EMPLOYMENT TRIBUNALS

Claimant: Ms S Evans

Respondent: Just One Health & Social Care Ltd

HELD AT: Wrexham **on:** 5th September 2023

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: Mr T Rushton, Counsel
Respondent: Mr M Ramsbottom, Senior Litigation Consultant

RESERVED LIABILITYJUDGMENT

The judgment of the Tribunal is that the claimant was unfairly dismissed by the respondent on 5 July 2022; her claim of Unfair Dismissal is well-founded and succeeds.

REASONS

The Issues:

1. In a situation where the respondent says that it dismissed the claimant for a reason related to conduct, and the claimant claims Unfair Dismissal, the issues (which were agreed at the outset of the hearing) were as follows:

    1.1. What was the reason for the dismissal? The respondent says it was for a reason related to conduct.

    1.2. If the reason was related to conduct, did the person making the decision to dismiss have a reasonable and genuine belief that the claimant was responsible for the conduct relied upon?
    1.3. At the time of the decision to dismiss, had there been a reasonable investigation, and did the person who made the decision to dismiss the claimant rely upon it?

1.4. Did dismissal fall within the range of reasonable responses of a reasonable employer to the conduct in question?

1.5. To what extent, if any, did the claimant's conduct cause or contribute to the dismissal?

1.6. If the claimant was unfairly dismissed, was any conduct of the claimant's such that it would be just and equitable to reduce or further reduce any basic award?

1.7. Was the claimant at such risk of dismissal that any Compensatory Award should be reduced to reflect that risk?

1.8. If there is a finding that the dismissal was to any extent caused or contributed to by any act of the claimant, by how much should any compensatory award be reduced to reflect that?

1.9. How much would it be just and equitable, in all the circumstances, and having regard to losses sustained by the claimant in consequence of the dismissal insofar as the loss was attributable to action taken by the respondent, should the Tribunal award, other Tribunal shall apply the same rule concerning the duty of a person to mitigate loss as applies to damages recoverable under the common law of England and Wales. This latter issue was not determined as the liability judgment was reserved.

The Facts:

2. I found the following facts:

2.1. The respondent (R):

2.1.1. R is a company providing social care for both vulnerable adults and vulnerable young people in a number of residential projects in England and Wales. They operate 11 supported living residential projects in the Wrexham area, and four in England that are for vulnerable adults. A separate section, not involved in this claim operates projects in Wales, Manchester, and Devon managing 22 properties for young adults.

2.1.2. It employs approximately 220 people. It has a professional HR function. It relies upon external legal advice and representation services via Peninsula.

2.1.3. R operates a number of written policies for its staff and supported clients, referred to throughout this hearing by the parties as "Service Users" (being mindful at all times that we were talking about vulnerable adults). Amongst other things, it has a documented grievance and disciplinary procedure, and safeguarding policy and procedure, both of which were referred to during the hearing. Safeguarding matters in the Wrexham area projects are overseen by Wrexham County Borough Council. Ultimately the project in question falls under the authority of Care Inspectorate Wales (CIW).

2.1.4. Evidence was given on behalf of R by Paul Tomlinson, a director, who is based in Liverpool; he did not have day-to-day involvement or management responsibility in respect of the Acorns Project, which is the subject of these proceedings, and until today's hearing he had not met the claimant. For reasons explained below, whilst Mr Tomlinson did not carry out the disciplinary hearing, he was the decision-maker in that he decided that the claimant should be dismissed for gross misconduct in relation to an incident on 29 April 2022. Mr Tomlinson was aware of, but have not read, the ACAS code of practice on disciplinary and grievance procedures; he has had no formal training in handling disciplinary matters; he had conducted 2 to 3 disciplinary hearings prior to that involving the claimant. Mr Tomlinson relied on the preparatory work, rationale and draft decision of his predecessor disciplining officer, Ms Hayley Jones, statements made by some of C's colleagues that were not disclosed to the claimant, his knowledge of the dismissal of another Support Worker in relation to conduct issues on the same morning as those involving the claimant, and external legal advice in connection with this decision.

2.1.5. The Tribunal also heard evidence from Mr Greg Price, another director, who was the named responsible individual for CIW purposes. Mr Price did not deal on a regular basis with the Acorns Project; he had met the claimant prior to these proceedings. He was the appeals officer in this case. Mr Price is aware of the applicable ACAS code; he too relied on advice from the external legal team. His expertise is as a business director rather than having a background in care but, for reasons not relevant to these proceedings, he has previously had the benefit of a Support Worker and he understood the relationship that should exist between a Support Worker and the supported vulnerable adult. In reaching his decision Mr Price made some analysis of his own having heard from the claimant, and also relied upon statements made by some of the claimant's colleagues that were not disclosed to the claimant, his knowledge of the dismissal of another Support Worker in relation to conduct issues on the same morning as those involving the claimant, and external legal advice as to their view of the sufficiency of the prior work of Ms Johnson and Mr Tomlinson.

2.2. The claimant (C):

2.2.1. C commenced employment with R on 5 January 2019 as a Support Worker. She was continuously employed until her summary dismissal by letter dated 5 July 2022 sent to her by email received and by her on the same day. The effective date of termination of employment was 5 July 2022.

2.2.2. At the commencement of employment C was required to undergo a six-month probationary period which she duly passed.

2.2.3. Until the time of her dismissal, C had a clean disciplinary record. The claimant was valued as a Support Worker. The appraisals to which I was referred in the hearing bundle are positive, raising no issues of concern.

2.2.4. C was at all times a member of a recognised trade union, and she had the benefit of trade union advice and representation at all formal stages of the disciplinary and appeal process where external representation was permitted in accordance with statutory requirements; in other words, the only stage where she did not have the benefit of trade union representation was at investigatory interview.

2.2.5. C says she is dyslexic; this is not, as I understand it, contested. The respondent seems not to have known of C's dyslexia until some stage during her disciplinary suspension pending investigation; R made enquiries of C's colleagues as to whether or not they were aware of her dyslexia and it seems from R's oral evidence (although no written statements or other documents in relation to this matter were adduced) that in commenting upon dyslexia certain of C's colleagues also made personal criticism of her attitude.

2.2.6. Mr Tomlinson recalls reading that certain of C's colleagues said, in commenting upon C's dyslexia, that sometimes her behaviour was "unprofessional", and "she raised her voice". These statements, although relied upon by both Mr Tomlinson and Mr Price, were not disclosed to C as a part of the disciplinary process. R relied upon these undisclosed, unchallenged, statements as being corroborative evidence that C would act unprofessionally, raising her voice, towards vulnerable adults in her care. Neither Mr Tomlinson nor Mr Price spoke to these "witnesses" to C's conduct. There was no probationary or supervisory documentation to bear out these criticisms. C accepted that she would react, by blushing and speaking in an agitated way, when and if she suffered a panic attack but she denied unprofessionally raising her voice to vulnerable adults; she admitted correcting CG (a "Service User" – see below) whose behaviour she found, in my words, to be insubordinate on the material date, 29 April 2022.

2.2.7. The mother of the "Service User" involved in the key incident on 29 April 2022, referred in writing to C's manner as being "brusque" (this was in an email dated 22 May 2022 (page 178) referred to in the disciplinary process). Other than the said email, R was unable to adduce any documentation forming part of the probationary, line management, or appraisal procedures affecting C that would suggest a lack of professionalism or a poor manner prior to 29 April 2022.

2.3. CG: CG (aged 37 at the material time) is considered to be a vulnerable adult and she is resident at the Acorns Project. She is supported by Support Workers employed by R, and until 29 April 2022 this included C. CG lives with Down's Syndrome; she wears a brace on one leg and has use of only one arm. Her speech is impaired following a stroke. She has depression and "under active thyroid". CG has mental capacity. She is capable of exercising her autonomous will. It is accepted by both parties that she may benefit from guidance as to the exercise by her of her choices, such as with regard to healthy diet.

2.4. Incident 29 April 2023:

2.4.1. On this date there were at least two “Service Users” at the Acorns Project, and maybe a third resident. They were supported by C and her colleague AV. At the material time there was also present in the building Lynn Dutton, Senior Supervisor, and Rhian Dyer, Care Coordinator. Ms Dutton and Ms Dyer are not senior managers, but their role is akin to being line managers of both C and AV; they were at that time in a position of authority over them.

2.4.2. There was an incident, or there were incidents, involving C and CG, and AV and CG during the course of the morning of 29 April 2022. An incident report form (North Wales Safeguarding Board – Reporting Abuse or neglect of an Adult at Risk form – page 145 – 153 of the hearing bundle, to which all page references refer unless otherwise stated) was completed by Shaun Randall, Manager and Investigating Officer, on the same day. R confirmed “verbal and threatening behaviours/abuse towards client [CG] from 2 x staff members” [AV and C], that there was evidence CG “had been abused or neglected”, that the said staff had been suspended, that CG was unable to protect herself from abuse or neglect because “this is being inflicked (sic) by staff members”, that there was evidence CG lacked mental capacity to consent/understand the concerns (but it was not confirmed whether an advocate had been informed). The type of abuse indicated was “emotional/psychological” only (and not “financial/material”, or “Neglect”, or “Physical”, or “sexual”), being “verbal and threatening behaviours/abuse” witnessed at the home on that day. R’s view of the impact on CG was “triggering behaviours by her which can trigger behaviours from the other house mates”. CG was reported as being “upset and shouting back at staff”. It was said that the incident(s) was/were witnessed by Ms Dyer. No further details were given as to what AV and C were accused of, whether it was the same incident or in anyway related, or as to their respective roles in the alleged “abuse”.

2.4.3. A further form was completed, by Jennie Millington, a director of R, for WCBC, “Allegations Against a Person in Position of Trust” (Section 5 Referral Form (Person in Position of Trust)” (pp154-159). The Nature of the Allegation (again referring to 29 April 2022 at the Acorns Project) was “physical”, “conduct/behaviour”, “emotional” (as opposed to “sexual”, “neglect” or “financial”). This form named only C and not AV. In the description of the incident in question, it is reported that Ms Dyer heard banging and shouting between C and CG in the kitchen and asked whether everything “was okay”; C said that CG would not eat her sandwich which CG said she had taken away from her and C said CG was putting in the bin; CG alleged C was trying to make her eat the sandwich which she took from her; C explained CG wanted to eat chocolate yoghurt instead of the sandwich; Ms Dyer explained C could only give advice and not to tell CG what to do, at which point C gave CG the yoghurt and CG said “see I am allowed to have my yoghurt”. C was reported as being “really angry” and, with a red face, she said “how dear (sic) you even speak to me like that, who the hell do you think you are talking to”. CG was reported as staying quiet. CG later said that C had “snatched” the sandwich and took the yoghurt out of her hand “(snatched)”. Ms Millington confirmed that she was not aware of any previous allegations against C.

2.4.4. AV: there was no further documentary detail concerning AV before the Tribunal. Mr Tomlinson confirmed that she was dismissed for gross misconduct but not by him, and she was dismissed before his involvement with C; he did not know the details concerning AV. Mr Price gave evidence that the accusation concerning AV was that she threatened to hit CG and "throw her in the canal". It is unclear whether, or to what extent, AV participated in any part of the discussion concerning a sandwich and the yoghurt, but she was in the kitchen in the Acorns Project at the time of that incident. AV was not interviewed as part of the investigation into C's conduct, or if she was then her statement was not disclosed to C nor has it been to the Tribunal. Mr Tomlinson, when dealing with the dismissal, and Mr Price, when dealing with C's appeal, accepted legal advice that it would be inappropriate to obtain witness evidence from AV about the events in question because she herself was subject to investigation. The Tribunal was not shown any details of the investigation into AV's conduct. I do not know whether AV was interviewed about her conduct, put through a disciplinary procedure, or summarily dismissed without due procedure.

2.4.5. In her witness statement to the investigation Ms Dyer said that first she heard CG raise her voice, and then C raise her voice, but she could not make out what they were saying; that she asked what was going on and that, in a raised voice, C said that CG would not eat her sandwich but wanted a chocolate yoghurt and was going to throw the sandwich in the bin; that C took the sandwich at said CG could not eat the yoghurt before the sandwich. Mr Dyer says that she instructed C that she could only advise CG, but the decision was that of CG alone, and that C could not remove her choices. Ms Dyer went on to say that C reacted to that by talking to her in a raised voice, and that when CG said, "see I am allowed my yoghurt", C said "Who the hell are you talking to? Don't you dare talk to be this way". CG was reported as staying quiet and that, after a hug from Ms Dyer, she left.

2.4.6. In her witness statement to the enquiry Ms Dutton says that she heard a commotion from the kitchen and when asked about it C reported that CG would not eat her lunch but wanted a yoghurt, so C told her yoghurt back (presumably in the fridge). She says Ms Dyer told CG she could wrap up the sandwich for later at which CG said to C "told you" and she walked off. Ms Dutton says that C then shouted at CG "hey don't you dare talk to me like that" CG said, "my choice" and returned to her room with her yoghurt.

2.4.7. The statements of Ms Dyer and Ms Dutton are not wholly consistent. Mr Tomlinson (when signing off the decision to dismiss the claimant) and Mr Price (when deciding on her appeal) did not pick up ion any inconsistency.

2.4.8. C says that AV made a sandwich for CG and placed it on the table, but CG saw a housemate eating yoghurt and went to the fridge to get one for herself. C says that she informed CG that it would be healthier if she ate the sandwich first, and CG closed the fridge. In evidence she says that it

was the noise of the closing fridge that alerted Ms Dyer who was in the hallway. Ms Dyer asked, “is everything okay?” And that C explained what had happened. She says Ms Dyer interrupted her, telling her that it was CG’s choice, and that C could not stop her. C says that she replied that she knew all that, but that she merely prompted CG to eat something other than the yoghurt. Ms Dyer is then said to have repeated that it was CG’s choice and that CG then spoke to her “in a nasty tone”, while she started to walk back to the kitchen. C says she “informed” CG not to speak to her like that, and she says that whatever tone she adopted it was because her “anxiety had kicked in and I was red in the face”. She says CG ignored her and walked back to the kitchen. C’s version again includes significant differences from those of Ms Dyer and Ms Dutton.

2.4.9. The investigating officer seems not to have taken statements from CG, AV, or any other resident who may have been a witness. I did not hear evidence from Ms Dyer or Ms Dutton.

2.4.10. On balance, it appears that there was a disagreement between CG and C which resulted in a noise loud enough to attract the attention of Ms Dyer and Ms Dutton who were not in the kitchen at the time but in the hallway; that C explained her preference, for CG’s sake, that CG eat a sandwich before a chocolate yoghurt, and that when Ms Dyer said it was a matter for CG to exercise her own choice, CG goaded C; C reacted to this in a way that indicated she took exception to how she had been addressed by CG. Whether through annoyance, the circumstances at the time with several people talking, or anxiety, it is likely, on the balance of probabilities, that C raised her voice to CG. There are three different accounts as to whether or not CG was pleased because of the outcome, or indifferent to what C had finally said to her about the way in which CG addressed C. I am unable to make any finding as to whether CG was affected by C telling her, in whichever version quoted above, not to speak to her as she had done. In essence therefore, there is consistent evidence only that C took exception to the way that CG spoke to her, and she expressed it, although how she did so is disputed. Two witnesses report that C raised her voice to CG; C denies it. I cannot say with certainty how CG reacted, what she did or where she went immediately.

2.5. Disciplinary procedure:

2.5.1. Suspension: both C and AV were suspended on 29 April 2022. C’s suspension letter is at page 144. C was suspended pending investigation into “allegations of verbally abusing a Service User”. Appropriate details were set out in that letter such that C was aware of the procedure.

2.5.2. Investigation: the investigation was conducted by Shaun Randall, the home manager. C was invited to 2 investigatory meetings. The first was on 18 May 2022 (page 170 – 177), and the second on 6 June 2022 (181 – 184). Neither set of notes has been approved by C.

2.5.3. Hearing:

2.5.3.1. C was invited on 14 June 2022 to attend a disciplinary hearing, which took place on 16 June 2022. The invitation letter is on page 189. The matter of concern was described as being a failure to follow company rules and procedures, namely care standard procedures for the care, privacy, dignity and mental well-being of vulnerable Service Users. The particular allegation concerning C was that on 29 April 2022 she treated CG "in a very aggressive and inappropriate manner when she refused to eat her food and asked for a chocolate yoghurt. Instead of supporting her with guidance and information, you restricted her choices and made a decision on her behalf". It was explained that if proven this would represent a gross breach of trust, and would be an allegation of abuse which, if substantiated, would be regarded as gross misconduct and may lead to dismissal without notice. The claimant was sent copies of the disciplinary and grievance procedure, safeguarding procedure, investigation meeting notes, the statements of Ms Dyer and Ms Dutton, and a brief email from CG's mother. It was explained that the HR manager Hayley Johnson would conduct the hearing. C was reminded of her entitlement to be accompanied by a fellow employee or trade union representative and reminded that failure to attend without good reason could amount to a misconduct issue.

2.5.4. Representation: C was represented by her union official at the disciplinary hearing and appeal hearings. Representatives were allowed to clarify matters for her and to comment, but not to answer questions for her.

2.6. Decision to dismiss:

2.6.1. I did not hear evidence from Ms Johnson. I accept from Mr Tomlinson's evidence that Ms Johnson prepared a letter setting out her rationale for dismissing the claimant for gross misconduct, and that all bar the introductory paragraph which has been changed, her draft letter was in the same terms as the letter of 5 July 2022 (page 208). Before signing the letter Ms Johnson left her employment with R.

2.6.2. Mr Tomlinson was told that there was an outstanding disciplinary matter that needed his attention. He was given a pack of documents and Ms Johnson's draft letter of dismissal. Mr Tomlinson looked at the documents and I preferred his later version of oral evidence that he spent between one and two hours on the documents of the course of a working day, as opposed to his initial evidence that he spent an entire working day on the documents. He received the documents a day or two before 5 July or maybe on that day. He had a busy schedule that day. Amongst other things he looked at the paperwork in the morning, and amongst other things he looked at them again in the afternoon; he took advice from an external legal team. He told me that the legal team advised him that Ms Johnson's letter was appropriate but that it was his decision whether or not to dismiss C. Mr Tomlinson did not speak to C. He did not speak to any witnesses. Amongst the documentation brought to his attention were critical comments made by two or three colleagues of the claimants (which are referred to above in connection with them being

asked whether they knew that C was dyslexic); he noted and took into account in his decision-making that those colleagues (with whom he had not spoken and whose statements had not been disclosed to C) said that the claimant's conduct could be unprofessional and she would raise her voice. He accepts the statements at face value, as indeed he accepted the entire pack, or at least insofar as he read it. Mr Tomlinson's evidence was not convincing; initially he attempted to portray that he had thoroughly or forensically addressed the investigation pack and draft letter. On balance I consider that he briefly considered the documentation, did not find any obvious fault with Ms Johnson's rationale and accepted external legal advice that Ms Johnson's draft letter was appropriate in the circumstances. His approach was to approve a draft, as opposed to conscientiously considering all available evidence and properly assessing the credibility of witnesses. He had no reason to doubt C's version of events other than that there were two of his colleagues with different (although not wholly consistent) versions, and Ms Johnson had made the decision as to which evidence she preferred. He did not speak to Ms Johnson. He accepted at face value advice he was given that AV was irrelevant as she had been dismissed. He did not consider, in the light of probationary and appraisal reports that this was perhaps an isolated incident but rather considers it part of a pattern based on evidence that was never put to C (the two or three statements from her colleagues referred to above).

2.6.3. Acting on advice that Ms Johnson's letter was appropriate, Mr Tomlinson signed it off without any substantive amendment or refinement. Mr Tomlinson did not apply himself conscientiously to the task of fully considering the circumstances, exculpatory information, any defence or mitigation; I find that he did not consider all potential outcomes ranging from no further action, through counselling/training and all stages of informal and formal disciplinary warning; he latched on to Ms Johnson's conclusion of summary dismissal, and then followed external legal advice that such sanction was appropriate. He believed that the claimant was guilt of misconduct but without forensic examination of the pack presented to him, sufficient consideration of inconsistencies, a proper consideration of the credibility of C, and in part in reliance on derogatory or critical statements from C's colleagues (those referred to above).

2.7. Appeal Procedure:

2.7.1. Letters of appeal: with the assistance of her trade union C notified R of her intention to appeal on 6 July 2022 and on 14 July 2010 put forward substantive grounds of appeal (page 212).

2.7.2. Hearing: the claimant was invited to an appeal hearing; her appeal was considered by Mr Price. The hearing took place on 24 August 2022. The claimant was represented by her trade union. She was asked a series of open questions by Mr Price and given an opportunity to put forward her grounds of appeal, supporting evidence for each ground, her preferred outcome.

2.7.3. Mr Price considered all relevant information before him, but also considered the two or three witness statements from her colleagues that were critical of the claimant albeit their contents were not put to her. He relied in part of those statements as corroboration for his belief that C was prone to raising her voice to Service Users, and that she did so on 29 April 2022.

2.7.4. Mr Price upheld the decision to dismiss. His principal concern was that he believed C raised her voice to CG on 29 April 2022. He did not consider the allegation that she took away CG's choices was as clear as that she raised her voice inappropriately. He considered that C may have been giving guidance only to CG with regard to choice of food and was not convinced that this aspect amounted to gross misconduct. When asked in cross-examination what was it that amounted to gross misconduct his immediate answer was "raised voice"; on reflection and further questioning he said possibly taking away choice was gross misconduct, but this was not as clear as the challenging approach and raised voice. He had a genuine belief that C raised her voice to CG inappropriately and that doing so was unprofessional conduct amounting to gross misconduct. He felt that the critical statements from colleagues corroborated this finding, and they were relied upon him in reaching his conclusion.

2.7.5. Mr Price addressed the documentation before him conscientiously and thoroughly. He asked C open questions and took note of the responses. He took into account representations made on behalf of C. He had a genuine belief that C raised her voice to CG inappropriately and that doing so was unprofessional conduct amounting to gross misconduct. He felt that the critical statements from colleagues corroborated this finding, and they were relied upon him in reaching his conclusion.

2.7.6. Outcome: Mr Price concluded that C's appeal failed. He sent a written outcome to her on 30 August 2022 (p227-8).

2.7.7. ACAS Early Conciliation was between 30 August and 1 September 2022; the claimant presented her claim on 29 September 2022. Her initial claim was on of disability discrimination and Unfair Dismissal; she later withdrew the discrimination claim which was formally dismissed.

The Law:

3.1 Section 94 Employment Rights Act 1996 (ERA) states that an employee has the right not to be unfairly dismissed, while s.98 ERA sets out what is meant by fairness in this context in general. Section 98(2) ERA lists the potentially fair reasons for an employee's dismissal, and these reasons include reasons related to the conduct of the employee (s.98(2)(b) ERA). Section 98(4) provides that once an employer has fulfilled the requirement to show that the dismissal was for a potentially fair reason the Tribunal must determine whether in all the circumstances the employer acted reasonably in treating that reason as sufficient reason for dismissal

(determined in accordance with equity and the substantial merits of the case).

3.2 Case law has provided guidance but that is not a substitute for the statutory provisions which are to be applied. Case law provides that the essential terms of enquiry for the Employment Tribunal are whether, in all the circumstances, the employer conducted a reasonable investigation and, at the time of dismissal, genuinely believed on reasonable grounds that the employee was guilty of misconduct. If satisfied of the employer's fair conduct of the dismissal in those respects, the Employment Tribunal then has to decide whether the dismissal of the employee was a reasonable response to the misconduct. The Tribunal must determine whether, in all of the circumstances, the decision to dismiss fell within the band of reasonable responses of a reasonable employer; if it falls within the band the dismissal is fair but if it does not then the dismissal is unfair.

3.3 Whilst it used to be the case that emphasis was placed on the rationale and actions of the decision-maker it is now established that the investigator is also key to the question of fairness. If an investigator is acting in an official capacity for an employer that carries authority, and that person misleads the decision-maker or applies undue influence, that may render a dismissal unfair regardless of the good-intent, diligence and impartiality of the decision-maker. This is not a factor in the current case.

3.4 Questions of procedural fairness and reasonableness of the sanction (dismissal) are to be determined by reference to the range of reasonable responses test also (**Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588** and **Iceland Frozen Foods Ltd v Jones [1983] ICR 17**).

3.5 The Tribunal must not substitute its judgment for that of the employer, finding in effect what it would have done, what its preferred sanction would have been if it, the Tribunal, had been the employer; that is not a consideration. The test is one of objectively assessed reasonableness. **In *Secretary of State for Justice v Lown* [2016] IRLR 22** , amongst many others, it was emphasised how a Tribunal can err in law by adopting a "substitution mindset"; the point was made in **Lown** that the band of reasonable responses is not limited to that which a reasonable employer might have done. The question was whether what this employer's response did fall within the range of reasonable responses. Tribunals must assess the band of reasonable responses open to an employer and decide whether a respondent's actions fell inside or outside that band, but they must not attempt to lay down what they consider to be the only permissible standard of a reasonable employer.

3.6 Under the **Polkey** principle it may be appropriate to reduce an award by applying a percentage reduction to the Compensatory Award to reflect the risk facing a claimant of being fairly dismissed, or to limit the period of any award of losses to reflect this risk, estimating how long a claimant would have been employed had they not been unfairly dismissed, in circumstances where the respondent would or might have dismissed the claimant. I must consider all relevant evidence, and in assessing compensation I appreciate that there is bound to be a degree of

uncertainty and speculation and should not be put off the exercise because of its speculative nature. In this case we did not consider remedy in detail, but I explained that in deciding on liability I could and would unless objected to (and it was not) address "the Polkey point" and the law at 3.7 below, at least superficially.

3.7 Where a Tribunal finds that a complainant's conduct before dismissal was such that it would be just and equitable to reduce a Basic Award it may do so (s.122 ERA). Where a Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce any compensatory award by such amount as it considers just and equitable having regard to that finding (s.123 ERA). In doing so a Tribunal must address four questions (**Steen v ASP Packaging Ltd [2014] ICR 56 EAT**):

3.7.1 What was the conduct giving rise to the possible reduction?

3.7.2 Was that conduct blameworthy?

3.7.3 Did the blameworthy conduct cause or contribute to the dismissal?

3.7.4 To what extent should the award be reduced?

3.8 When a claimant argues that a respondent's disciplinary decisions were inconsistent and that this gives rise to unfairness, it is important that the dismissing and/or appeals officers who are accused of being inconsistent are actually aware of the comparator cases. It is also essential that the comparators relied upon are in comparable situations to the claimant. Because of the need for respective facts to be truly comparable, arguments of inconsistency are difficult to maintain. That said, inconsistency of treatment in truly comparable situations may give rise to a finding of unreasonableness and unfairness on the part of the respondent, such as to render the decision to dismiss unfair. In the current case we know only that AV was dismissed, that the Incident Report suggested that she participated in the same incident (same date, in relation to CG, at on the same morning) but it seems she was accused of threatening CG with violence).

Application of law to facts:

4. I have established that there was an incident on 29 April 2022 in which C and CG, a "Service User'", took issue with each other. Advising CG about nutritional well-being was within C's remit; CG was entitled to accept or reject advice and she was entitled to exercise her autonomous choice. Neither had a right to provoke, goad, speak aggressively or belligerently nor to raise their voices. In circumstances where a Support Worker was acting within her remit and a Service User reacted adversely, there was a duty on the investigating officer, disciplining officer, and appeals officer to consider all of the circumstances in some detail, and to take account of the record of the Support Worker, her version, apparent difficulties with the Service User, the Service User's version where appropriate, and all other available evidence, and to test

that evidence following full disclosure. In this case there were issues of credibility. Credibility therefore had to be assessed. The evidence of one witness, whether it be to the incident on 29th April or general practice of the Service User and of the Support Worker, had to be put to other witnesses. There ought to have been proper consideration of any conflicts and inconsistencies in witness evidence. No evidence should have been taken into account by decision-makers that was not put to the protagonists and other eyewitnesses (save in respect of CG as this may not have been appropriate in terms of safeguarding and capacity).

5. As regards the reason for the dismissal, Mr Tomlinson's reason was that he understood Ms Johnson's letter, considered that it seemed appropriate, and he followed legal advice, but it was in order for him to sign it off. He was in effect presented with an outcome that, on advice, he was prepared to sign off. I do not consider that he engaged conscientiously and thoroughly with the issues that he needed to resolve, the circumstances that he ought to take into account, before reaching his own conclusion. Without due consideration he merely supported someone else's rationale because he was so advised. In doing so he took into account critical witness statements, that is statements from certain of C's colleagues critical of her, which were not disclosed to C. She was not given an opportunity to address the criticism by her colleagues. I was not informed or shown any evidence that would suggest, that R took statements from any more colleagues or whether they were from all of her available colleagues; there may have been supportive statements from other colleagues had they been asked and if they were asked it does not appear that they were provided to Mr Tomlinson. I find that Mr Tomlinson believed in the C's guilt, but that he did not do so on reasonable grounds. By the time the matter reached him, the decision was effectively a fait accompli. In effect, therefore, the decision to dismiss was that of Miss Johnson and I have not had the opportunity of hearing her evidence including under cross-examination, of assessing her credibility and plausibility, and knowing whether her belief was genuine. This was unfair to C.

6. The situation could have been corrected on appeal. Mr Tomlinson's involvement was unsatisfactory. The appeal process gave an opportunity for R to deal with the matter in a satisfactory fashion, by which I mean to remove any unfairness.

7. I am satisfied that R adopted a potentially fair procedure in that there was an investigation, there was a hearing, C was accompanied and properly represented, she was given the right to appeal and did so, there was an appeal hearing at which she was accompanied and properly represented.

8. I understand that Mr Tomlinson was busy, this was not initially his project, and it fell to him to finalise a former colleague's work. For those reasons I have some empathy for him in his position. That said, the sanction of dismissal is the most severe sanction, and its immediate and potential effects upon an employee are both deep and far-reaching. It was incumbent upon him to do more than sign off someone else's work on advice that the dismissal letter was appropriate; in essence I find that this is all he did, having satisfied himself, following a relatively brief and interrupted perusal of the pack presented to him, that the letter did not seem to be perverse. Even if I am

wrong about that, it was evident from Mr Tomlinson's evidence that he took into account criticisms of C that were not disclosed to her or put to her; statements to the effect that the claimant would at times act unprofessionally and raise her voice were relied upon in corroboration of suspicion that this is what happened on 29 April 2022; in the circumstances this was manifestly unfair to C.

9. It is understood generally and was submitted by Mr Ramsbottom on behalf of R appropriately, that the Tribunal ought not look for perfection but a procedure that is good enough. The Tribunal must assess if there was any unfairness, any conduct of the procedure that was unreasonable, inequitable, unjust and therefore unfair. It must then decide whether any unfairness was such that it affected the outcome and was more than so minor or trivial that it was in effect irrelevant. In this case I find that Mr Tomlinson's consideration was both unreasonable and unfair for all the reasons stated above, and it led to C's dismissal.

10. Mr Price dealt with the matter more thoroughly and conscientiously than did Mr Tomlinson. He addressed the grounds of appeal. He was prepared to accept in evidence that deprivation of choice was not made out to the extent relied upon by Miss Johnson and, by proxy, Mr Tomlinson, so as to amount to gross misconduct. He did not say that it is outcome letter. He ought to have stated it if that was his finding. This however emphasised the significance of the belief that C was prone to raising her voice and being "unprofessional". He satisfied me that it was his earnest belief that no Support Worker should ever raise their voice to a Service User and that, in his book, this amounted to gross misconduct. He genuinely believed that. His belief was in part based on the same critical statements from colleagues that I have referred to repeatedly above. That was unfair on C who do not have an opportunity to consider the statements, obtain others in support of her, or to address the criticism. It was a significant unfairness and it severely prejudiced C, especially as Mr Price held principally that C's gross misconduct was raising her voice.

11. I am also concerned that with little knowledge of the background, both Mr Tomlinson and Mr Price were aware that AV had been dismissed in relation to an allegation that, on the face of it, looks similar, and which related to the same Service User on the same day, as the allegation facing C. Mr Price understood that there was a threat of violence in AV's case. Whether or not there was a threat of violence, it was incumbent on both Mr Tomlinson and Mr Price to obtain further and better particulars of that dismissal before attempting to act consistently by dismissing C; in fact, they do not know whether the decision was consistent, and they cannot properly compare conduct of the two Support Workers. The absence of a statement from AV, who was a witness to events in the kitchen on that day, is a substantial absence of evidence. They say that they were told it would be inappropriate as AV was dismissed, but they did not have grounds for that understanding; they may have been excluding information useful to better understand what had occurred involving C. I am unsure how significant AV's evidence can have been, not least because C says little about her. C has suggested that she was dismissed because R wanted to dismiss AV; there was a relationship between the allegations facing her and those facing AV on that day; this may be true, but I cannot make a positive finding. That possibility and assertion

however emphasise the significance attaching to AV. The omission of details regarding her version of events, and the circumstances of her dismissal, is significant and, in part, undermines the investigation and decision-making process. I do not consider that this is as significant as Mr Tomlinson and Mr Price taking into account the other critical colleague statements, but nevertheless it shows a lack of thorough and comprehensive consideration of relevant factors.

12. C was dismissed for a reason related to conduct. There is no evidence of any ulterior motive.

13. Both Mr Tomlinson and Mr Price had a genuine belief, but an unreasonable belief, based on incomplete investigation. More weight was placed upon statements critical of the claimant made by her colleagues than upon her employment record, defence, and mitigation. In these circumstances dismissal fell outside the band of reasonable responses of a reasonable employer.

14. All that said however, I consider that C was at risk of disciplinary sanction, and perhaps dismissal, because of her interaction with CG on 29 April 2022. Being a Support Worker can be a challenging role. It is extremely valuable work, and a conscientious Support Worker should be commended for the contribution they make in safeguarding and assisting vulnerable adults to live as independently as they can. It appears from C's employment record that this is what C did, although there is a suggestion that she could become impatient or otherwise reactive to challenging behaviour. She is only human. Support Workers are however required to remain mindful at all times about what it is that makes the adult in their care vulnerable; we are all too often prepared to just use the words "vulnerable adult" without due consideration to the nature of the vulnerability. It is inappropriate to shout or raise one's voice petulantly and impatiently at a vulnerable adult in one's care. There may be mitigating circumstances, and it may be understandable, that this will happen, but when it happens it must fall within the band of reasonable responses of a reasonable employer to dismiss a Support Worker who has so misbehaved, provided they act fairly and reasonably throughout the process. I have found that R did not act fairly and reasonably, and that the dismissal was unfair however, C was at risk of dismissal by her conduct. It would be appropriate to consider whether a reduction to either, or both, the Basic Award and Compensatory Award ought to be made because of C's contributory conduct and (in respect of the Compensatory Award) to reflect the risk facing her.

15. There is to be a remedy hearing. Respective representatives addressed me briefly on contribution and Polkey, but I do not consider that I am in a position to give any indication of a reduction in award at this stage. It is significant that Ms Johnson considered the behaviour reprehensible to the extent that, on advice, she would have dismissed the claimant, Mr Tomlinson's reading was such that he felt dismissal may be appropriate, and Mr Price had a firm view that a Support Worker should never shout at a Service User. On balance, I have found that C raised her voice petulantly to CG. She put herself at risk of disciplinary sanction with the potential for dismissal.

16. I will issue case management orders under separate cover in due course in preparation for a remedy hearing. I trust that the parties will discuss this judgment and they may be able to resolve some or all remedy issues between themselves. Any unresolved issues will be determined at a remedy hearing which is yet to be listed.

Employment Judge T.V. Ryan

Date: 13 September 2023

JUDGMENT SENT TO THE PARTIES ON 15 September 2023

FOR THE TRIBUNAL OFFICE Mr N Roche