021 that she felt "abandoned" [**144**], she had been invited on 12 December to come to the office to meet with Ms Alexander, and it was due to her ill health that she had not been able

to do so.

146. In all, whilst there was some initial delay in providing details the allegations, I do not consider that this significantly affected the fairness of the disciplinary process.

Initial investigation

147. The initial investigation was conducted by Mr Karl. He interviewed the Claimant on 5 January 2020 [**273-290**], and also Ms Alexander [**322C-H**] (who signed the notes on 29 January 2020). The Claimant subsequently emphasised that she was in a state when she spoke to Mr Karl [**298**]. As she put it in her appeal against dismissal, she was in a bad way mentally and physically at the time of the interview and under treatment for emotional stress and had no idea what was going on [**443**]. Whilst I accept that she was stressed and upset, I do not accept that this invalidates what was said in the meeting or that she was not aware of what was going on. She was specifically asked how she was at the start of the meeting and whether she was OK to continue. She confirmed that she was. She was also able in the course of the meeting to respond to questions, to challenge forcefully where she believed Mr Karl was straying beyond allegations she expected to be discussed at the meeting and to advance her own questions, including challenging the Mr Karl as to the aspects of the handbook that was being relied upon.
148. Ms Alexander also submitted a statement, prepared on or around 22 December 2020, relating to events of 4 and 5 December 2020 [**270-271**].

Grievance

149. On 5 January 2021 the Claimant submitted a grievance [**145-153**]. Ms Irwin avoided looking at the grievance on the basis that she may hear any disciplinary hearing and considered it better to keep the processes separate.

150. By letter of 8 January 2021 [**155**] the disciplinary investigation was put on hold pending consideration of the grievance, as the Claimant had herself requested within the grievance [**149**]. Ms Irwin's evidence to the Tribunal was that she made the decision to pause the disciplinary process drawing on her experience that this was the usual course. However in her interview with Mr Holt (relating to the appeal against dismissal) she explained the decision to pause the disciplinary process on the basis that the insurers had said to "stop everything" in the light of the grievance. She said it was only 3 or 4 weeks later that the insurance company said this was wrong advice and they should carry on [**459**]. I regard this as the more likely explanation, on the basis that being closer to the time it is more likely to be reliable.

151. The grievance was largely focussed on the Claimant's hours of work and lack of support, though it also, amongst other matters included a complaint about pay and the instigation of the disciplinary process without being informed of the allegations or, initially, being informed this was on full pay [**145-153**].

152. The Claimant was informed by letter of 8 January 2021 that Debbie Scola (external HR Consultant) had been appointed to manage the grievance process [**155**]. No further progress was made until 28 January 2021 when Ms Scola invited the Claimant to a grievance hearing [**157**]. In a further letter of the same date Ms Alexander apologised for the delay, reassured that Claimant that she would remain on "full basic pay" for the duration of the process, and noted that the Claimant could contact her at any time should she have any questions about the process [**156**].

153. In the light of a refusal to permit the Claimant's solicitor to attend [**167**], the Claimant declined to attend the grievance hearing. She proposed instead that questions be submitted and answered in writing [**157**]. That was done. Written questions were submitted on 8 February 2021, and answered on 15 February 2021 [**172-180**]. Ms Scola also conducted grievance interviews with Ms Alexander in February 2021 [**206-211; 212-214**]. She also conducted an interview with MA, who had been carrying out caring duties for HF for three days a week since December 2020 (after the Claimant's suspension) [**217**]. Ms Scola's grievance outcome letter, rejecting the grievance, was sent to the Claimant on 5 March 2021 [**252-256**].

154. The Claimant submitted an appeal by email of 10 March 2021 [**313-322**]. Another external consultant, Ruth Cunnigham, was appointed to hear the appeal. She interviewed the Claimant on 29 March 2021 [**373-375**] and conducted an interview with Ms Scola on 1 April 2021 [**405-506**] and with Ildago on 19 April 2021 [**445-446**]. The Claimant was notified of the rejection of the appeal by email of 5 May 2021 [**445-446**].

155. I am satisfied that the grievance was fairly considered and investigated. It was also reasonable for those investigating the disciplinary allegations to regard them as distinct in the absence of any findings in that process bearing on the disciplinary matters. At most the complaint as to the circumstances in which the Claimant was working was relevant to mitigation. If the Claimant contended that the matters raised within the grievance were relied upon as material to the disciplinary allegations it was for the Claimant to explain that within the disciplinary process.

Continuation of the disciplinary investigation

156. In the meantime, following a change of view from the insurers, and drawing on external legal advice that the processes could proceed together [**459**], Ms Alexander had informed the Claimant by email of 11 February 2021 [**291**] that the disciplinary process would continue and would run concurrently with the grievance. Since Mr Karl was no longer available, another external HR Consultant, Mike Matthews, was appointed to complete the investigation.

157. The email of 11 February 2021 [**291**] set out further details of the disciplinary issues being investigated, identifying 8 headings as follows:

> "1. An unauthorised individual residing and working at GGN's client's property.
> 2. The sub-contracting of care duties to others residing or visiting the GGN's client's property.
> 3. Sub-contractor(s) working without DBS, references or training.
> 4. Actively seeking to hide the fact that sub-contractors were involved in caring for the client.
> 5. Unauthorised removal and/or retention of a credit card and other confidential items belonging to the client from his home.
> 6. Storing large amounts of personal clothing at the client's property.
> 7. Failing to share any of the above information with GGN.
> 8. Alcohol found on the premises."

158. At this point therefore, and following Mr Karl's initial investigation, more detail was provided including that duties had been sub-contracted to "others" rather than just referring to one person.

159. Mr Matthews conducted telephone interviews with B [**294-295**] and then with G [**292-293**] on Tuesday 16 February 2021. B signed the notes to confirm the accuracy of the notes of the meeting with her. The notes contained Mr Matthews' summary of what was said by B and G rather than a verbatim account in their own words.

160. G could not be contacted after his call with Mr Matthews, other than initially texting Mr Matthews an email address [**366B**]. Mr Mathews, Ms Irwin and Ms Alexander all tried to contact him with no response. The statement was therefore left unsigned. He had said that he would be returning to Poland, though that did not explain why he failed to respond to any attempt to contact him.

161. Mr Matthews had been provided with G's number by Ms Alexander and he had been informed by Ms Alexander that G was due to return to Poland. G confirmed during the call on 16 February 2021 that he would be doing so on the following Monday [**366E**]. Ms Alexander's evidence was that she thought that G had mentioned this to her when she saw him at HF's house on the evening of 4 December 2020. However she explained this on the basis that it was the only way she would have known. In fact, as noted in her interview with Mr Holt [**467**], she had had a further call with G. Her recollection then was that she called him to ask if he would be happy to give a statement. It is likely that it was in this call, rather than the initial discussion on 4 December, when the information was relayed. If it was said at the outset it is likely that would have been mentioned in Ms Alexander's initial note.

162. As Mr Matthews explained when interviewed by Ms Irwin on 19 March 2021, the interview with G was in "less than ideal circumstances" as G was speaking on a mobile phone in a noisy area and was "quite distracted from time to time". I accept however that the note of the meeting provided a reliable account of what G said, and that the disciplinary officer (Ms Irwin) and appeal officer (Mr Holt) were entitled to so conclude. It was reasonable for them to do so in the light of other statements which G made to similar

effect to Ms Alexander on 4 December 2020 and to N and J.

163. At the outset of the interview Mr Matthews sought to clarify G's name but he moved on to other matters. Mr Matthews explained in interview with Ms Irwin that his impression was that G was "more intent on offloading … than answering the questions" [**366C**]. In an appeal interview with Mr Holt he added that it was not his impression that G had deliberately steered away from giving his name and nor that he was avoiding questions, but that he was going off on a tangent and was quite disjointed in what he was saying [**448**]. Mr Matthews added that G's knowledge and the information he provided, such as in relation to what happened on the day the police visited, indicated that the person he interviewed was the same person as Ms Alexander had found at the property [**449**]. I accept that he was entitled to reach that conclusion (as were Ms Irwin and Mr Holt), and that it is likely to have been correct.

164. In the course of the phone call on 16 February 2021, G claimed that [**292-293**]:
    164.1 He had been visiting HF's property daily for some time before lockdown, and then on lockdown moved into the property to help with HF. Essentially the same allegation was made in the initial call with N and J on 1 December 2020 and to Ms Alexander on 4 December 2020 [**270, 335, 337B, 1103**]. In the 1 December call he had said that he had been working for HF for almost two years and had been coming in for two or three times a week pre lockdown for the garden.
    164.2 He had been renting a room at the Claimant's house for £750 per month which he continued to pay when he moved into HF's house.
    164.3 When he moved into the property all his living expenses were covered by HF, and he believed that also to be the situation with the Claimant and B. He was paid daily cash in hand, paid initially £100, and then increased to £140 "2 or 3 months ago". There was no explanation of the basis for the belief that the payment came from HF in the interview.
    164.4 Initially he was doing gardening and walking the Claimant's dog, but progressively he did all the cooking, having previously worked as a chef. He claimed that this included breakfast, lunch and dinner and anything else required. The same allegation had been made in the initial call with N and J on 1 December 2020 [**1102, 1106**].
    164.5 He sat with HF and sometimes took him for a walk. In the call with N and J, G had alleged he pushed HF every time they went out for a walk [**1103**].
    164.6 He was employed by HF on a casual basis, working 7 days a week. (As Mr Mathews explained in his interview with Mr Holt, the reference to being "casual" was his summary rather than G's own words, which were to the effect that he was working 7 days a week doing work cash in hand [**450**])
    164.7 He had not been subject to any DBS or reference checks.
    164.8 When visitors came to the house he and B were told by the Claimant to go upstairs, though he thought that was because of the covid situation. As above, this was not something that had been

mentioned in the initial call with N and J but it was said on 4 December 2020.

164.9 The Claimant had large amounts of clothes at the property which he believed she had purchased using HF's money. There was no information given as to the basis for this belief.

164.10 There was alcohol at the property which the Claimant purchased using HF's money (again with no explanation of the basis for this assertion), and there was far more than needed; HF did not drink whereas the Claimant drank whisky, coke and vodka.

164.11 He had found the papers and card which he returned on 5 December in the Claimant's home and told her that it was not right and that he would return them – although he did not read the papers and could not confirm what they related to.

164.12 He had paid a rental deposit to the Claimant of £1,000 which she was refusing to return.

164.13 The Claimant spent £600 per week on massage and beauty treatment which he believed was paid for by HF and sent money from HF each week to her sister in South Africa. Again the basis for this assertion was not explained. Nor is there any indication that G was asked about this. N also relayed in the interview with Ms Irwin that G claimed on 4 December that the Claimant had a massage three times a week [**337C**]. In fact from the end of lockdown, the Claimant attended appointment for massages by way of treatment on her injured heel.

165. Although not specifically recorded in the note of the interview with G, in Mr Matthews' interview with Mr Holt he added that G said that he had regarded the Claimant as a friend but that she had taken advantage of him and that he was very clear that he had become part of the caring support [**448**].

166. Mr Matthews own thought, as expressed in his interview with Ms Irwin, was that he "wasn't quite sure just how much of what he was saying was credible, and whether he was embellishing things or not." [**366C**]. He noted in his appeal interview with Mr Holt that at the back of his mind he had a concern that if G was in dispute with the Claimant about rent and deposit he could be disgruntled and want to get back at the Claimant [**450**]. He said that he therefore only drew firm conclusions where there was corroboration.

167. The allegation of G having become involved in tasks that were part of the care support for HF was corroborated in the meeting with B. In Mr Matthews' interview with Mr Holt he emphasised that B had no hesitancy in setting out that G had been living at HF's property and that both of them had been instructed to undertake roles that involved caring and support for HF [**449**]. In the interview with Mr Matthews [**294-295**], B stated that:

167.1 G had moved into HF's property at the start of lockdown.

167.2 Before lockdown she had been employed solely as a housekeeper, but since had been looking after HF, including care duties and sitting with him, sometimes all day.

167.3 She had not been subject to DBS and reference checks.

167.4 She confirmed that whenever visitors came to the house, she and

G were told to go upstairs by the Claimant, but she thought this was related to the covid situation.

167.5 G did the cooking during lockdown and occasionally sat with HF and took him for a walk.

168. Whereas on 4 December 2020 B had said that since March 2020 she had been working 12 hours a day, 7 days a week [**270,464**], she told Mr Matthews that there was "considerable variation" in the hours that she worked, as required by the Claimant [**294**]. Although she said her duties included care duties, sometimes all day, she was not asked to elaborate on how often this was. On one occasion, when the Claimant attended training in early September 2020, it was Ms Alexander who had suggested that B stay with HF, although that instruction would have been relayed by the Claimant. The Claimant herself stated that B would be with HF when she went out for a walk, which on Ms Alexander's evidence was permissible. However whatever ambiguities there were as to the duties undertaken by B, the allegation as to G doing all the cooking appears to have been clear.

169. Although G's interview with Mr Matthews substantially repeated the allegations that G had made to N and J in the call with them on 1 December 2020, there were some differences. Notably:

169.1 In the call with N and J, but not the interview with Mr Matthews, G contended that the Claimant did nothing to care for HF and did not cook for him at all [**337C, 1102, 1105-1106**], she was on the phone all day [**337C, 1106**].

169.2 In the call with N and J, G claimed that B was there all day every day when lockdown came and was asked by the Claimant to work 12 hours a day (whereas in B's statement she said that her hours varied).

169.3 There was no mention in the call with Mr Matthews of G taking time off every two weeks because of the dentist or of G challenging the Claimant about her treatment of G, being sent home and then being called back a week later (see paragraph 101 above).

169.4 In the transcript of the call, G said that he had asked HF if he wanted help but that HF had said no. G speculated that this might be because HF "don't know me exactly".

Claimant's response to the allegations

170. The Claimant was interviewed as part of the disciplinary process by Mr Karl on 5 January 2021 [**273-290**]. Mr Matthews also interviewed the Claimant on 22 February 2021 [**296-304**] and submitted questions to Ms Alexander by email of 23 February 2021, to which she responded [**322B**].

(1) Response in relation to G

171. In her investigation interview with Mr Karl on 5 January 2021 the Claimant explained [**278-279**] that G was a friend who lived in her house and since about two years ago had come to help her by walking her dog because she was so busy during the day, and with the garden because it was very overgrown and there were problems with vermin. She stated that she had

obtained HF's permission and that the family were also aware of it. In fact that the family were not aware of G. Indeed they asked why they had not been aware of him living in the house or seen him on zoom calls [**337B**]. There was no specific question put however as to whether they were aware of someone being engaged to do the gardening or walk the Claimant's dog.

172. The Claimant added that before Covid G had come two or three times a week, and afterwards he came a little bit more because he was isolated at home, and he came to help more often with the garden and that:

> "there was maybe once or twice that he helped me just to push Mr [HF] outside when we went out for outing because it was just you know, he was there and I ask him just to help me, so that was really what he was doing" [**279**]

173. The Claimant denied that G ever stayed over and maintained that he did not look after HF [**279**]. She also denied that she had asked B and G to go upstairs when anyone came to the house [**283**].

174. In the disciplinary hearing the Claimant explained that G was her lodger up to the point when he left on 4 December 2020 [**349, 350**]. She reiterated that G went home after visiting her [**333**], that he walked her dog and did some gardening and that she paid him for the time he was there [**349**]. She stated that he had looked after a friend's house for 2 or 3 months from October whilst they were way in Spain and that he had had dental appointments non-stop from August, in relation to which she had supported him financially, and so could not have been at the house. She accepted that G had once made food when he visited but this was a one off [**360-361**]. In her oral evidence (but not before) she contended that this had been in or around May or June 2020, that HF had been unwell and that he had wanted to make a came for HF. She contended that she had therefore asked HF if G could come in for an hour or two and that G wanted to see HF, and that HF had said this was fine. She also stated in her oral evidence (but not before) that there was another occasion, in around November 2020, when it was raining and cold and wet outside so G had come in and stayed for half an hour and she made him coffee and chatted with him in the kitchen, and that he saw HF briefly on that occasion.

175. In her evidence the Claimant contended that G could not have done all the cooking because HF was kosher and he would not have known anything about kosher meals or was plates/ cutlery to use. However that was not a point made in the disciplinary hearing. Indeed as noted above the Claimant accepted that G had once made food for HF. In any event, if it was the case, as G and B alleged, that he did the cooking, then the Claimant could equally have explained what was required in relation to keeping Kosher.

176. In her appeal hearing with Mr Holt, the Claimant said that G's claim that he had worked as a chef and lost his job before covid was untrue, and that he had not worked for a long time [**430**]. In her evidence she clarified that he had worked in a restaurant but maintained that he had not been a chef.

177. In the interview with Mr Karl the Claimant also disputed that there was an obligation to seek permission from the Respondent. In relation to this she identified the passage in the handbook stating that unauthorised persons should not be permitted into the client's home [**96**], but argued that this did not state that the authority must be from Respondent rather than the client [**279-280**]. She recognised that it would be different if someone was there day and night [**280**]. She emphasised that in this case HF was aware and saw G and talked to him when he was outside – though she clarified she was talking about two years ago.

178. In the disciplinary hearing the Claimant also denied having seen the code of conduct and ask what was its relevance [**334**].

179. The Claimant also added in the disciplinary hearing that the allegation about her having beauty treatments was obviously untrue given that this couldn't have happened during lockdown.

180. The Claimant added in the disciplinary hearing that she had given her whole life to HF from the day when she started to work for him and he was always her priority, and she had no choice but to work day and night due to Ms Alexander's failure to provide relief cover when it was needed. [**334**] (Ms Alexander's contention, as set out in her appeal interview with Mr Holt, was that it was the Claimant's choice to be there the whole time and she had not requested time off and was adamant that she did not want anyone strange coming in [**465, 467**], would always say not to come over and she was fine [**468**]).

181. In her oral evidence, but not before, the Claimant took issue with G's contentions as to what he was paid by G. She asserted that she paid him £9 or £10 an hour to walk Grace. She contended that he was paid £60 or £80 a day for work on HF's garden, which she said was agreed with HF (at a time when he was outside the house). Unlike the payments for walking Grace it was said that this came from HF's money. I regard that as contradicting what the Claimant told Mr Kline on 6 January 2021, where she said that he had come to do the garden to assist her [**279**]. Whilst she stated that she had asked HF about this, she did not suggest either that it had been agreed directly between HF and G or that it was paid for from G's money.

182. The Claimant also contended in oral evidence that G did work on her house; painting the house (in April and May and paid around £200), cleaning the conservatory roof in June or July (paid about £100) and working in the garden, mainly in the Summer (being paid £50, £60 or £70). Again there was no mention of this in the disciplinary process or prior to the Claimant's oral evidence, notwithstanding its material relevance in responding to the contention that G had moved in with HF.

(2) Response in relation to B

183. In relation to B, in her interview with Mr Karl the Claimant explained that B

was paid by HF, and that she did cleaning and laundry. She added that when the Claimant would go out for a walk, B would be with HF but that Ms Alexander was aware of this and this was just to make sure B was OK. She noted that there were a few months when B did not come at all due to covid, and she would come for mostly 4 or 5 or sometimes 6 hours a day [**282**].

184. In the disciplinary hearing the Claimant added that B was not there at all in March, April and May 2020 [**333**] and that when she came back she did the cleaning, ironing and organising shelves and collected supplies a few times from the chemist if the Claimant was too busy [**333**]. She accepted that she paid B, but stated that this was on HF's instructions [**332**]. The Claimant added that Ms Alexander was aware of this and was aware that she was there most of the time as a housekeeper [**333, 356**].

185. The Claimant also pointed out that on the Claimant's annual training day on 4 September 2020, Ms Alexander, despite having known about the Claimant's training for months, asked the Claimant to get B to look after HF in her absence, and suggested leaving HF in bed so that it was easier for B to look after him [**333**].

186. The Claimant contended in her appeal hearing with Mr Holt that she was not convinced that B was aware of what she was signing as B's English was not good enough to have expressed herself as she did in the notes of her interview with Mr Matthews. She alleged that Ms Alexander must have used other words to explain the position to her. [**435-436**] However in relation to this, Mr Matthews explained in his appeal interview with Mr Holt that the notes were not verbatim, but were in a form that the participants could confirm as accurate [**449**]. As such, I accept that Mr Holt was entitled to conclude that the note of the interview with B was a fair reflection of the gist of what she had said, and that B had confirmed this by signing the statement.

187. The Claimant contended in the disciplinary hearing that B had been manipulated, which she claimed had been done by Ms Alexander. She said that B was susceptible to this as she was a very vulnerable and insecure person, with four children to support in the Philippines [**356**]. She repeated the allegation in her detailed grounds of appeal [**438-444**] and her meeting with Mr Holt [**430**], claiming that Ms Alexander's reason for doing so was to cover up her failures as a manager.

(3) Response as to events of 4 December

188. As to the events of 4 December, the Claimant said in her interview with Mr Karl that when the police came (which she mistakenly said was on 2 December 2020), B and the Claimant were downstairs and G was upstairs. She noted that the police presence had upset G, who had been crying and was very stressed. [**283**]. In the disciplinary hearing she added that G obviously had something to hide given that he had cried like a baby and panicked when the police came [**356**].

189. As noted above, the Claimant stated to Mr Karl that G was in the property

because Grace (her dog) had had surgery, it was cold outside and she asked HF about this [**280**]. Whilst in Ms Alexander's appeal interview with Mr Holt she contended that this account was implausible on the basis that the dog was not at the property [**464**], this was not a point that was put to the Claimant in the disciplinary process.

190. The Claimant further explained to Mr Karl that she was out when Ms Alexander came on 4 December 2020 because she had a half hour appointment in relation to treatment for an injury on her heel, and that HF was Ok and was with B [**285**]. As noted above, Ms Alexander's contention in her interview with Mr Holt that she was at the property for 1.5 to 2 hours and that the Claimant did not return was not put to the Claimant during the disciplinary process or specifically relied upon in the decision. Ms Alexander accepted that it was fine for the Claimant to pop out and leave HF, provided that he was with someone if it was going to be for an extended period of time [**463**].

(4) The Bank Card and other property returned by G

191. The Claimant's response in relation to the Bank Card is addressed above (paragraphs 134 and 135).

(5) The alcohol

192. As to the allegations as to alcohol in the property, the Claimant stated in her interview with Mr Matthews that this was gifts from neighbours and the Claimant did not have any of it. She stated that she gets gout if she drinks a little bit of wine [**303**].

(6) Notebooks and daily activities

193. The Claimant added in her interview with Mr Matthews [**296-304**] that she recorded his daily activities and night care in notebooks. She noted that she had handed 7 of these which she had been able to find on 5 December in HF's offices to Ms Alexander and that there would be more that she had been unable to find at that stage. She emphasised that she required a copy of these to prepare for disciplinary meetings and that failure to provide them would hamper and prejudice her position. [**296**] She had similarly emphasised the importance of seeing the notebooks in her grievance [**173-176**].

194. The Claimant expanded on this at the disciplinary hearing and in her written statement for that hearing. She set out in some detail her daily routine [**329-331**], and noted that this would be evidenced by the notebooks which she said Ms Alexander was refusing to provide [**331, 333, 356, 359**].

195. The Claimant did not however specifically answer the point made in Ms Alexander's responses to the questions in Mr Matthews' email of 23 February 2021 that there were no notes after July 2020 [**322B**]. Nor was she specifically asked about this. I accept however that the notebooks were not

kept up to date. Ms Alexander had asked the Claimant when she attended on HF's birthday in August 2020 why the notes were not up to date and had been told by the Claimant that she would get round to doing them. The last entry from the Claimant was on 4 July 2020 and was in the middle of one of the notebooks.

Investigation report

196. Mr Matthews submitted an investigation report dated 5 March 2021 [**264-268**]. He concluded that there was corroborative evidence to reasonably conclude that G was living at HF's property between March 2020 and January 2021 and was preparing most of HF's meals, that B was spending most of her working time caring for HF, that neither B nor G had been DBS checked, referenced or received any training, that the Claimant was paying both B and G for their caring duties and so sub-contracting them, and that none of this was disclosed to the Respondent. On that basis he concluded that there was a disciplinary case to answer for potential gross misconduct.

197. I do not accept the Claimant's contention that it was not appropriate for Mr Matthews to refer to potential gross misconduct. He was identifying the nature of the case that he found it was appropriate to proceed to a disciplinary hearing where it would be considered further. It would be for the disciplinary officer to form a view as to whether the allegation was upheld. In any event I accept that Ms Irwin did form her own view.

Disciplinary hearing

198. The Claimant was invited to a disciplinary hearing by a letter of 5 March 2021 [**305-306**] and told that it would be conducted by Ms Irwin. The same allegations as notified on 11 February 2021 were relied upon.

199. The Claimant was provided with a copy of the investigation report, notes of her interviews with Mr Karl and Mr Matthews, statement of Ms Alexander, notes of Ms Alexander's interview with Mr Karl, and notes of the meetings with B and G and a copy of Mr Matthews email to Ms Alexander of 23 February 2021 with her responses [**322B**].

200. The Claimant was invited to a disciplinary hearing by an email from Ms Irwin of 9 March 2021 [**308**]. She was asked if she intended to call any witnesses to the hearing which was to take place by Zoom. At that time the Claimant was still subject to an instruction, initially given on 6 December 2020, not to contact other members of staff or clients, or as it was put on 28 December 2020 [**131**], not to do so (or to access the workplace or any other clients) without Ms Alexander's prior consent [**134**]. However there was no request made either to Ms Alexander or Ms Irwin (or otherwise) to make contact with any potential witness for the purposes of the disciplinary hearing.

201. In any event, notwithstanding the instruction, the Claimant's solicitor did make contact with Ildago and a statement from her, consisting of a series of answers to questions, was submitted by the Claimant to Ms Irwin on 17

March 2021 [**326:3, 338**]. Ildago stated that she had not met G and did not know him and did not see guests in the house [**326:3**]. However Ildago was not at the property post-lockdown and prior to the Claimant's suspension other than one day in October 2020 (30 October).

202. The Claimant was informed in the email of 9 March 2021 of her right to be accompanied by a colleague or union representative. She was not a union member. It had previously been made clear, in relation to the grievance process ,that she could not be accompanied by her solicitor. I do not accept the Claimant's contention that the fact she had been told not to contact anyone prevented her being accompanied by a colleague. It was open to her to ask to contact someone for the purposes of being accompanied at the disciplinary hearing. Although there was an initial enquiry on 4 January 2021 about approaching Ildago to accompany her for the investigatory hearing [**144**], there was nothing pursued in relation to this for the disciplinary hearing. The Claimant's evidence was that, notwithstanding the statement obtained from Ildago, she would not have wanted to contact Ildago as she has ceased contact with the Claimant, with all texts and messages having suddenly stopped. Nor did the Claimant want to involve someone else and have to explain to them about the situation and did not want to have someone with her who did not know what was going on. That was a legitimate choice on the part of the Claimant but does not detract from the fact that she was offered the right to be accompanied.

203. The disciplinary hearing with Ms Irwin (by zoom) took place on 12 March 2021, and the notes of it incorporating the Claimant's comments were sent to her on 24 March 2021 [**339-366**]. Ms Irwin reiterated that the Claimant had the right to call witnesses, to which the Claimant said that she had "witnesses in other forms but not here" [**342**]. In her evidence the Claimant explained that she had in mind getting other people involved who knew HF such as friends who she said were present during Covid. However she did not elaborate on what she meant during the disciplinary process. Whilst little turns on this, it is more likely in my view that it was a reference to the possibility of calling witnesses before a tribunal, the ACAS notification having been made on 5 March 2021.

204. Whilst the Claimant did not call other witnesses (other than submitting the statement from Ildago) she did ask why Ms Irwin had not interviewed HF or asked him any questions. She said that he should be approached so he could confirm what the Claimant did and who was in the house and verify what she said about G. [**332, 362**]

205. Generally, as Ms Irwin commented when interviewed for the appeal, her impression during the disciplinary hearing was that the Claimant did not want to add more information [**460**]. In my view that requires some qualification. The Claimant did add considerable detail in a statement which she read out as to her daily routine in caring for HF and what was involved in doing so given HF's condition. A copy of the statement was submitted by the Claimant on 16 March 2021 [**327-334**]. However it was reasonable for Ms Irwin to form the impression that, the Claimant having read out her

statement, she was reluctant to add further information beyond what she had said in her previous interviews. After the Claimant had read out her statement in the disciplinary hearing, when the discussion turned to further questions about the eight disciplinary allegations, Ms Irwin made clear that rather than just relying on what had been noted as said in the previous interviews, she wanted to hear from the Claimant as to her version of events. The Claimant's response was that this was the third or fourth meeting, that she was "*really fed up with it*" and that "*I'm not going to change any of my answers*". Later in the hearing, with reference to the statement being unsigned and an issue as to referring to him as "Greg", she stated that she was not going to talk further about him until she knew who he was [**361**]. In response, Ms Irwin agreed that she would find out why there was a difference in the surname and that she was happy not to mention G until they obtained a the signed statement from him (having earlier expressed her understanding, which was incorrect, that the statement had been signed) [**360,361**].

206. Ms Irwin did persist with some further questions clarifying the Claimant's case and offering the Claimant an opportunity to add any further comments in response to Mr Matthews' investigation report. The Claimant maintained that G was lying possibly because he had something to hide from the police, that he was not living at the property but helped he with walking Grace, looking after her on the day she had surgery and looking after the garden and cooked for him on a one off occasion and that B's duties remained as a cleaner and had not changed. The Claimant also stated that in March, April and May 2020 she was on her own in the house, with even B not there.

207. At the conclusion of the meeting, Ms Irwin indicated that once she had the transcript of the meeting she would go through it and see if she had any further questions, but taking into account that she did not want to repeat the same questions and that the Claimant has said that she was not going to change any of her answers. She made clear that the next stage may be either to raise some further questions or to proceed to a decision.

Ms Irwin's follow up investigation

208. Ms Irwin considered interviewing HF but was advised not to do so by Ms Alexander. Ms Irwin was told that was because of his age and health conditions [**453**]. Essentially therefore it was Ms Alexander who prevented HF being interviewed. Ms Alexander explained in evidence that she had asked the family on 4 December 2020 if they were happy for Ms Alexander to talk with HF about the matter and they said that they were not and that it would only upset him as he had been through quite a lot. However that was at a point where the police had just been round. She did not ask the family again after that. She acknowledged that HF could have answered questions but stated that these would have worried him. She accepted that there might have been an opportunity between December 2020 and March 2021 when she should have gone back and tried to speak with HF. She maintained however that once they got past the point of no return (within a few months), in the sense of HF having moved on, she would have been concerned about

resurrecting the memory of the Claimant for HF and would not have wanted to rake this up. Indeed for this reason they did not mention the Claimant's name in HF's house, though in the beginning he asked. She accepted that she probably should have gone back before then, and told the consultants that they could do so.

209. As a follow up from the disciplinary hearing, Ms Irwin conducted a telephone interview with N on 19 March 2021, and N signed a copy of that interview on 23 April 2021 [**337A-E**]. Having been informed by Ms Alexander and the Respondent's solicitors that she should not interview HF, her reasoning in interviewing N was so as to hear from someone who she thought might be on the Claimant's side, that being her impression of what the Claimant believed. That may have been what she had in mind, and was consistent with the Claimant having said in the disciplinary hearing that N and J were close friends of hers, who trusted her with everything in the house [**359**]. However it ought to have been apparent that it was unlikely to be correct since in Ms Alexander's interview Mr Karl she had already said that the cousins were convinced that the Claimant had been taking money from HF [**322E**].

210. As noted above, in the interview N relayed the allegations made by G on 1 December 2020 and stated that the call had been recorded [**335**]. Ms Irwin received a copy of that recording. In evidence she stated that she did not listed to the recording. I do not accept that was the case. In her interview with Mr Holt she said that having listened to recordings of G it seemed he wanted to get the information out [453]. Further, in response to Ms Alexander's text that the recordings were "just terrible listening", Ms Irwin response "awful" [**1138**].

211. The Claimant was not provided with a copy of the recordings. Nor was N in a position to give significant first hand evidence in relation to the allegations in relation to G and B, other than relaying what she was told by G and in the anonymous call, and that G was present when she and J attended the property on 4 December 2020. It was not an adequate substitute for interviewing HF.

212. Ms Irwin also interviewed Mr Matthews on 19 March 2021 [**366A-F**]. She reached out to G by email of 18 March 2021 but received no response from him [**337F**].

Disciplinary outcome

213. Ms Irwin's decision was emailed to the Claimant on 29 March 2021 [**376-384**]. She found that whilst G had returned to Poland without signing his statement, the content had been corroborated by B and N [**377**] (albeit that the corroboration from N was not independent of G, but a reflection of what he had said to her). As to this:
    213.1 She upheld the allegation of an unauthorised individual (G) residing and working at a client's property. In relation to this:
        (a) She relied upon the evidence from G, as set out in his interview

with Mr Matthews and relayed by Ms Alexander when she visited on 4 December 2021, and as relayed to N, and the corroboration by B.

(b) She concluded that it was reasonable to expect the Claimant to have advised the Respondent that G was visiting the property to assist the Claimant.

(c) She also concluded that G was an unauthorised individual who "was possibly residing and definitely working" at the property. It was implicit in this that she regarded this as requiring authorisation from the Respondent, rather than from the client as the Claimant had contended.

(d) Although she used the phrase "possibly residing" she confirmed in evidence that her conclusion on the balance of probability was that he was residing there. That followed from having accepted the evidence of B and G. It was also consistent with having upheld the allegation.

213.2 She also upheld the allegation of subcontracting of care duties to others residing or visiting the client's property. When interviewed for the appeal Mr Irwin explained further that her conclusion as to subcontracting was based on G and B taking on part of the Claimant's role in the job description in the handbook: cooking, doing elements of the care, and the lack of disclosure about this [**457**] She noted that it had possibly also included sitting with HF but that this could be said to be different from caring. She referred to what happened on 4 December 2020 as a case in point of leaving B and G in a position of responsibility for HF's health when the Claimant was not there [**458**].

213.3 It followed from this that the allegation of sub-contractors working without DBS, references or training was also upheld.

213.4 She upheld the allegation of seeking to hide the fact that sub-contractors were involved in care for the client, on the basis of accepting B and G's evidence as to being told to go upstairs when there were visitors and that despite being in regular contact with the Claimant Ms Alexander had not been made aware of B or G. In the course of the appeal process, Mr Irwin clarified that in relation to B her understanding was that whilst Ms Alexander was aware that B was a housekeeper, she was not aware of the hours she was working, or the amount B was paid or the extent of her duties [**458**]. Ms Irwin concluded that the Claimant had ample opportunity to inform Ms Alexander that G and B were helping her to care for HF and that it was unreasonable of her not to do so. The allegation of failing to share information with the Respondent was also upheld for the same reason.

213.5 The allegation in relation to unauthorised removal and/or retention of a credit card and other confidential items was not upheld on the basis that whilst there was evidence of her having retained these, there was insufficient evidence of having done so intentionally and that the police were investigating this and would have more information.

213.6 The allegation relating to alcohol found on the premises was also not upheld on the basis of insufficient evidence.

214. Standing back, essentially Ms Irwin's core finding was the G and B were both

assisting substantially and on a regular basis with carrying out duties that fell within the Claimant's caring responsibilities, that G was working without DBS, that G was also residing at the property, and that there had been a failure to disclose this to the Respondent and obtain authorisation and that, indeed, it had been actively concealed, and that this was in breach of the Claimant's responsibilities as set out in the handbook.

215. Ms Irwin concluded that in the light of those findings the Claimant had acted in breach of the Respondent's code of conduct (paragraphs 2, 3, 5, 8 and 9) [**73**] and her terms and conditions [**100**]. This included the duty in paragraph 2 of the Code of Conduct to "act with honesty, integrity and with respect for the client's home and property". Ms Irwin considered that the Claimant had not been honest with the Respondent in relation to what had happened in relation to the role of G and B. She also considered that bringing in G who was working without DBS was contrary to the duty to "promote and safeguard the client's health, well-being and interests" (para 3 of the Code). She considered that there had been a breach of the duty not to be involved in any action that may prejudice the Service or damage the reputation of the Agency or generally diminish confidence of the public (para 5 of the Code). She had in mind that the Respondent's business was developed on referrals and if find were to be found that someone working with a client and was not insured or DBS checked that could have a huge impact and the reputation and commercial well-being of the business. Essentially for the same reasons Ms Irwin also considered there to have been a breach of paragraph 8 (duty of agency staff to act "totalling professionally at all times" and paragraph 9 (duty to "act totally professionally with respect to the relationship with the client").

216. Ms Irwin also took the view that there was a breach of paragraphs 3 to 5 of the terms setting out the carer's responsibility. However paragraph 4 was concerned with the rules etc of the client rather than the Respondent. Paragraphs 3 and 5 were concerned with steps to safeguard the interests of the client and not engaging in conduct contrary to his interests, rather than those of the Respondent. Whilst there was some relevance of this in relation to G being untrained and having no DBS, it was not the heart of the findings, which focused on conduct harmful to the interests of the Respondent. I do not however consider this to be of central importance given the nature of the misconduct on Ms Irwin's findings.

217. Ms Irwin concluded that the Claimant's conduct amounted to gross insubordination and gross misconduct [**384**]. As she put it when interviewed by Mr Holt for the appeal, she was clear that there was gross misconduct "because of the number and the severity of the allegations and because also it's a caring industry so I think I felt there was a different level of duty of care."

218. Ms Irwin also commented in her appeal interview that if she had just had two statements (of B and G) the position might have been different, but that she also had the statement from N [**453**]. She said that the deciding factor was that it was not a standalone statement that was different from everything else

but that it was a combination of the evidence from G, B, Ms Alexander and N [**454**]. Again, I note that to a large extent the input from Ms Alexander and N was merely relaying what they had been told by G. That was not however wholly the case. They had themselves witnessed G being present at the property on 4 December 2020.

219. Ms Irwin was asked by Mr Holt in the appeal interview whether she thought it would have been legitimate if G had only been attending the house to help with the garden and to walk the Claimant's dog on various occasions and that had been authorised by HF [**457**]. She responded that the challenge would still be that Ms Alexander was not aware of this and it could be tarnishing the business reputation. She noted that the Claimant was in frequent contact with Ms Alexander, who should have been informed. She added that it was OK for the Claimant to have support but it should be disclosed [**457**] In any event it was not Ms Irwin's finding that this was all that had occurred. Had it been, it may have put a very different aspect on the matter, compared to the conclusion that there had been a lack of honesty and integrity.

Dismissal

220. On the basis of Ms Irwin's recommendation, by a letter of 29 March 2021 Ms Alexander notified the Claimant of her summary dismissal on grounds of gross misconduct [**399-400**].

221. In her appeal interview with Mr Holt, Ms Alexander explained that she regarded the wrongdoing as covering "a multitude of things", including what G and B were doing but also the amount she was paying them. She commented that if the Respondent was accepting one part of G and B's story it was going to accept it all, including "huge amounts of money" the alcohol in the house, the number fridges and freezes there, and that she thought the Claimant was just out of control. That went beyond the findings that were upheld. However I accept her evidence that whilst she believed that the wrongdoing was more widespread, she was content to follow the findings of those who had been appointed to investigate and conduct the disciplinary process.

222. If the allegations had not been upheld the Claimant would not have been summarily dismissed, but she would have been dismissed on notice in the light of the outstanding financial allegations that would take a considerable time to investigate. Auditors were appointed by the power of attorney (who was not appointed until March or April 2021) and did not complete their investigation until April 2022 (when matters were handed over to the police). The family would not have allowed her to return to work with HF.

223. It is also clear that Ms Alexander regarded the findings made by Mr Irwin as of themselves requiring summary dismissal. In the appeal interview she emphasised that it was not just that G had been brought into the house, as someone with no insurance, no training, no DBS, but that the Claimant had actively hid what B and G were doing, and that even just on the strength of

this the trust had gone [**468**]. She emphasised that what had been done had the potential to cause "massive" damage to the Respondent's reputation and that as a business they work on recommendations [**469**].

224. As set out above, the Claimant was sent with the dismissal decision extracts from the meeting with N, excluding the parts which were not considered to relate to the disciplinary allegations [**335-337**]. Due to an oversight, she was not sent the notes of the meeting with Mr Matthews [**366A-F**].

Appeal

225. The Claimant initially appealed by a letter dated 6 April 2020 [**408-409**]. She was notified by letter dated 9 April 2021 that Ben Holt (external HR consultant) had been appointed to hear the appeal [**411**]. She contended that:
    225.1 There had been a failure to take into account mitigation; covid and that she was on her own unsupported.
    225.2 Dismissal was disproportionate given her unblemished record.
    225.3 G's witness statement was hearsay and should have been disregarded and in any event he was not available to question and had a motive to lie.
    225.4 The Claimant was not told she could question witnesses and they were not made available to her.
    225.5 The evidence was untested
    225.6 The statement which she had submitted from Ildago had been disregarded.

226. The Claimant expanded upon her points of appeal in a letter of 16 April 2021 [**438-444**] and in her appeal hearing. Amongst other things she raised the following:

    226.1 She highlighted that she had had very little time off because Ms Alexander could never manage to get cover.
    226.2 She had been given no explanation on 5 December for her suspension other than that there was to be an investigation.
    226.3 She denied G's allegations and contended that the fact that G had suddenly disappeared to Poland without signing his statement was an obvious sign that he was running away from his untrue allegations [**440**].
    226.4 B had been manipulated by Ms Alexander to make untrue allegations so as to cover up her failures as a manager. B would sign any statement given to her as she was very vulnerable with four children to support in the Philippines. It was also plainly untrue for B to say she was there all the time when she had not been present at all for the first three months of lockdown.
    226.5 There was an inconsistency between G's allegation that the Claimant did nothing and was on the phone all day, and what N said about the Claimant taking HF to JW3 every week. (That was plainly a reference to the position before lockdown, and was followed by reference to enabling him to access lectures online when lockdown

came).

226.6 The Claimant had been prejudiced by being cut off from everyone, which she said was part of Ms Alexander's plan.

226.7 Various allegations were made as to Mr Alexander not doing her job.

226.8 She requested a copy of:

(a) the recording between N and G of 1st December

(b) N's signed statement or the recording of the meeting she had with Ms Irwin.

(c) a copy of the recording of her meeting with Mr Karl.

(d) a copy of the text message sent by G regarding the red credit card.

226.9 She put Ms Alexander to proof that she had visited four times during lockdown. [**443**]

227. In the appeal hearing on 19 April 2021 [**420-436**], the Claimant largely focussed on her contention as to Ms Alexander having not done her job, failing to arrange trained cover, or to protect the Claimant or doing an assessment, and as to the Claimant working round the clock. The Claimant was specifically asked if there was anyone that she wanted Mr Holt to speak to [**420**]. In response she stated that she thought this was in her dismissal appeal. In fact this was not mentioned in the appeal letter [**438-444**]. The Claimant again emphasised in the appeal hearing the need for the recordings of what N and J heard from G [**422]**, but this was not provided.

228. Following the appeal hearing with the Claimant, Mr Holt carried out interviews with Mr Matthews [**448-451**], Ms Irwin [**452-461**] and Ms Alexander [**462-469**]. The Claimant was not sent notes of those interviews. Nor were the points raised in those interviews raised with the Claimant prior to the appeal decision.

229. In the interview with Mr Matthews, on 23 April 2021 [**448-451**] he commented (amongst other matters) that:

229.1 He did not think that G necessarily steered away from giving his name. Mr Matthews felt that G wanted to unload, but only went so far and was then hesitant and would go off on tangent [**448**].

229.2 G claimed that he had regarded the Claimant as a friend but that she had taken advantage of him and that she had charged him rent even when living with HF. He had been clear that he had been living in HF's property and claimed that he did breakfast, lunch snacks and sat with him sometimes and was clear that was part of caring support [**448**]. His reference to G being employed on a "casual basis" was Mr Matthews' summary based on G working cash in hand 7 days a week.

229.3 B had also had no hesitancy in setting out that G had been living there and that both had been instructed by the Claimant to take on roles involving caring and support for HF [**449**]

229.4 He had the impression that B was frightened of the consequence of speaking against the Claimant and that there was no evidence from speaking to her of any pressure having been applied by Ms Alexander [**449**].

229.5 G's knowledge and information indicated he was the same person as had been at HF's house. He had been able to account for what happened on the day police visited. [**449**]

229.6 Mr Matthews had not been able to reach conclusions on bolder claims re money, alcohol and clothes without involving the family or seeing some of the records. [**449**]

229.7 The notes of the interview were not verbatim but in a form that participants could confirm as accurate [**449**].

229.8 He had considered whether G had a motive to lie, noting the dispute with the Claimant in relation to rent/ deposit. He therefore only ruled on points where was corroboration. [**450**].

230. Mr Holt approached the appeal on the basis that it was a review of Ms Irwin's decision as to whether the decision and process followed was reasonable, rather that retaking the decision afresh. He rejected the appeal by letter of 12 May 2021 [**475-483**], concluding that:

230.1 If the allegations were made out, then the circumstances under lockdown would not have been reasonable mitigation as:

(a) G was found to have moved in and to be undertaking duties in March 2020 right at the start of lockdown (being a point Ms Alexander had made in her interview with Mr Holt).

(b) There was no evidence of the Claimant raising the need for additional support and she had ample opportunity to do so.

(c) Cover would have been available if needed as it had been in the past and it was acceptable to take breaks during the day for respite or attend appointments without requiring cover.

(d) The allegations upheld were of significant seriousness to warrant disciplinary action. It was reasonable to conclude that they amounted to gross misconduct and placed the organisation at significant reputational, financial and legal risk [**476-477**] This was the key finding, whether or not it was right that cover would have been available if requested (which was in tension with the fact that it had been necessary to ask B to cover when the Claimant attended training).

230.2 There was no reason to discount N's statement of what she had been told by G. Nor had it been given undue weight. The statements were used in conjunction with one another and allegations that could not be verified, such as in relation to clothes, alcohol and use of credit cards, were not upheld [**477**]

230.3 In relation to the contention that the Claimant was not told she could question witnesses and that evidence was untested, Mr Holt noted that it is good practice for witnesses to be told to maintain confidentiality and not discuss the issues with anyone, and that this protects employees from further allegations and the employer from risk. He agreed that it should not prevent the employee from suggesting to the investigating or disciplinary or appeal officer that any witnesses should be interviewed or raising questions to be asked. In this case Ms Irwin had discussed the possibility of suggesting witnesses and the Claimant had replied that she had witnesses in other forms but not here. Mr Holt noted that there were also subjects that she asked Ms

Irwin to look into, including as to G's identity, and that she submitted a statement from Ildago. [**477-478**] He concluded that there was no evidence that the Claimant was prevented from launching an adequate defence.

230.4 He did not agree that it was necessary to disregard G's statement. He noted that the interview with Mr Matthews was the third time G had outlined his version of events, having previously done so to N and J and to Ms Alexander. He also noted that both Mr Matthews and Mr Irwin confirmed that they had considered motive for G to lie and only made findings on allegations that were corroborated by B, Ms Alexander or N [**479**].

230.5 Having considered further Ildago's evidence, it did not undermine the reasonableness of the disciplinary conclusion. The cover Ildago provided at the end of October 2020 had been arranged in advance and the Claimant did not leave the property, and she had encouraged Ildago to leave early as the Claimant was there anyway. Whilst it was evidence that G and B were not there when Ildago was there, that was consistent with B and G's evidence that they were asked to go upstairs or leave when other people attended the property. [**480**]

230.6 In relation to the suspension process, once the HR consultant was appointed the Claimant was given information as the allegations [**480**]

230.7 Having B provide cover when the Claimant went for training had the potential to blur the lines around what was acceptable even if it was simply sitting with HF with the ability to call for support. Mr Holt recommended that there should be a review of practices in relation to this and that only employees of the Respondent should be given responsibilities in relation to care or supervision of clients. However he concluded that this did not mean that it was reasonable to regularly leave the client in the care of an untrained non-employee or to outsource elements of the client's care. Nor did it undermine the findings in relation to G. [**481**]

230.8 In relation to the comment in Ms Irwin's report as to Ms Alexander being unaware of B, Mr Irwin had clarified that she meant that Ms Alexander had not been aware of the duties and hours that B had been undertaking [**481**].

230.9 B's statement was not in words B would use as it was summarised by Mr Matthews, and B had signed it as an accurate record [**481**].

230.10 There was no evidence that Mr Matthews' reference to gross misconduct had unduly influenced the outcome of the disciplinary process [**482**].

230.11 Mr Holt rejected the contention that the process had been contrived to distract from poor practice by the Respondent and Ms Alexander. The investigation had only begun following a call to Mr Alexander, and to N and J, from the police and the subsequent attendance at HF's property on 4 December 2020 where G and B were present (and the Claimant was absent). The grievance had not been raised until one month after this. Mr Holt also regarded it as implausible that B, G, Ms Alexander and N would have collaborated in lying. I note again that in one sense the reference to N and Ms Alexander may be said to miss the point that they were repeating what

they had been told by G and B. However in the disciplinary hearing the Claimant's contention had been that B had been manipulated by Ms Alexander, and in that sense it was an allegation of collusion.

231. The issue of whether HF should have been interviewed was not raised by the Claimant on the appeal or addressed in the appeal decision. In the interview with Ms Irwin she had explained that she had not interviewed him because she had been advised that she could not do so due to his age and health. The instruction given by Ms Alexander to Ms Irwin therefore indirectly continued its effect on the appeal.

RELEVANT LEGAL PRINCIPLES

Relevant legal principles in relation to deduction of wages

232. So far as material s.13 ERA provides:

> "(1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (2) In this section *"relevant provision"* , in relation to a worker's contract, means a provision of the contract comprised—
>
> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
>
> (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.
>
> …
>
> (6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified. …"

233. There is a deduction therefore if the total amount of wages paid on any occasion is less than the total amount of the wages "properly payable". Being "properly payable" means that there is a legal entitlement to the

payment: ***New Century Cleaning Ltd v Church*** [2000] IRLR 27 (CA).

Relevant legal principles in relation to holiday pay

234. Regulation 14 of the Working Time Regulations 1998 ("WTR") addresses the entitlement to pay in lieu of annual leave on termination on employment. So far as material it provides:

> "(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).
> (3) The payment due under paragraph (2) shall be–
> (a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or
> (b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula–
>
> (A × B) − C
> where–
>
> **A** is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;
> **B** is the proportion of the worker's leave year which expired before the termination date, and
> **C** is the period of leave taken by the worker between the start of the leave year and the termination date.
> …"

235. A "relevant agreement" is defined as including any agreement in writing which is enforceable between the worker and the employer (reg 2(1) WTR).

236. Regulation 14(3) therefore sets out a default provision, in the absence of a relevant agreement, for determining the period of leave outstanding upon termination, but cross-referenced to regulation 16 in relation to the amount to be paid in relation to this. Regulation 16 sets out provisions for calculating weekly pay for the purposes of calculating annual leave. However regulation 16(5) provides:

> "(5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period."

237. This therefore provides for credit to be given for rolled up holiday pay paid during the year. However, that is to be construed so as to comply with the

Working Time Directive (European Union (Withdrawal) Act 2018 s.4(1),5(2)). As such it only applies if the employer shows that the additional payments in relation to rolled up holiday pay were made "transparently and comprehensibly": ***Robinson-Steele v RD Retail Services Ltd*** [2006] ICR 932 (CJEU) at paras 64-69; ***Lyddon v Englefield Brickwork Ltd*** [2008] ICR 198 (EAT).

Relevant legal principles in relation to unfair dismissal

238. In determining whether the dismissal was fair or unfair the following principles apply:

238.1 The Respondent must establish that it had a genuine belief in the misconduct.

238.2 I should consider whether that belief was formed on reasonable grounds, following a reasonable investigation and a fair procedure.

238.3 It is not for me to substitute my decision for that of the employer. Nor is it for me on the issue of fairness of dismissal to introduce my own findings of fact as to the Claimant's conduct. Both in relation to the substantive decision and in the procedure and investigation followed, there may be a range of reasonable responses.

238.4 The focus must be on what the employer did and whether what it decided, following a reasonable investigation, fell within the band of reasonable responses which an employer may adopt. The Tribunal's role is to examine the conclusions reached by the employer and to consider, objectively, whether those conclusions could reasonably have been made on the evidence presented. The Tribunal must avoid substituting its own evaluation of witnesses or the evidence for that of the employer: ***Morgan v Electrolux Limited*** [1991] IRLR 89 (CA).

238.5 The relevant circumstances include the gravity of the charges and their potential effect on the employee, and there should be a focus by the employer on potential evidence that may exculpate or point to innocence as well as evidence pointing to the allegations being made out.

238.6 The focus is on the state of mind of the dismissing and appeal officers, together with such further information as ought to have been ascertained by a reasonable investigation: see ***Orr v Milton Keynes Council*** [2011] IRLR 317 (CA).

238.7 In applying the statutory test it is necessary to take into account the whole of the disciplinary process including the appeal stage. As explained in ***Taylor v OCS Group Limited*** [2006] IRLR 613 at para 47, that the Tribunal:

> "should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage."

239. If it is determined that the dismissal was unfair, the following considerations apply in relation to any reduction for contributory fault:

239.1 It is necessary to make findings of fact as to the Claimant's conduct, but care is needed not to allow any such findings to infect my assessment of the issue as to whether dismissal was unfair: ***London Ambulance Service NHS Trust v Small*** [2009] IRLR 563 (CA).

239.2 The Claimant indicated that in the event that she succeeds in her claim she would be seeking compensation only. In that event, contributory fault may lead to a reduction in the basic and compensatory awards.

239.3 In relation to the compensatory award, pursuant to s.123(6) ERA:

(a) Conduct will not entail a reduction in the award unless it (i) is culpable or blameworthy and (ii) caused or contributed to the dismissal to any extent: ***Nelson v BBC (No.2)*** [1980] ICR 110 (CA).
(b) If those conditions are satisfied I must (not may) reduce the amount of the compensatory award by such proportion as I consider just and equitable having regard to that finding.
(c) It is necessary to take a broad common sense view of the situation, deciding what if any part the employee's conduct played in causing or contributing to the dismissal and then, in the light of that finding, assessing the reduction to be made on a just and equitable basis: ***Hollier v Plysu Limited*** [1983] IRLR 260 (CA).
(d) In the EAT in ***Hollier*** four general categories were put forward: ranging from 100% (totally to blame), 75% (largely to blame), 50% (employer and employee equally to blame) and 25% (slightly to blame). Whilst these are helpful yardsticks, I am not bound to those four alternatives, and the extent of any deduction is "a matter of impression, opinion and discretion": ***Hollier*** per Stephenson LJ at para 19.

239.4 In relation to the basic award, pursuant to s.122(2) ERA, if I consider that any blameworthy conduct of the Claimant before dismissal was such that it would be just and equitable to reduce the basic award to any extent, I should reduce the award by that amount.

Essentially the question is what if any reduction it is just and equitable to make in respect of that conduct. It is very likely by not inevitable that what a tribunal considers is a just and equitable reduction of the compensatory aware will also have a similar effect in respect of the basic award. See **Steen v ASP Packaging Ltd** [2014] ICR 56 (EAT) at [14].. If there is a difference in needs to be reasoned.

239.5 Albeit unusual, it may be permissible for a Tribunal to make a 100% reduction for contributory fault in the basic and/or compensatory awards, and to do so despite significant procedural failings, if the Claimant's conduct was wholly responsible for the dismissal, but it remains necessary to consider what is just and equitable in the circumstances: ***Lemonious v Church Commissioners*** UKEAT/0253/12/KN, 27 March 2019 at [31-36].

240. In addition to, and distinct from, any reduction for contributory fault, I should consider whether it is just and equitable to make a reduction to compensation under s.123(1) ERA on the basis of a chance, which it is for the Tribunal to assess on the evidence, that the Claimant would in any event have been fairly dismissed. In **Rao v CAA** [1994] ICR 495 (CA) it was suggested that any adjustment for the chance of fair dismissal should be calculated before the adjustment for contributory fault. It may also be appropriate to take into account that adjustment in determining what if any further adjustment to be made to the compensatory award for contributory fault, particularly bearing in mind the need to avoid double counting.

Relevant legal principles in relation to wrongful dismissal

241. In relation to the claim for notice pay (wrongful dismissal), the issue is not whether the dismissal fell within the range of reasonable responses, but rather whether the Claimant was in repudiatory breach of her contract, such that the Respondent was entitled to dismiss without notice. In particular it was agreed that the issue is whether the Claimant was in breach of the implied term that she should not without reasonable and proper cause or excuse act in a manner such as the destroy or seriously damage the relationship of trust and confidence.

242. Ms Hatch placed some reliance on the EAT's decision in ***Human Kind Charity v Gittens*** [2020] IRLR 412 as illustrating that an employee making untruthful statements to cover up their own wrongdoing might amount to gross misconduct irrespective of whether there was a positive duty to report the wrongdoing. I accept that is so, albeit that ultimately the issue is whether in all the circumstances the conduct was such as objectively to destroy or seriously damage trust and confidence, without reasonable cause or excuse.

DISCUSSION AND CONCLUSIONS IN RELATION TO DEDUCTION OF WAGES AND HOLIDAY PAY
(1) Senior care rate claim

243. The Claimant sought to rely on the job description in the handbook for a

"senior live-in carer job description" as defining the key elements for a senior carer. Her contention was that if a carer met those requirements that they were entitled to be paid as a senior carer [**86-87**]. In particular she focused on the qualifications required and that a senior live-in care can expect to be allocated to care for clients "with more complex and/or acute needs where appropriate experience is important and relevant to the effective delivery of the care service."

244. Even aside from the fact that this refers to a "senior live-in carer" rather than a senior carer, I do not accept that case. As to this:

244.1 The Claimant was notified of the rate at which she would be working. If not before, it was communicated in the payment sheets. Initially these set out the hourly rates (being the prevailing carer rates) and subsequently set out a simplified rate for 24 hours but which equated to the prevailing carer rates. On her own case at no stage was she informed that there was any entitlement to a higher rate. The contract expressly provided for an entitlement to be paid in accordance with the notified rate. There is no basis in my view for implying a right to payment at some higher rate.

244.2 There was no published hourly rates for senior carers (as opposed to the rate charged to the client).

244.3 Whether a carer was designated as a senior carer depended on whether this is what was agreed to be supplied to the client. If it was agreed with the client that a senior carer would be supplied there were different and higher rates that would apply. In order to fulfil such a position a carer would indeed need to be able to meet the requirements of the job description. But it does not follow that someone who could satisfy those requirements would be entitled to be paid as a senior carer if that is not what was being supplied to the client.

244.4 The obvious structure of the business was that the cost of the carer supplied would be funded by the payments made by the client, and as such it would make little or no sense for the pay to automatically be varied even if no such agreement to supply a carer had been reached with the client. Further that would be productive of uncertainty. There is no obvious clear measure of the point at which the client should be regarded as "more complex" or acute. Further it might vary over time or at different times. It cannot have been the objective intention that that the rate of pay would depend on the interpretation of whether at any particular time the needs of the client were sufficiently complex.

244.5 The job description within the handbook does not make the status of a carer dependent on the complexity of the work. Instead it provides that a senior live-in carer can expect to be allocated to care for clients with more complex and/or acute needs where appropriate. Thus being employed as a senior live-in carer impacts on the type of work that the

worker can expect to be allocated rather than vice versa. There however still needs to be agreement to the worker being engaged in the role of senior carer or live in carer. There was no agreement as to this in the present case.

245. In short, the rate of pay was a matter of offer and acceptance. The rate was notified to the Claimant and accepted by continuing to work and putting in her hours. There was no offer to pay at a higher rate and no agreement to do so. The Claimant's case would entail that there was some right to be paid at a higher rate that was never offered or published, which was contrary to the rate communicated to the Claimant and which she accepted at least by conduct in working on that basis, and even though the right to charge the client at the higher senior care rate would be dependent on agreement with the client. The Claimant had no such entitlement.

246. Accordingly the claim in relation to the senior care rate fails.

(2) Claim for time worked by Ildago

247. I turn to the implications of my findings above in relation to the claim for time worked when Idalgo was paid instead of the Claimant, addressing first the contractual claim and then in relation to a deduction of wages claim.

248. So far as concerns the contractual position, in the light of my findings above I accept that there was an oral agreement that, at least until notification of bringing the arrangement to an end, the Claimant would not be paid for one of the days she worked every other week, and that Idalgo would instead be paid. More specifically, it was agreed that if the Claimant did not submit a time sheet for that day, and Idalgo did, that it was Idalgo that would be paid. The consideration from the Respondent was the agreement to make payment to Idalgo, and the consideration from the Claimant was forgoing payment for that day. Alternatively there was a waiver of the right to payment for that day, by the agreement and/or by not claiming for it in the time sheets submitted.

249. I turn to the position in relation to the deduction of wages claim. The restrictions in s.13 ERA limiting whether there can be a deduction only arise if the amount paid was less than the sum properly payable. In the light of the agreed variation I do not consider that sums were "properly payable" where the Claimant had reduced the number of hours claimed in her time sheet so as not to claim for them, pursuant to the prior agreement made in relation to this.

250. There is some tension between the analysis that an oral variation may lead to the conclusion that there is no sum properly payable, and the emphasis on the need for a written agreement or prior written notification of a terms under s.13(1)(a), 13(2) ERA. I therefore address in the alternative the position here if the non-payment to the Claimant of the day instead paid to Idalgo is to be regarded as a deduction.

251. In each case the Claimant had previously signalled in writing her agreement

or consent to the deduction, within the meaning of s.13(1)(b) ERA, by not claiming for those hours in the timesheet. The issue then arises as to whether the deduction was on account of any "conduct of the worker", or any "event occurring", before the agreement or consent was signified (se.13(6) ERA). Whilst the work was done by the Claimant prior to the consent, the deduction was not on account of having done that work. Nor do I think this can refer to the original agreement as to paying Idalgo instead of the Claimant. That would have the anomalous effect of preventing reliance on a worker's confirmation in writing of an earlier verbal agreement. The better view in my judgment is either that the deduction was not make on account of any "conduct" or "event" or, if it was, this was the submission of the email with the hours worked, in which case the consent to the deduction was signified at the same time.

252. In addition the deduction was authorised pursuant to the terms of the handbook (which formed part of the contract of employment), that the Respondent's obligation was to use reasonable endeavours to make payment within 9 days of delivering a duly completed time sheet for the hours worked in the previous week. It was in my view necessarily implicit that there Respondent was not obliged to make payment for hours that were not claimed in the time sheet.

253. The same conclusion would follow even on the Claimant's version of events. The major difference on her account is that the arrangement of paying Idalgo instead of the Claimant was initiated by Ms Alexander. However the Claimant agreed to that course. Whilst she contended that she did not intend it to last as long as it did, that was not communicated and nor did she communicate that she wanted to end the arrangement prior to submitting her grievance . She continued working and acted on it in submitting time sheets to that effect. It is not contended that any threat was made to secure that agreement. Again therefore there was an agreement to vary the amount payable, at least until there was a communication that it was being ended or so long as the Claimant continued to submit payment claims on the basis of it.

254. In the course of her evidence the Claimant suggested that she had made the entries in the notebook because she was put under pressure by having to work all hours and the failure to provide a carer to relieve her. On the resumption of her evidence on 5 May 2019 I clarified with her whether she was advancing a case that any agreement with Ms Alexander in relation to payment for Ildago was brought about by duress. The Claimant's initial response was that she was not contending that any such agreement was brought about by duress or pressure and that the pressure she had been referring to related to the circumstances in which she made the notes in the handbook (falsely referring to a handover to and from Ildago). She subsequently revised her position on this and contended that the situation was brought about by pressure applied by Ms Alexander in the sense that if she did not stay there would be no one to provide care for HF. At that point she indicated that she would want to amend to add this. In the event, no application no application to amend was ultimately made.

255. In any event I reject the contention that that the agreement was vitiated by duress. The agreement was not brought about by threat or illicit pressure applied by Ms Alexander. Even if there had been, and if the arrangement had been at Ms Alexander's instigation, the Claimant raised no objection or challenge to what was proposed. As such it cannot in my judgment be said that the Claimant had no practical alternative to giving in to any such threat or pressure: see ***Times Travel (UK) Ltd v Pakistan International Airlines Corporation*** [2023] AC 101 (SC) at [78,79].

256. If I had found that there was an unlawful deduction in relation to the payments made to Ildago, I would also have concluded that the complaint was made in time. Each of the deductions would plainly have been part of a series. The last of the series would either have been not earlier than the payment made on 6 December 2020, being payment slip of that date and would therefore have been in time. (Since this would in turn impact on the sum due for payment in lieu of annual leave, it might be argued there was a later final date in the series by reference to when payment in lieu of annual leave should have been paid at the end of employment if it had not been paid earlier as part of rolled up holiday pay. But nothing turns on this in relation to the application of time limits).

(3) Holiday Pay

257. The holiday pay claim is largely dependent on the claim of underpayment in relation to hours worked that were instead paid to Ildago and in relation to care rates. Neither of those claims having succeeded, there is no further issue raised as to whether the amount of the weekly deduction was insufficient. The remaining issue is whether the provision as to rolled up holiday pay was sufficiently clear and transparent. I am satisfied that it was. The provision as to how holiday pay was to be paid, and the amount that was to be paid, was clearly set out in the handbook. The payment in relation to holiday pay was also clear on the face of each payslip. Accordingly the Respondent is entitled to credit for those payments pursuant to regs 14(3) and 16(5) of the WTR with the effect that there is no further sum due for pay in lieu of annual leave.

DISCUSSION AND CONCLUSIONS IN RELATION TO UNFAIR DISMISSAL
Genuine belief in misconduct

258. I am satisfied that the Respondent held a genuine belief in the alleged misconduct, being at its core that G (and also B) was assisting with caring duties that were part of the Claimant's role without having sought permission from Ms Alexander and concealing this from her and then being untruthful about this in the disciplinary investigation. There is no basis in my view for finding that either Ms Irwin, Mr Holt or Ms Alexander lacked such a belief, or that Mr Matthews did not believe that there was a case to be considered of gross misconduct.

259. I reject the suggestion that Ms Alexander was in some way involved in

manipulation of B to provide supporting evidence. Nor do I accept she did not have a genuine belief because she was panicking or seeking a scapegoat or seeking to cover up her own failings or those of the Respondent. The allegations had been made by B and G to N and J before Ms Alexander became aware of them. When they were first recounted to Ms Alexander when she attended HF's property on 4 December 2020, N and J were also present. As such when Mr Matthews came to speak to G and B they were largely confirming allegations already made either before Ms Alexander's involvement or when the cousins were also present. I also regard it as implausible that, having appointed external investigators, Ms Alexander would have run the risk of manipulating what G and B said. There would have been no need to do so given the account they had already provided, and it would simply have run the risk undermining the investigation if the interference were to come out under questioning from Mr Matthews.

260. I also take into account that the Claimant's grievance, and the issues raised within it, was not raised until the disciplinary process had already started. That is not of itself necessarily inconsistent with Ms Alexander having concerns as to what may come out, for example as to the hours the Claimant was working or possible lack of support. It is however relevant that the disciplinary process had commenced before the allegations had been made by the Claimant.

261. The allegations made by G and B provided a clear basis for the belief in misconduct and plainly required investigation. The appointment of the HR consultants was an appropriate course in order to do so. It is implausible in those circumstances that the disciplinary investigation was actioned without a genuine belief that there was prima facie evidence of wrongdoing, or that Ms Alexander did not hold a belief in the wrongdoing when it was upheld by the external HR consultants.

262. As set out above, Ms Alexander held a belief in wrongdoing going beyond that which was found in the disciplinary investigation. I do not however consider that this affects the position in circumstances where she appointed external HR consultants to investigate and make findings on the allegations and abided by those findings.

Reasonable grounds

263. I also accept that there were reasonable grounds for the belief, in the light of the allegations made by G and B. This was supported by the fact that G was at the premises when the police came on 4 December 2020 and when N, J and the Claimant arrived, and had been left there by the Claimant.

264. The HR consultants and Ms Alexander were entitled to place weight on the fact that G's allegations were corroborated by B. There was no adequate explanation of why B should make up the allegations. Whilst there was a lack of clarify as to what caring duties were alleged to have been done by B, there was clarity in her corroboration of the claims of G having moved into the premises and undertaking the cooking. It was suggested that B was

susceptible to pressure, but the HR consultants were entitled to take the view that there was nothing to indicate that such pressure had been applied. In theory G might have said something to scare her into making the allegations but there was no evidence that had been done other than the Claimant's own contentions that what B alleged was untrue. The Claimant's own contention in the disciplinary hearing as to B having been manipulated by Ms Alexander was implausible given that the allegations were made before the issue came to Ms Alexander's attention.

265. Further, if the allegations were correct, I accept that they provided grounds for a finding of gross misconduct. In the context of a pandemic it was all the more important that if there was to be a person coming to the property that authorisation should be sought and in any event that the Respondent should be kept informed. That was all the more clearly the case if that person was undertaking functions within the Claimant's role, given the need for suitable training and checks to be carried out. It was still more the case if he was residing there. In addition, there was evidence of his presence being concealed. Again that was supported by B and G's evidence as to being told to go upstairs and go out. If B and G were believed in relation to G's presence, then the fact that there was no sight of G on the video calls with N and J or when Ms Alexander attended on HF's birthday or on the day when Idalgo provided cover, was also consistent with his presence being concealed.

266. That is not affected in my view by the issue raised by the Claimant as to whether on the proper construction of the handbook, the reference to the need for authorisation was to authorisation from the client rather than the Respondent. It might be said that the provision does not specify by whom the authorisation can be given, and that a client is capable of authorising who may come into their own home. There might be force in that if taken aside from the context of the pandemic and if all that had been found was of a friend occasionally come round to visit the Claimant with HF's permission. However here the context was of a pandemic where HF was vulnerable by reason of his age. Further the risks were reflected in the discussion in March 2020 when it was agreed to carry on for the time being without another carer coming into the property. This was also to be seen against the context of the obligation to keep the Respondent informed of what was going on in the property.

267. In those circumstances even aside from any express term it was also implicit in my view that the Claimant could not bring someone into the house, without any requisite training or DBS check, to assist in carrying out functions falling within her job description, without revealing this and seeking permission from the Respondent, let alone concealing this and that person residing there. That would be an obvious breach of the implied term of trust and confidence and requirement to keep the Respondent informed of relevant matters, let alone to conceal matters. For there to be a failure to mention what G was doing at the property, despite being in regular contract with the Ms Alexander, would also be a clear breach of the obligation for the information to be accurate, true and complete. The same would also apply if false

denials were given about this when the issue was raised, as it follows was the case on the basis of believing B and G's version of events. Indeed the Claimant accepted in evidence that she was aware that if G had been carrying out part of her duties this would have to be authorised by Ms Alexander.

268. I have also taken into account whether it was unreasonable to place reliance on there having been corroboration by N and Ms Alexander to the extent that they were merely repeating, essentially as hearsay, what they had been told by G. The fact that the allegations had been repeated at least showed that there had not simply been a misunderstanding as to what was alleged, and that G and B had been willing to repeat it on more than one occasion. That may objectively have been of limited value, but Ms Irwin and Mr Holt (and Ms Alexander) were entitled to place weight on the fact that there was corroboration from B. There was also the evidence of having found G at the property on 4 December 2020 and the surprising nature of the explanation based on G having been there to look after the Claimant's dog, when there was no sign of the dog being at the house.

Reasonable investigation and reasonable procedure

269. I turn to the issue of whether there was a reasonable investigation and whether a reasonable procedure was followed (in both cases applying the range of reasonable responses test). There is some overlap between those two elements and I therefore take them together.

270. The failure to interview HF, or to revisit with N and J after 4 December 2020 whether he could be interviewed, was a serious flaw in the investigation. It was a decision in substance made by Ms Alexander, rather than the HR consultants that she had appointed to investigate, without any sufficient reason for doing so. I accept that Ms Alexander made an initial request of HF's family to speak to HF about the matter on 4 December 2020. That however takes matters little further. It was said in the context of HF having only just been interviewed by the police and at a stage where the particular matters to be investigated internally had not yet been defined.

271. The issue was not revisited once the investigation commenced other than to advise Ms Irwin that she not interview HF due to his health and age. However it was not the evidence before me that either his health or age were such as to prevent him answering questions. The most that was said was that it might remind him of the Claimant when he had moved on. Even if that was right Ms Alexander accepted that there was a window when he could have been asked questions. Ms Alexander's evidence was that there was an opportunity to do so between December 2020 and March 2021. That would have tied in with when the matter was being investigated. If that was not the case then it behoved the Respondent to seek permission to interview HF before it was regarded as too late to do so.

272. In any event the HR consultants who were dealing with the matter ought to have been given an accurate account of what the issue was. Further, the

family had been happy with G being put in touch with HF to say goodbye. Whilst that was a decision of N and J rather that Ms Alexander, it pointed against the concern about being reminded of the Claimant being so great that it merited bypassing him in the investigation.

273. There was no adequate explanation before me as to why the matter was not revisited with N and J. Nor was there any adequate explanation as to why Ms Irwin was told that she could not speak to HF because of his age and health conditions, without revealing that there had been no request made of the family since 4 December 2020. In those circumstances I infer that, contrary to Ms Alexander's evidence, and whether consciously or unconsciously, her failure to revisit the matter with the family and instructions that HF could not be interviewed, was influenced by her view that HF would be supportive of the Claimant. In her initial statement Ms Alexander stated, albeit in relation to the financial allegations, that HF would she believed back the Claimant 100%. Again in the interview with Mr Kline she stated that HF would not have a bad word said against her. However, it was wrong to prejudge what HF would say or to dismiss its value before any questions were asked. Ms Alexander speculated in her evidence that he would just have said it was fine because "that is how he was". If that was all he had said it may have taken matters little further. However it was open to ask him more specific questions to test what was said as to G's presence in the house or the care support provided. It was not a permissible approach to assume what the answers to those questions would be without asking them.

274. There was evidence before me that even if G had been in the house, HF may not have seen him, or in any event be in a position to give an accurate account of how often he was there. Thus if as alleged he had been involved in preparing the meals, HF could not see him from his room, and nor would he have necessarily been able to see him going upstairs. The Claimant's contention was that HF remained mobile and would often like to sit in the kitchen or would move around the house with the aid of his Zimmerframe. I regard this as having exaggerated the extent of HF's mobility at that time. Although for 2020 there were only records in the notebook made by the Claimant for the period from 6 May 2020 to 4 July 2020 they indicate much more limited mobility. They show that a usual part of HF's daily routine was to do two or three laps of the lounge, and on some days to repeat this. They also show instances, but more rarely, of going to the kitchen and back. It is clear in any event that any movement would have been slow.

275. However other than G and B, and the Claimant, HF was the only other person present in the property. Even if he did not see G cooking he was in a position to comment on allegations made bearing on the credibility of what was alleged by G and B including whether or not B and G were there in the initial lockdown period; whether G would sit with HF sometimes and take him for walks [**292, 295**], the contentions that the Claimant did nothing and that B undertook care duties and would sometimes sit with HF all day. Even if HF may not have seen G doing the cooking, if he contradicted those allegations, that was potentially very important evidence to consider. An obvious follow up line of enquiry would have been to question B in the light of this and seek

to identify how she explained the difference and to ask her expressly, particularly as G was no longer around, whether she had been placed under any pressure to make her allegations. Ms Irwin's own evidence was that in reaching her conclusions it was significant that the only evidence she has other than from the Claimant pointed in the same direction.

276. Further, even if there was a concern as to reminding HF of the Claimant, that fell to be balanced against the serious consequences for her of the allegations and the importance of a thorough investigation, and whether in the light of that permission should at least be sought from HF and N or J, to do so. That was not addressed.

277. That failing was compounded by Ms Irwin's failure to respond at all to the point raised in the disciplinary hearing that HF should have been interviewed, even to explain why that was not done. Nor do I accept that it is an answer that the Claimant failed to raise this issue again on the appeal. That is to be seen in the context where not only had the Claimant not been given the reasoning for not interviewing HF, but also the notes of the further interviews conducted by Mr Holt were not provided to her. Had they been provided the Claimant would have had sight of, amongst other things, the purported rationale for not interviewing HF and the opportunity to comment on this.

278. Taking those matters in the round, and given the obvious potential importance of interviewing HF as the only other person present in the property, I consider that this failing was of itself sufficiently serious that the investigation fell firmly outside the range of reasonable responses.

279. In my judgment the investigation and/or procedure was also deficient in:

    279.1 Failing to provide the Claimant with the recording or transcript of the conversation N and J had with G, despite her request for this. This was potentially important to verify what had been said and identify potential inconsistencies. Providing the recordings might also have avoided the risk of the Claimant being distracted by the issue of whether the person making the allegations was in fact G.

    279.2 Failing to provide a copy of Ms Irwin's notes of her meeting with N until the dismissal decision, and only providing the full transcript with the appeal decision. It was important as a matter of fairness for the Claimant to be able to see how the allegations had originated. It was also important to see and understand what was being alleged in the round even if that was not at the heart of the particular disciplinary allegations pursued so that she was able to comment on this from credibility perspective. That was all the more important in circumstances where G had disappeared and was not available to be questioned.

    279.3 Not providing the notes of the appeal interviews with Mr Matthews, Ms Irwin and Ms Alexander until after the appeal. Notably fairness required the Claimant be provided with Ms Alexander's explanation in the appeal interview as to why she said the explanation for G being present on 4 December was not plausible and being provided with an

opportunity to respond.

280. It is not necessary to determine whether those matters alone would be sufficient to conclude that the procedure fell outside the range of reasonable responses. They add to the element of unfairness in relation to the failure to interview HF, or at least seek permission to do so, which I consider of itself to have been sufficiently serious as to render the investigation or process as outside the range of reasonable responses.

281. I have also considered whether the investigation was flawed by reason of Ms Irwin or Mr Holt not having followed up with any further interview of B. Ms Irwin did not do so because she concluded that she would have been asking the same questions. However some aspects of what B called out for more clarity. She said that she sat with him "sometimes all day". On its face that suggested on more than one occasion, but might possibly have referred to the time when she was asked to do so when the Claimant attended training in September 2020. The reference to carrying out care duties also begged a question as to what care duties she claimed she carried out. On Ms Alexander's own evidence if was permissible for the Claimant to go out and leave HF for a while with HF. It was important therefore to be clear whether what B was alleging when beyond this. Further on 4 December 2020 B had said that she had been working 12 hours a day whereas in her interview she said that there was considerable variation in her hours as required by the Claimant, which begged a question as to the reason for the difference.

282. Further, the Claimant had alleged that B did not come to house during lockdown and returned having isolated for several months. Especially when G was not present it was important to ask B as to this. If it was accepted it in turn begged further questions such as in relation to how she was able to say that G had moved in at the start of lockdown.

283. However, other than the point as to not attending during lockdown, these were not points that were raised in the disciplinary process by the Claimant. Further, B was clear that G had moved in at the start of lockdown and had had been cooking for him and sometimes sat with him. Mr Holt specifically investigated with Mr Matthews the contention that B's English was not strong enough to have answered the questions put in the way recorded and that some of the questions were loaded. He confirmed that she gave the details recorded, which he summarised in his own words, which she had been content to sign without amendment. In those circumstances, whilst it would have been better practice to have followed up with B to test what was set out in her statement, and add something to the other failures noted above, I do not consider that the failure to do so of itself was sufficient for the process/ investigation to fall outside the range of reasonable responses.

284. The same applies in my view to the failure to investigate the position in relation to whether there were any of G's belongings at the property, and if not what the explanation was for this. As noted above, this was a relevant factor to consider and it would have been better had it been investigated. However the failure to do so has less weight in circumstances where it is not

something that was raised by the Claimant who, though in poor mental health, had the benefit of solicitors advising her.

285. I do not accept that the failure to provide the notebooks requested by the Claimant rendered the process or investigation procedurally flawed. I accept that at the time they were with the family who were not willing to release them.

286. Nor do I accept that the delay in the process rendered the procedure unfair. It was permissible for Ms Alexander to take some initial time to consider the position and then to appoint an independent HR consultant to manage the process. It was also legitimate then to seek a further person to carry out the investigation so that Ms Irwin was available to deal with the disciplinary hearing. The time taken to appoint Mr Karl is to be seen in the context of the Christmas period. Whilst there was some delay in informing the Claimant that her absence was on full basic pay and of the nature of the allegations, I do not consider that those are matters that rendered the process as a whole unfair or contributed significantly to this.

287. I have considered whether this is affected by the decision to pause matters whilst the grievance was addressed, and then the subsequent decision to proceed. It is not an unusual step to put matters on hold so as first to consider at grievance, and I do not consider it was unreasonable in this case. Indeed it was the Claimant's own contention in her grievance (formulated with assistance from her solicitors) that this should happen. One particular factor was the possibility that G would return to Poland and therefore the possibility that a delay would impinge on the Claimant's ability to challenge his evidence. As set out above, however, I consider that it is likely that Ms Alexander was not informed of this on 4 December but only subsequently at the later stage where she called him to ask if he would give a witness statement. In any event , I do not consider that it was unreasonable for the Respondent not to anticipate that he would disappear. Contact details had been sought and even if he had returned to Poland that did not entail that he could not participate remotely in a disciplinary process. The fact that in the event he chose not remain in contact was a relevant factor in the investigatory and disciplinary process, but the Respondent was entitled to proceed on the basis that there was corroboration for the allegations.

Was dismissal within the range of reasonable responses?

288. Having regard to my findings above as to whether the Respondent had reasonable grounds for its decision, and subject to the failing identified in the previous section as to the investigation and the procedure, I accept that the decision to uphold the allegations fell within the range of reasonable responses. I also accept that having made those findings dismissal was within the range of reasonable responses. Ms Irwin and Mr Holt (and Ms Alexander) were entitled to find that bringing G into the property on a regular basis, his and B's assisting in the caring duties (and indeed if only G had done so), the failure to disclosure G's involvement and steps taken to conceal G's presence, was a fundamental breach of contract, that (taking

into account also the lack of training or DBS checks for G – there being none required for B - and the circumstances of the pandemic) it entailed a serious risk to the Respondent's reputation, and that it, and the continued denial of it, thoroughly undermined trust. There were mitigating factors of the long hours that of work involved in the Claimant's role, albeit that she did not request cover during the period beginning with lockdown other than for the training day and possibly when Ildago attended at the end of October. There was also some blurring of roles when B provided cover on the training day. But even allowing for that, on the basis of the findings that I accept that Respondent was entitled to reach but for the failings in relation to the investigation and procedure, I would have accepted but for those failings that the dismissal felt within the range of reasonable responses.

289. However in the light of the investigation/ procedural failings, and most importantly the failure to interview HF or seek permission to do so after 4 December 2020, I conclude that the procedure/ investigation as a whole fell outside the range of reasonable responses and the dismissal was unfair.

Contributory fault

290. I turn to the issue of contributory fault. As set out above, any reduction for the chance of dismissal in any event should be assessed because the reduction if any for contributory fault (unless there is to be a 100% reduction in any event). However it is convenient to set out my conclusions on the facts relating to contributory fault first because this has some bearing on the assessment of what HF would have said, or the limits of would he is likely to have said, if he had been interviewed.

291. In addressing contributory fault I am not concerned with the issue of whether the conclusions reached by the Respondent fell within the range of reasonable responses, but with findings of what happened on the balance of probabilities.

292. I have taken into account as an important consideration that I have not heard evidence from either G or B. I also take into account that after his interview with Mr Matthews G disappeared rather than continuing to cooperate with the disciplinary process, and that the Claimant did not have the chance to put questions to him either directly or through the investigators. Nor were there follow up questions raised with B, such as clarifying what care she claimed to have undertaken, or testing her evidence as to providing care since lockdown in the light of C's contention that B had been isolating with friends, or the discrepancy between telling Ms Alexander on 4 December that she worked 12 hours a day and the information provided to Mr Matthews that the hours were variable as the Claimant required.

293. I have also taken into account that, as noted above, there might be said to have been some inconsistency between B's allegation in the her interview with Mr Matthews that G "occasionally sat with [HF] and took him for a walk" and the fact that N said that she was told that whenever they went out G pushed the wheelchair. That is not wholly clear because it may be that it

was only occasionally that they went out for walks; the notes kept for 2020 in the notebook suggest this was rare at least during the time covered by those notes. In any event, I do not consider that this is a strong basis to infer that the is probable that B was being untruthful.

294. I also note the striking similarity in language in aspects of the statements of B and G. Notably in referring to being asked to go upstairs when there were visitors both added the caveat "although I thought this was because of the Covid situation." Mr Matthews explained this in evidence as reflecting that it was his own words summarising what was said. That they both expressed the same understanding might be regarded as indicating a degree of collusion. As against that, the fact of being sent upstairs when someone came to the door had also something that was said to Ms Alexander on 4 December 2020, and if G was not in the house regularly that begs the question as to how any collusion could plausibly have come about.

295. I note the evidence of a willingness on the part of G to act in an unethical way in so far as he had taken pictures of HF which were sent to N. Even assuming that G did not have permission from HF to do so, it was also consistent with a belief on his part as to the need for evidence to back up concerns as to serious wrongdoing. It also indicated that that he had been in the property when the Claimant was with him, as did the fact that he had been able to obtain J's number from the notebook. As to the latter I accept that it is likely that he did so, given his explanation that he found the number "from the black book." Contrary to the Claimant's initial denial, that was consistent with the fact that the front of the notebook was black and had the contact details on the inside. I accept though that the mere fact of having been in the house unsupervised does not necessarily entail that the Claimant permitted this. It is possible, as the Claimant suggested, that he was let in by B (though that is more surprising during a pandemic and if B was only a gardener and dog walker) that G was able to get into the house from the garden because the Claimant would not have locked doors when B was there.

296. I take into account in relation to G's credibility my finding as to the improbable nature of G's account that he told the Claimant on 5 December 2020 that he would return the credit card and papers that he found. It is likely in my view that there was at least exaggeration in the claims made by G. Thus in his initial call he alleged that the Claimant did nothing. I reject that contention as inherently unlikely having regard to the range of tasks required as set out in daily routine which the Claimant set out. Further, the claim that the Claimant did nothing is inconsistent with the N's account that HF said there was nothing wrong on 4 December 2020, albeit it is not clear what he was asked. It is also difficult to reconcile with Ms Alexander's evidence in her interview with Mr Kline that HF continued to ask for the Claimant and would not have a word said against her [**322G**]. I also consider the claims made such as referring to beauty and massage treatments, whereas the Claimant was attending the clinic for her injured heal, is indicative at least of the element of exaggeration.

297. However there are significant pointers against the Claimant's account:

297.1 There was no apparent credible or likely motive for G to have made up the allegations. On the contrary, there was good reason for him not to speak up. He was putting himself at risk of having to move out of his home (whether staying with HF or his lodgings with the Claimant) if she found out what he had disclosed. Further, on the Claimant's case she had been highly generous to him, including paying for his dentistry and allowing him to fall behind on his rent. It was suggested that G may have panicked when the police came. However G had called J and N on 1 December 2020 and made the allegations before the police were called. It was not suggested that he had been making any threats to her or was seeking money from the Claimant or HF's family or the Respondent. The Claimant suggested that perhaps he was after her job. However there was nothing to substantiate that speculation, and I do not regard it as plausible given the absence of anything to indicate he was qualified to be a carer.

297.2 Nor was there any credible or likely motive for B to make the allegations and corroborate what B said. The Claimant suggested that B might have been in fear of her job, but there is no explanation as to why backing up G's allegations would be a means of preserving her job, which was in any event with HF rather than the Respondent. I also reject the contention that she was manipulated by Ms Alexander. There is no evidence to support that contention. B had initially made allegations on 4 December 2020 when N and J were also present and when Ms Alexander been alerted either to the allegation or the Social Security issue. It is possible that B was manipulated in some way by G. However there is no evidence before me to indicate that was the case other than if an inference is drawn from the Claimant's evidence that her allegations were untrue. On the face of it she had little to gain in making the allegations about G being there and the work he was doing. The Claimant suggested B would have been concerned about her own position because she was also responsible for sending money back home to her family. However that would be a reason not to make false allegations, with the risk of doing so being that it could put her own job in jeopardy. It is more understandable that if she worked with G day in day out that she may have felt loyalty to him, or felt the need to explain his presence, but that is less plausible if he was only a gardener and dog walker. Nor was it suggested that B had previously shown any personal issue with or dislike of the Claimant which might be indicative of allegations having been made out of malice.

297.3 Whilst there are some matters on which there was lack of specificity by B, notably in relation to what care duties she was doing and how often (bearing in mind Ms Alexander's own evidence that it was unobjectionable to leave HF with B whilst the Claimant popped out), other aspects of G's allegations were corroborated in clear terms. Notably that included his cooking for HF and sometimes sitting with him and taking him for a walk and being told by the Claimant to go upstairs

whenever visitors came to the house.

297.4 The Claimant suggested that the first time that G came into the house was in May or June 2020, when she said he wanted to see HF and make a cake for him and she asked HF if he could come in for an hour or two. That was still quite early in the pandemic when there were still lockdown restrictions in place. The fact that on the Claimant's own case she was content for HF to come into the house and see HF at that time tends in my view to make it less plausible that she was strict in terms of preventing G, her friend, coming into the house at other times.

297.5 Further, on the Claimant's account each time G came to the property he travelled from the Claimant's house in Wanstead to East Finchley. She contended that most of the time he travelled by train, which she said in evidence was a 45 minute journey, though if he was late he would come by taxi. Particularly against the context of the discussion in March 2020 with Ms Alexander as to not having another relief carer come in, that make it all the more surprising that the Claimant would have thought it appropriate to invite G in the house on a one off occasion and see HF, just to make a cake and to allow him to chat to HF, knowing that it was his practices to travel there by public transport. A more plausible explanation is that he came into the house because the Claimant felt she needed the help, and that rather than travel there and back on public transport, he moved in as he alleged to avoid having to do so.

297.6 Towards the end of the Claimant's evidence she accepted that there was a further occasion on which G had come into the house, which she said was towards the end of November 2020 and when he again saw HF briefly. In the disciplinary process the Claimant had only referred to one occasion when G came into the house before 4 December. Further, the explanation given by G that it was raining and cold outside must often have applied at that time of year in London. Again, if the Claimant saw no reason in principle not to invite G in, that calls into question the plausibility of only having done so on those two occasions. Notably this was raised by the Claimant for the first time after the issue had been raised in cross-examination that the G must have been in the house in order to take the photos that he had sent and to obtain J's number.

297.7 I regard there as being some significance in what was found on 4 December 2020 when the police came, and in the Claimant's change in her account as to this. The fact that B and G were found upstairs was consistent with their contention that they were asked to go upstairs when there were visitors. Before the Claimant had seen that the allegation had been made as to asking them to go upstairs, it was the Claimant's own contention in her interview with Mr Kline that she had specifically asked HF is G could be upstairs as Grace had had surgery and it was cold outside. Yet in the Claimant's evidence in the tribunal she claimed that G was not supposed to be in the house and that she

was not aware he had gone upstairs. I regard it as overwhelmingly more likely given the proximity in time of the interview with Mr Kline, that the Claimant was indeed aware that G was upstairs and that it was not the case that she had not permitted him to be in the house that day. I take into account that there are difficulties in recollection given the time that had elapsed. However on such an important issue it is surprising, particularly if as the Claimant contended it was unusual for G to be in the house, that she should overlook this. It is more likely that that the Claimant's evidence that G was not supposed to be in the house, or upstairs, was driven by seeking to dispute that she had acted in the way alleged by B and G in asking them to go upstairs when visitors came. Further, as set out above, I consider that it is more likely that Grace was not at the house when N, J and Ms Alexander arrived and spoke with B and G latter on 4 December 2020.

297.8 I also note that G called and asked to speak to HF to say goodbye when he was leaving. Again that is more consistent with his account, than the Claimant's evidence which would indicate more limited interaction with HF.

297.9 I regard the Claimant's conduct in creating false entries in the Notebooks as a factor which casts doubt on her credibility. On her own evidence the entries, and the pages left blank, were with the deliberate intention of misleading the CQC should there be an inspection. That was dishonest. Further, this undermines the Claimant's reliance upon the entries in the notebooks as evidencing her contention as to her daily routine and round the clock care provided for HF. In any event it is unsurprising that if G was providing assistance with the cooking that this was not recorded given that his presence was not disclosed to Ms Alexander.

297.10 I also regard the events when Ildago provided cover at the end of October 2020 as in tension with the Claimant's case. If she had really been working without relief or assistance, such as it was alleged that G and B provided, it is particularly surprising that, as I accept was the case, she should remain present in the house providing assistance when Ildago provided cover, and then send her away early after one day or night.

297.11 I am concerned also as to the steps taken by the Claimant to destroy potentially relevant evidence at a time when she had instructed solicitors. It was the Claimant's evidence that she deleted all messages with G, with Ildago, with B and with Ms Alexander – although in closing submissions it was said in relation to Ms Alexander (after producing a text message) that only WhatsApp messages were deleted. In relation to G, it was the Claimant's contention that she had initially deleted a phone message from G a few weeks after her suspension where he had said he was sorry for all that happened, and then had deleted all of G's messages when she found out that he had called J. At least by the time of the general deletion, it would have been obvious that G was

the source of allegations against the Claimant. It was equally obvious that there was a likelihood of litigation. I take into account the Claimant's contention that she was in a bad place in relation to the state of her mental health and was emotional and upset. However the messages, particularly with G, were potentially important evidence likely to bear on the credibility of the contentions that he was residing and working at HF's property. I regard it as implausible that they would have been deleted if they contained evidence that was supportive of the Claimant's case. Instead it was consistent with suppressing relevant evidence.

298. I have also given careful consideration to the diary entries relied upon by the Respondent. In relation to G these include the following entries:
    298.1 On 22 March 2020: "paid G £980 from today 7 days".
    298.2 On 4 April 2020: "G→ Home – 17.00" [**981**]. Under this is the entry £980 but as this is in different colour pen it is not clear that it relates to the same matter.
    298.3 12 April 2020 "paid G £280 [or possibly it may say £230] rent £750 cash sat [**980**]
    298.4 18 April 2020: "G-£980" [**981**]
    298.5 2 May 2020: "paid G £400 cash". On the same page there is a calculation showing a "balance G" of £1,790. That appears to be a balance payable to G because the total owing had been reduced by the sum of £400 which was noted as having been paid to G and a sum of £750 which was the amount of G's rent.
    298.6 23 June 2020: an entry showing a total of £9,000 due to B and G for one month, made up of £4,546 to B and £4,243 to G
    298.7 Entries on 1 and 2 July 2020 recording "G off no pay" [**970, 971**].
    298.8 On 11 July 2020: "G-Home 18.00" [**968**]

299. It was argued on behalf of the Respondent that the payments of £980 accords with the fact that G states that latterly he was paid £140 per day, such that this would equate to £980 for 7 days. I do not consider that connection can necessarily be drawn because G's own evidence in the February meeting, his daily rate had only gone up to £140 "two or three months ago". However I accept that the notebooks evidence payments being made by the Claimant to G which she was unable to explain in evidence. They are inconsistent with the contention that he was just walking her dog for £9 to £10 an hour or the limited payments she indicated would be made for the garden or work at her own house such as cleaning the conservatory. Whilst the Claimant may not recall the detail of what each specific entry related to, given the spotlight that had been placed on her dealings with G and the allegation as to sub-contracting, it is surprising if there was another explanation for the large sums paid, other than paying for his help with HF as alleged, that she was not able to provide it.

300. Further, I consider that there is significance in the entries on 4 April 2020 and 11 July 2020 which on their face indicated the time of G going home. In theory it is possible that they might refer to G going home after working in the garden or walking the dog. But in either case it is not clear why going home

would be a notable event, and specifically recorded on only a couple of occasions. It is more consistent with the allegation that G was residing at the property, such that it was a notable event when he went home.

301. I also record the entry for 4 April 2020, together with the above payments noted in the diary, as pointing against the Claimant's contention that there was no one else at the property during the start of lockdown. That is reinforced by entries indicating that, contrary to the Claimant's evidence, B was also working from early in lockdown, including an entry on 18 April 2020 recording "Betsie 6th payment" [**979**] and on 23 April 2020 recording "Cash G & Betsie ". I regard as implausible the Claimant's contention that she would note these entries down on random dates and that they may have no relation to the date of the entry.

302. Taking the above points together, whilst I accept there was exaggeration in G's allegation that the Claimant did nothing, having regard in particular to the corroboration from B, I accept on the balance of probabilities the core of the allegations as to G providing regular assistance with cooking for HF and that, whilst there were times when (as is clear on G's own account) he would go home, he moved into HF's property on lock down and resided there. I also accept the allegation, corroborated by G, that he would sometimes sit with HF and push him when they went out. It is not clear from G and B's own accounts how often that happened and I therefore make no finding that it was common. Indeed the notebooks for 2020 indicate that, at least for the period which covered, it was quite rare for HF to be taken for a walk out of the house.

303. I also accept that the Claimant concealed G's presence at the house and involvement in helping with HF from Ms Alexander. In the light of my findings as to the support he was providing this was plainly an important matter to draw to her attention. That followed from the obligation in the Handbook to keep the Respondent informed of what was going on in the house and that all information provided by accurate true and complete. Even aside from whether the Claimant had in mind the specific wording in the Handbook or Code of Conduct it was obvious that it was the sort of matter of which Ms Alexander needed to be apprised, especially in the midst of a pandemic. Yet despite this and being in regular contact with her there was no mention of it. I accept that the Claimant took steps to ensure that there was no sign of G when visitors came or on calls with N and G. That was consistent with the contentions of B and G about being told to go upstairs (which is where G was found on 4 December) and there being no sign of G when visitors attended on and around HF's birthday and when Idalgo attended at the end of October.

304. In relation to B it is less clear why she would have been told to go upstairs when lockdown eased. It may be that the focus on that allegation related to the period earlier in lockdown, which is consistent with her contention that she thought it was to do with Covid. It is also consistent with the entries which indicate, and I accept, that B was working at the proper at least by mid-April 2020.

305. Aside from this I am not satisfied that there was any blameworthy conduct by the Claimant in relation to B becoming involve in care duties. Ms Alexander was aware that HD had a housekeeper. There was inconsistency in the allegation as to how many hours B was present. There was also a lack of specificity in her statement as to what if any care duties B carried out and how often she sat with HF. This was against the content that there was not anything wrong in leaving HF with B for limited period of time when the Claimant went out, and indeed that it was Ms Alexander agreed or suggested this when the Claimant attended her training day.

306. However these matters relating to B do not detract significantly from the core findings as to blameworthy conduct relating to G. Equally it follows that the Claimant was not truthful in her account given in the disciplinary process.

307. It may be that the Claimant felt that given the long hours she was working there was good reason to have this assistance. I accept that the Claimant faced a very challenging situation. At the start of lockdown Ildago could not carry out her shifts. There was good reason in any event for concern as to a carer having come and go (unlike G if he moved in at the start of lockdown as he alleged), albeit that B continued to do so. I accept that the Claimant genuinely considered that the prospect of a relief carer being reliably provided was unlikely. That had been her experience over previous years and including an occasion where the relief carer provided was pregnant and not fit to be able to cope with care for HF. When the cover had been required when the Claimant went for training in 2020 the care ultimately had to be provided by B, despite Ms Alexander being given plenty of notice.

308. However even allowing for those consideration, there was a serious breach in G moving in and preparing the meals for G, whilst not disclosing this to the Respondent, even aside from whether this extended to telling G to go upstairs or be out of sight when visitors came. That was compounded by the denials of this in the disciplinary process.

309. I return to the issue of what reduction should be made in relation to contributory fault having regard to my findings above, after dealing with and taking into account, the conclusions as to the chance that there would have been a fair dismissal in any event.

Chance of dismissal in any event

310. I accept that even if the Claimant had not been summarily dismissed, she would have been given notice of dismissal. The Claimant could not have returned to work with HF given the loss of trust on the part of his family and the issues that were still being investigated in relation to financial impropriety. I also accept that the Respondent did not have control over those further investigations, and could reasonably have taken the view that the Claimant could not be employed elsewhere whilst they were unresolved. I am satisfied that even if Ms Irwin and/or Mr Holt had been satisfied that there was sufficient doubt as not to uphold the allegations, Ms Alexander would

have dismissed on notice, and could have done so fairly.

311. Given that the reason for a dismissal on notice would have differed from the allegations that were subject to the disciplinary allegations, my preliminary view is that for there to have been a fair process there would have had be notice given of the proposed reason for termination and an opportunity to comment. As I did not hear submissions as to whether such a process would have been required for a dismissal to be fair or as to how long it would have taken, it is appropriate that the parties be afforded the opportunity to address this at the Remedy hearing. My preliminary view is that it is something that could have been dealt with relatively quickly, probably within about a week. But if the parties wish to contend otherwise that can be addressed at the Remedy hearing.

312. So far as concerns the procedural failings other than in relation to the failure to interview HD, I consider that it is highly unlikely that they would have affected the decision, which drew heavily on the corroboration by B of G's allegations. The more difficult issue relates to the potential impact if HF had been interviewed. There is an initial question as to whether J and N would have agreed to his being interviewed. I accept that although HF was the client it would have been reasonable for the Respondent to gather and taken on board the views of N and J in relation to this. However the Respondent has not adduced any evidence to indicate they would not have agreed. The earlier refusal was in the context of HF having been upset that day by being interviewed by the police. It would in my view at least have behoved the Respondent to explain why it was important in the light of the nature of the issue that this be permitted. I do not accept that there is material to indicate that it is likely that this would have been refused.

313. There is then the further issue of what HF would have said had he been interviewed. As noted above, Ms Alexander's own view expressed to Mr Karl was that the client would not have a word said against her. However simply saying that in general terms was unlikely to carry much weight. What was important would have been what he would have said as to the substance of the allegations as to what G and B was doing, and their presence in the property. Consistently with my conclusion as to the element of exaggeration in G's allegations, he may have been able to confirm what the Claimant was doing to care for him, and thereby contradicted the allegation that the Claimant was doing nothing. In the light of my findings as to HF's limited mobility (see paragraph 274 above) it may also have been that he was not aware of G either cooking for him or residing at the property.

314. It is possible that comments along those lines would have put sufficient doubt in Ms Irwin's mind so as not to uphold the allegations. As noted above she placed evidence in the appeal interview on the evidence all pointing one way. However I do not consider that a likely outcome. In the light of my conclusions on the issue of contributory fault it is more likely that if going into more detail in response to specific questions, beyond saying all was fine, that there would also have been more information to indicate G's presence in the property and sometimes sitting with HF. If he had kept to saying all was fine,

without going into more detail, then in the light of the corroboration provided by B, by far the likely outcome is that the decision would have remained to accept the gist of the allegations and find that there had been gross misconduct.

315. I conclude that there should be a reduction in the compensatory award of 70% to reflect the chance of a fair summary dismissal. In addition the period of loss is limited to the notice period plus any further period required for a fair process to terminate the employment on notice. In closing submissions it was accepted on behalf of the Respondent that if notice was to be given the entitlement would be 8 weeks as claimed by the Claimant.

316. This is a broad brush assessment which in my judgment sufficiently takes into account the further contingencies relating to the fact that on the Claimant's own evidence she would not have wanted to go back and return to work for the Respondent. It does not follow that she would have responded to the prospect of dismissal on notice by leaving in a way which resulted in loss of pay in relation to the period to be given by the Respondent.

317. Ms Hatch reserved the Respondent's position as to what a weeks' pay would be for the notice period and as to mitigation. Those are matters for the Remedy hearing, though if the Respondent contends that during any notice period the Claimant would not have continued to be paid at the same rate as during the suspension that will need to be explained.

Adjustment for contributory fault

318. I return in the light of this finding to my conclusions as to the adjustment to be made for contributory fault. I do not accept the Respondent's contention that a 100% reduction is just and equitable. First, in the light of my conclusions in relation to B, the dismissal was not solely by reason of the allegations that I have concluded were well-founded. That is however a fairly minor point in the scheme of things given my conclusions in relation to G which were at the heart of the allegations. In considering what reduction is just and equitable I have also taken into account the mitigating factors noted above, including the unprecedented difficult situation faced by the Claimant in the pandemic. Even then the blameworthy conduct was significant and causative of the dismissal. But for taking into account the reduction made for the chance of dismissal in any event, I would have concluded that the basic and compensatory awards should be reduced by 75% on account of that conduct. Taking into account the reduction made for the change of dismissal in any event on account of the misconduct and the element of overlap in the effect of that misconduct on the award, I reduce the further reduction for contributory fault in relation to the compensatory award to 60%.

Basic award

319. Although the list of issues identified that the amount of the basic award was a matter for the Remedy hearing, in closing submissions the Respondent

accepted that, aside from adjustments, the award would be as claimed by the Claimant, being £4,573 and could be determined as part of this Judgment. It follow from my finding above that this is to be reduced by 75% that the basic award payable is **£1,143.75**.

320. Strictly the Claimant is entitled to make the election as to whether she seeks an order for re-instatement or re-engagement following the decision on liability. However the Claimant made clear that she does not seek such an order and would not wish to be employed by the Respondent an nor would it be practicable in the light of my findings.

Compensatory award

321. Other than the determination of the above adjustments to the compensatory award, the quantification of it was an issue for determination at any remedy hearing.

WRONGFUL DISMISSAL (NOTICE PAY)

322. It follows from my findings in relation to contributory fault set out above that I accept on the balance of probabilities that summary dismissal was justified on the basis of repudiatory breach of contract by the Claimant. Aside from the express terms in the handbook, there was a breach of the implied term of trust and confidence. Accordingly the notice pay claim fails.

REMEDY HEARING

323. I will deal with directions and listing of the Remedy hearing in a separate Order. Two days were reserved for the liability hearing, but in the light of the limited remedy issues remaining, relating to the compensatory award, I will provide for the second day to be vacated.

Employment Judge J Lewis KC

Date: 23 June 2023

Judgment sent to the parties on:

27 June 2023

FOR THE TRIBUNAL OFFICE: