



EMPLOYMENT TRIBUNALS

Claimant: Ms Dyna Del Campo

Respondent: Really Flexible Care Ltd

Heard at: Watford

On: 19-22 June 2023

Before: Employment Judge Bansal (sitting alone)

Appearances:

For the Claimant: Miss Leslie Millin (Counsel)

For the Respondent: Miss Sarah Jane Wood (Litigation Consultant)

RESERVED JUDGMENT

The Claimant's claims of unfair dismissal and wrongful dismissal are well founded and succeed.

REASONS

Background

1. The claimant commenced employment with the Respondent on 16 January 2017, and was summarily dismissed for her conduct on 8 May 2020.
2. The claimant contacted ACAS on 19 May 2020 and an early conciliation certificate was issued on 3 June 2020.
3. The claimant presented a Claim Form (ET1) on 21 June 2020 claiming unfair and wrongful dismissal. The respondent submitted its response (ET3) on 24 August 2020 contesting the claims asserting the claimant was fairly dismissed for gross misconduct, and in the alternative the dismissal was for a SOSR reason, arising from its duty to protect service users from risk of harm and the damage caused to relations with her colleagues.
4. At this hearing the claimant was represented by Miss Leslie Millin of Counsel (instructed under the Direct Access Scheme) and the respondent by Miss S J Wood, (Litigation Consultant)

List of issues

5. The parties had not agreed a List of issues. Both parties produced separate

Lists. The main difference being Miss Millin's draft List only mentioned the reason for dismissal as conduct. Whereas Miss Wood's draft List included an alternative reason for dismissal to include a Some Other Substantail Reason ("SOSR"). In my reading, I noted the respondent in the Amended Grounds of Resistance had pleaded the principal reason as conduct and in the alternative a SOSR, arising from its duty to protect service users from risk of harm and the damage caused to relations with colleagues. Accordingly, the issues to be determined were as set out below.

6. I clarified with the parties at the outset that I would deal with liability first, and remedy, if appropriate, time permitting.

Unfair dismissal

7. What was the reason or principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1)&(2) of the Employment Rights Act 1996 ("ERA")

The respondent asserts the reason was conduct, which is a potentially fair reason. In the alternative, it is asserted the dismissal was for a SOSR reason. The tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

- 8.1 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The tribunal will usually decide, in particular, whether:
 - 8.2 there were reasonable grounds for that belief;
 - 8.3 at the time the belief was formed the respondent had carried out a reasonable investigation;
 - 8.4 the respondent otherwise acted in a procedurally fair manner;
 - 8.5 dismissal was within the range of reasonable responses.
- 8.2 If the reason is a SOSR, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant.

Remedy

9. If the claimant was unfairly dismissed and the remedy is compensation, the tribunal will decide;
 - 9.1 What financial losses has the dismissal caused the claimant?
 - 9.2 Has the claimant taken reasonable steps to mitigate her losses?
 - 9.3 If not, for what period of loss should the claimant be compensated?
 - 9.4 If the dismissal was procedurally unfair, what adjustment, if any should be made to any compensatory award to reflect the possibility that the claimant would still have been fairly dismissed or have been dismissed in time anyway (**Polkey**)

Contributory fault

- 9.5 If the claimant was unfairly dismissed, did she cause or contribute to dismissal by any blameworthy or culpable conduct?
- 9.6 If so, would it be just and equitable to reduce the basic and

compensatory award. If so, by what proportion pursuant to s122(2) & s123(6) ERA.?

- 9.7 Did either party fail to comply with a relevant Acas Code, and if so, should any compensation awarded be increased or decreased (by up to 25%).

Wrongful dismissal/Notice pay

10. Did the claimant fundamentally breach the contract of employment by her conduct?

- 10.1 If the claimant was wrongfully dismissed, how much is she entitled to by way of damages for breach of contract?

The Hearing

11. This was a remote hearing by Cloud Video Platform which had been consented to by the parties.
12. I was provided with an agreed hearing bundle, which consisted of 231 pages. I found the size of bundle to be excessive and contained irrelevant documents, to the legal issues to be determined. I therefore emphasised to both representatives that I would not read all of the documents contained in the hearing bundle but that I would read documents referred to me and that I may also read additional documents that have not been cross referenced in any statement. During the course of the hearing, the respondent disclosed an additional document, namely an email from Diane Rickhuss of Bedford Borough Council to the respondent Jodi Smith and others. This was a relevant document and was numbered as page 232.
13. I was presented with written statements from the claimant, and her witness Mr Samuel Kamsonga (Registered Manager- the claimant's Line Manager). The respondent presented statements from Mr Kiran Gohel (Human Resource Manager- who dismissed the claimant); Mrs Jodi Smith (Multi-Site Registered Manager); Mr O A Badmus (Deputy Manager); Mr Ebenezer Ldowu (Senior Support Worker); Mr Joseph Nsabimana (Support Worker) and Judy Muigai (Support Worker), who did not attend to give evidence.
14. The witnesses gave oral evidence and were cross examined. I also asked questions of the witnesses to help clarify matters.
15. At the conclusion of the parties' evidence, both representatives provided written submissions which they expanded upon orally. Due to lack of time, I reserved my decision, and we agreed a provisional date for a Remedy Hearing via CVP on 16 October 2023 at 10.00am.

Findings of fact

16. Having considered all of the evidence, on the balance of probabilities I have made the following findings of fact. Any reference to a page number is to the relevant page number in the bundle.

17. The respondent is a care home business which provides a care service to children and adults who are mentally and physically vulnerable and with challenging behaviours. The respondent is regulated by the Care Quality Commission (CQC). The respondent currently employs some 100 employees, across its 5 homes, which are, Penniston Barn, Bungalow, Avon House, Woodland House and Wadelow Grange. The sole Director of the respondent at the date of this hearing is Sureka Chouhan.
18. Mr Gohel is the respondent's Human Resource Manager and has been employed by the respondent for some 11 years. His role is to deal with employee issues and to oversee the day-to-day operations of the business, and the financial management of the business. He admitted that he has no qualifications in HR, and that the respondent is supported by an external employment law provider Peninsula in dealing with employee issues. He is the dismissing manager.
19. The claimant commenced employment with the respondent on 16 January 2017 as a Support Worker at Wadelow Grange. On 11 September 2017, she became Senior Support Worker, based at the Bungalow. On 7 July 2019, she was promoted to Deputy Manager and was based at Avon House, until her dismissal. The claimant reported to Mr Samuel Kamsonga, Registered Manager. At the date of the claimant's dismissal, Avon House cared for 4 service users which included the service user subject of the complaint, who was had severe learning difficulties and required one to one care.
20. The claimant, in her witness statement stated she was not issued with a contract of employment or a job description. In the bundle, the respondent included a copy of a signed contract of employment issued on 3 October 2017 and signed by the claimant on 11 October 2017. (p130-131) The tribunal is satisfied the claimant was issued with this contract of employment, but not with a job description, as none was produced and neither did the respondent maintain that one was issued.
21. At the date of the claimant's dismissal she worked at Avon House. Her contractual working hours were 40 hours per week between Monday and Sunday, depending on the shift rota. The notice period in the Contract of Employment is stated to be 1 week for each complete year. The contract of employment confirmed *"the disciplinary rules form part of the contract of employment. These are contained in the Employee Handbook which you should refer to."* (p131)
22. The bundle contained a copy of the Employee Handbook. The version is dated 30 June 2021 and states it is prepared by Citation Ltd. (p132-173) The respondent has not disclosed the Employee Handbook current at the date of the claimant's dismissal.
23. In summary the Disciplinary Procedure in the Employee Handbook states that no disciplinary action will be taken without a full investigation; employees may be suspended on full pay while investigations are carried out; the employee will be given reasonable notice of disciplinary hearings and will be entitled to be accompanied at the hearing; and be given the right of an appeal. (p156-157)

24. In terms of gross misconduct, the Rules of Conduct section provides gross misconduct will result in summary dismissal. The list of conduct offences, which is not an exhaustive list does not expressly include, abuse of service users as an act of gross misconduct. However, it lists using threatening or offensive language or behaviour towards anyone during working time including towards service users other employees or workers; deliberate falsification of records and deliberate failure to comply with the published rules of the company including those covering safeguarding. (p158-159)

Claimant's work record

25. The claimant's work history showed she had in the past been moved to the Barn for some 3 months due to complaints about her conduct with staff members. Following there has been no further recorded issues, and she returned to work at the Bungalow.
26. The claimant confirmed she had supervisions with her Line Manager, Mr Kamsonga at least every six weeks during her employment. The claimant disclosed her supervision records for December 2019 and February 2020, which showed positive feedback and with no concerns. At the date of dismissal the claimant had a clean disciplinary record.
27. On 29 January 2020, an inspection was carried out by CQC. In their report, the claimant and Mr Kamsonga were recognised for their respective roles. Further, on 30 January 2020, Miss Jodi Smith in her role with CQC, complimented the claimant and Mr Kamsonga for the positive feedback following the CQC inspection. **(p223)**
28. Mr Gohel, the respondent's Human Resource Manager, in his statement suggested that as Samuel Kamsonga managed the claimant, any complaints which may have been made were covered up by him, and that the supervisions were tainted and biased due to their being in a personal relationship. Some of the respondent witnesses in their statements also make the same claims, even though they admitted in evidence that they had not raised these concerns, with management. Both the claimant and Samuel Kamsonga, strongly denied being involved in a relationship. Further, Mr Kamsonga also denied covering up any concerns about the claimant. I make no finding on these claims.

19 March 2020 – Suspension

29. At the date of the claimant's suspension there were no recorded concerns about the claimant's conduct.
30. On 19 March 2020, the claimant was suspended on full pay by Miss Jodi Smith at a face to face meeting held at the Bungalow. There is a dispute between the claimant and Miss Smith about the reason given for the suspension.
31. Miss Smith is the respondent's multi-site Registered Manager, having re-joined the respondent in March 2020 after a year's absence, during which

time she worked as an Inspector with CQC. Miss Smith first joined the respondent on 1 August 2012 in the role of Deputy Manager and then became a multi-site Registered Manager in 2014.

32. Miss Smith in her evidence explained that on 19 March 2020, (which was her second day back with the respondent), she received a telephone call from Miss Kelly Holman of Bedford Borough Safeguarding Team at Bedford Borough Council ("Council") who informed her that a complaint had been made to the safeguarding team against the claimant verbally abusing residents, bullying staff, falsifying records and medication errors. She explained that the safeguarding concern was raised by the mother of a service user at Avon House who had informed the Council that she had received an anonymous call from a carer employed at Avon House who was concerned for the welfare of her child. Miss Smith in her witness statement sets out 9 specific allegations about the claimant's conduct. These mirror the allegations in the Council Report, dated 19 May 2020. (p55)
33. The claimant disagrees with Miss Smith's evidence that she was given full details of her suspension. The claimant claims she was only told that an anonymous complaint had been received which related to a safeguarding issue and because of this she was being suspended. She denies being told that the complaint was about her bullying staff, verbally and psychologically abusing residents, making medical errors and falsifying records.
34. Mr Samuel Kamsonga, the claimant's Line Manager, who was present when the claimant was suspended by Miss Smith does not give his account of the suspension in his witness statement. In evidence, however, Mr Kamsonga confirmed that the discussion with Miss Smith and the claimant was less than 5 minutes. He recalls, the claimant was out with a service user, when Miss Smith arrived at the Bungalow looking for the claimant. She told him, "*I don't think she is going to like this*" She said that an anonymous call had been made by someone to the parent of a service user, about the claimant's conduct. The claimant returned to the Bungalow within a few minutes, at which point Miss Smith informed the claimant that an anonymous call had been received concerning a safeguarding issue and that she was suspending her and needed her to leave the home. Miss Smith gave her no further details about the complaint. The claimant, speculated who it could be, from the 4 service users at the Bungalow. The claimant did speculate if it was the parents of a particular service user. Miss Smith did not say anything further and told the claimant to leave which she did do.
35. The respondent has not disclosed in the bundle a copy of the suspension letter, which may have assisted the tribunal with the reason for the suspension. The claimant is adamant that she did not receive any letter. Miss Smith stated after suspending the claimant she informed Mr Gohel, of the claimant's suspension, and that he would have issued the suspension letter. In evidence, Mr Gohel, said he did issue a suspension letter but could not find it on his computer system. I find no suspension letter was either prepared or sent to the claimant. Had this been sent the claimant would have received it. Also the respondent would have a copy on file either in paper or electronic form. Further, the respondent could have which it has not done so, disclosed the metadata information from the computer or laptop used to compile the letter. In the absence of this evidence, I prefer the claimant's evidence

supported by Mr Kamsonga that the reason given for her suspension by Miss Smith was about an anonymous call received concerning a safeguarding issue. No specific details about substance of the concern was communicated to the claimant. The Claimant was in the dark about the nature of the safeguarding complaint.

36. On 20 March 2020, the claimant had a text message exchange with Miss Smith about her work colleagues contacting her about her suspension, which she understood would be confidential. Miss Smith assured the claimant that the staff had not been told anything and did not know how they knew about her suspension. (p81)

The Investigation by Bedford Borough Council

37. On receiving the complaint, the Council, in accordance with its statutory powers under the Care Act 2014, put in place an Adult Protection Plan, to deal with the complaint, and instigated a safeguarding investigation enquiry. Miss Smith was appointed to assist in the investigation process. Her role was limited to provide documents to the Safeguarding team; to liaise with and to arrange interviews with the employees and others and to attend at the Conference Meetings. She confirmed she was not personally involved in the actual investigation of the complaint or in the decision making process. Miss Smith confirmed that following each meeting with the Safeguarding team, she updated the respondent management team, which included the director and Mr Gohel.
38. The investigation was led by the Council Safeguarding team, which included Miss Homan Lead Investigator and Social Worker, and Dianne Rickhuss Chair and Advanced Practitioner. The investigation took the form of interviewing current employees; agency workers and some ex-employees; the claimant and Mr Kamsonga.

The Council Report

39. The respondent disclosed in the hearing bundle the Council Report. ("Report") (p53-75). This is the report the respondent has relied upon in support of the decision to dismiss the claimant.
40. The Report has been compiled after the Case Conference Meeting held by telephone on 5 May 2020. This report was sent out for a quality check on 12 May 2020, and was issued on 19 May 2020. In attendance at this conference were Miss Smith, Miss Homan, Diane Rickhuss, the parents of the service user; the Nurse assessor and Class Teacher.
41. The Report states that the safeguarding enquiry was trying to establish if the service user was subject to psychological and emotional abuse.
42. The safeguarding enquiry states that it was set up as a safeguarding concern was received on 17 March 2020, about the conduct of the Deputy Manager (i.e claimant) of a service user. The initial complaint had been made anonymously by telephone, by an agency worker at Avon House (working on a temporary visa and who was due to return home), to the mother of the service user, about the claimant's conduct towards the

service user and her concerns about his welfare and safety. This caused the mother of the service user to raise her concerns with the Council.

43. The concerns about the claimant's conduct were; her screaming and shouting at staff; making staff cry; attitude and conduct towards staff members generally; swearing at staff members in the presence of service users. In relation to the service user these were; not liking the service user and his mother; targeting the service user to make him unsettled; shouting and screaming in front of the service user.
44. The other concern was that the claimant and Mr Kamsonga were setting up a business together, and if anyone said anything against them they were picked on; and that the claimant instructed a staff member to falsifying documents.
45. As part of his enquiry the police were informed of this matter. The Report confirms that from a police perspective there was no evidence that a criminal offence had been committed and they ceased their involvement in these safeguarding inquiry. (p58)
46. The claimant was interviewed by the Safeguarding team. The Tribunal has not been provided with the notes of this interview or any notes of interviews with others. Miss Smith confirmed in evidence that these have not been disclosed by the Council. The Council Report provides a summary of the interview with the claimant. (p72-74) In summary, the Report states, the claimant admits that she is loud and has a high pitched voice which can sound like she is shouting when she is not. She rarely works with the service user and denies saying to him that she did not like his mother. She denies falsifying any paperwork.
47. The Report covers, other issues about her conduct relating to a parking incident; the non-allocation of shifts to staff and threatening the staff about losing their jobs.
48. The Report does not record any discussion that the claimant was informed about the specific allegations and substance of the concerns made by the anonymous caller or the parent of the service user and neither that she was directly questioned about the specific allegations. The Report confirms "the questions posed was in broader terms and was asked to share information based on what was asked."(p72)
49. Mr Kamsonga was also interviewed. His interview confirms that the claimant is loud but did not shout. When the claimant was located at the Barn, there were no concerns received about her performance. Staff members were referred to the claimant because she was in charge of allocating shifts and which she did.
50. The Report, confirms that in total fifteen employees of the respondent were interviewed, via telephone. Three employees said they did not often work at Avon House, and could not comment on the practises within the home. Five employees reported that the claimant gave them less shifts and the claimant would not engage with them. They reported this to Head Office but did not receive any response. They did not like to work with the claimant as they

feared they would lose their jobs. Four employees said they had been informed by others that they had heard the claimant tell the service user that she hated his mum, and that she would shout at the service user when he tried to take his food to the computer room, which he did not like. 8 employees reported that the claimant shouts and swears at service users regularly, either having witnessed an incident or being informed by other staff. Five employees reported no concerns and said she is friendly to the service users and staff. Two employees reported that the claimant asked staff members to complete paperwork that was not completed such as incident reports and night time reports and one employee was told to change the notes but refused to do so.

51. The parents of the service user were also interviewed. It is recorded, they observed that since attending Avon House, the service user had been displaying an increase in challenging (destructive and aggressive) behaviour, heightened anxiety and OCD type behaviours.
52. The outcome of the enquiry was that the allegation of psychological/emotional abuse of the service user was unanimously upheld.
53. Although Miss Smith has confirmed in evidence that her role in the enquiry was limited and was not involved in the decision process, the Report states, *“Jodi Smith reach the same conclusion because there have been too many responses highlighting similar concerns it appeared there was staff segregation in favour of or against Dyna and so the issues have been difficult to pick apart it was acknowledged there have been failings to degree and the something went on”* (p64)
54. The Report also states, *“Jodi advised the respondent will be completing their own disciplinary investigation for both the claimant and Samuel. From the information received Dyna may be disciplined under gross misconduct and Samuel is likely to be going through the capability route but we await the outcome of these internal processes.”* (p62)
55. The agreed action to be taken by Miss Smith specifically relevant to the claimant as recorded, is *“to commence internal investigation processes in regards to Dyna Del Campo and Samuel Kamsonga. Considerations in relation to Dyna’s position with Really Flexible Care - a report to be made to DBS by Really Flexible Care in regards to Dyna.”*
56. *The report concluded that “The protection plan ended on 5th May this means that Jodi Smith is able to commence internal investigations and processes as per the actions from the Case Conference”.* (p64)

5 May 2020

57. In evidence the claimant stated that just before she was notified of her dismissal she received a call from the Director Sureka Chauhan, who advised her to resign otherwise she would not be able to work in care again. She said, she was told there may be a possibility of working again with the respondent in the future. The claimant does refer to this in her appeal letter. (p86) the claimant was not challenged about this conversation in cross examination.

58. On the same day, (i.e 5 May) the claimant had a text message exchange with Miss Smith. The first text was sent by the claimant at 14:26hrs in which she States, *"Hello Jody, sorry to bother you please is there any update yet. Thank you."* Miss Smith, replies, *" Hello, Dyna, unfortunately the findings and meeting have found the alleged abuse to be upheld (meaning true) and multiple concerns. This does mean you cannot return to work at present until our employment law service give further guidance on next steps. I'll contact you regarding next steps this week."* The conversation is ended with Miss Smith stating, *" Hi Dyna, no we can't share the investigation report from safeguarding when it's received as it is confidential. The main outcomes of the meeting will be shared with employment law and it will be recorded on disciplinary records though you can see unclassified reasons (no names etc)."*(p82)

Dismissal – 8 May 2020

59. By letter dated 8 May 2020, prepared and sent by Mr Gohel, the claimant was summarily dismissed and given the right of appeal. The letter states, as follows;

" Further, to your suspension and disciplinary action, I am writing to you to inform you of my decision.

The matters of concern were;

- *Safeguarding concerns upheld in recent inspection concluding on 05/05/2020 that DDC had verbally and psychologically abused service users.*
- *Multiple accounts of unprofessional conduct with professionals involved at services. Including telephone calls meetings and failure to provide up-to-date reports when requested.*
- *Multiple reports of unfair and intimidating treatment of staff members in the company. This included control of staff members working hours verbal abuse towards staff members and unfair treatment.*

" I have decided that your conduct has resulted in a fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship. The appropriate sanction to this breach is summary dismissal I have referred to our standard disciplinary procedure (or ACAS Code of Practice) when making this decision which does not permit a recourse to a lesser discipline sanction. You are therefore dismissed with immediate effect. You are not entitled to notice or pay in lieu of notice.

You have the right to appeal against my decision and should you wish to do so you should write to Head Office within seven days of receiving this letter giving the full reasons why you believe the disciplinary action taken against you was inappropriate or too severe. (p83-84)

60. In evidence, Mr Gohel made the following admissions;

- (a) he drafted the dismissal letter using a template letter he had;
- (b) did not conduct its own internal investigation in accordance with the respondent disciplinary procedure because as the allegations were distressing he did not think the family of the service user could withstand

- another investigation;
- (c) did not want to undermine the Council investigation;
 - (d) that another investigation by the respondent would be identical but not as independent as the one conducted by the Council. *“It would be an exercise in futility to just repeat the same exercise.”*
 - (e) considered the Council investigation was thorough enough to be relied on.
61. Mr Gohel confirmed that during the Council investigation, he was not provided with any interview notes or statements or other documentation. He was kept informed by Miss Smith about the progress of the Council enquiry, and had read the Report before he reached his decision to dismiss the claimant. This point is surprising, in view of the fact the Council report is dated 19 May 2020. The Report was sent for review on 12 May 2020, and was not made available until this date. When questioned about the timing of the report, Mr Gohel then said he understood he had received the report by email from Diane Rickhuss before he made his decision. During cross examination, he asked to check his emails, which I allowed him to do in the break period. He was unable to find the email enclosing the report. Instead he disclosed an email dated 6 May 2020 from Diane Rickhuss sent to Miss Smith and others. This was added as page 232. This email makes no mention to the report or that it was attached. It referred to actions and decisions arising from the initial case conference. I therefore conclude that contrary to Mr Gohel’s re-collection, he is mistaken on the point. Given the date of issue of the report this could not have been in his possession at the date of dismissal. In his decision making process he relied solely on what he was informed by Miss Smith.
62. In reply to my questions Mr Gohel, accepted that (i) that the claimant should have been informed of the precise allegations made against her for which she was dismissed; (ii) should have followed the respondent’s disciplinary procedure and could have undertaken an internal investigation after the outcome of the enquiry; (iii) he was familiar with the Acas Code of Practice on dismissal; (iv) the claimant’s dismissal was unfair as the respondent did not follow any procedure.

Miss Smith’s evidence

63. Miss Smith was cross examined at length. In summary, she confirmed that she had received the Report on 6 May 2020 by email. She offered no explanation why this email was not disclosed by the respondent in the bundle or during the course of the hearing. She updated the Director and Mr Gohel, after each strategy meeting with the Council; She did not make the decision to dismiss the claimant but did have discussions with Mr Gohel and the Directors and HR Team, in which she did recommend dismissal of the claimant on the understanding she could not be employed by the respondent; she is aware of the Acas Code of Practice and did not accept there has not been a fair procedure; she was of the view that had a formal disciplinary procedure been followed the outcome would have been the same as the Council enquiry was thorough.

Appeal

64. By letter dated 13th May 2020 the claim appealed the dismissal with the letter

addressed to the Directors.(p85-87) It is a detailed letter, in which she makes points and raises a grievance surrounding her suspension. In this letter, the claimant, sets out her grounds of appeal, which in summary are that; (i) the decision was unfair and wrongful; (ii) she was not told of the precise allegations against her; (iii) she did not receive a letter of suspension or details of her suspension; (iv) the respondent failed to carry out any investigation and disciplinary hearing; (v) she denied verbally or psychologically abusing any service user; (vi) no concerns about her performance or conduct had been raised in the last four years either formally or informally; and (viii) that the sanction of dismissal was excessive and inappropriate.

65. Mr Gohel replied to this appeal letter by e-mail dated 18th May 2000, in which he wrote, “ *Thank you for your e-mail and letter of appeal. Unfortunately I cannot take your appeal any further as we were guided by Central Bedfordshire Council to take the necessary action with regards to your disciplinary. Furthermore you have been placed on the disclosures barring list which prevents you from working in the care sector.*” (p88)
66. The respondent provided no documentary evidence to support that Bedfordshire Council prohibited the holding of an appeal process, or that the claimant was no longer able to work in the care sector.
67. By email dated 6 July 2020, the claimant responded to Mr Gohel’s email of 18 May 2020, in which she confirms making a tribunal application about her dismissal, and that the statement she had been placed on the disclosure barring list to be untrue and defamatory.(p89)
68. On 22 May 2020 Miss Smith made a referral to the Disclosure & Debarring Service about the claimant. (p90) In evidence the claimant confirmed that since her dismissal she has not been barred from working in the care sector.

Relevant Law

69. **Section 98(1) and (2) of ERA** provide that:
“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show;
(a) the reason (or, if more than one, the principal reason) for the dismissal; and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it -(b) relates to the conduct of the employee.”

Section 98(4) of ERA provides that:

“(4) Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)
(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) employer acted reasonably or unreasonably in treating it as a sufficient reason for

dismissing the employee; and
(b) shall be determined in accordance with equity and the substantial merits of the case.”

70. A reason for dismissal has been described as a “set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.” **Abernethy v Mott, Hay and Anderson (1974) ICR 323, CA.**
71. What is relevant is the evidence available to the employer at the time of dismissal. **CRO Ports London Ltd v Wiltshire EAT 0344/14**
72. If there are no reasonable grounds for a belief relied on as an important part of the reason for dismissal, the employer may be held not to have acted reasonably in all the circumstances in relying on it. **Smith v City of Glasgow District Council (1987) 79 HL.**
73. In conduct cases the tribunal must have regard to the test set out in the case of **British Home Stores Ltd -v- Burchell [1978] IRLR 379** EAT, namely:
(i) did the employer believe that the employee was guilty of misconduct;
(ii) did the employer have reasonable grounds for that belief;
(iii) had the employer carried out as much investigation into the matter as was reasonable in all the circumstances.
74. The first question goes to the reason for the dismissal. The burden of showing a potentially fair reason is on the employer. The second and third questions go to the question of reasonableness under Section 98(4) ERA and the burden of proof is neutral.
75. It was held in the case of **Sainsbury’s Supermarkets Ltd v Hitt [2003] IRLR 23 CA** that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason.
76. **In Shrestha v Genesis Housing Association Ltd [2015] EWCA 94** it was made clear that the investigation should be looked at as a whole when assessing the question of reasonableness.
77. The tribunal should be satisfied as to the appropriate thoroughness of the investigation in career ending cases, as in this case, or where some form of professional status is in jeopardy, where the consequences to the employee of a finding of guilt is likely to be severe. In **A v B (2003) IRLR 405**, the EAT (Elias J) presiding held the relevant circumstances include the gravity of the charge and the potential effect on the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or chosen field of employment is potentially opposite.
78. In the case of **Taylor v OCS Group Ltd [2006] EWCA Civ 702** tribunals were reminded they should consider the fairness of the whole of the process. They will 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 an early stage. Tribunals should consider the procedural issues together with the reason for dismissal. The two impact on each other and the tribunal's task is to decide whether in all the circumstances of the case the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.

79. In **Gallagher v Abellio Scotrail Ltd EAT 0027/19**, on appeal, the EAT held that this was a rare case where the tribunal was entitled to the conclusion that a dismissal procedure could be dispensed with because it was reasonably considered to be futile in the circumstances.
80. It is not for the tribunal to substitute its own view of what was the right course for the employer to adopt. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band, it is unfair (**Iceland Frozen Foods Ltd v Jones 1982 IRLR 439 EAT**)
- 81 **In Leach v Office of Communications 2012 ICR 1269 CA** Lord Justice Mummery noted that breakdown in trust and confidence is not a convenient label to stick on any situation in which the employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever a conduct reason is unavailable or inappropriate.
82. The ACAS Code of Practice :Disciplinary and Grievance Procedures (2015) ('the Code') which tribunals are required to take into account when considering relevant cases states, at Paragraph 5 that 'It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of a investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing. 'It also says that in misconduct cases, where practicable ,different people should carry out the investigation and disciplinary hearings. Paragraph 27 states that in relation to appeals that any appeal 'should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case.'
83. In the event of an unfair dismissal the tribunal must determine what would have been likely to have occurred if a fair procedure had been adopted in accordance with the guidance in **Software 2000 Ltd v Anderson 2007 IRL 569**

Wrongful dismissal

84. **Section 3(2) ERA and Article 3 of Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 SI 1994/1623** gives the Tribunal jurisdiction to hear claims for damages for breach of contract of this kind provided the claim arose on termination of the contract of employment and has been brought in time.

85. Subject to any defining terms in the contract of employment, summary dismissal is only permissible if the claimant's conduct amounted to a repudiatory or fundamental breach of contract. The employer must show that the employee behaved in such a way as to fundamentally undermine the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract). The conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence (a serious dereliction of duty) which undermined trust and confidence.
86. In accordance with **s86 ERA**, employees are entitled to one week's notice for each complete year of service unless dismissed for gross misconduct. If an employee of 18 proves that they have been dismissed (constructively or otherwise) without due notice, this will give rise to a claim for damages for wrongful dismissal.

Submissions

87. I have considered the written submissions both parties fully and briefly summarise them within this judgement.

Claimant's submission

88. Miss Millin for the claimant submits that the principal reason for the claimant's dismissal is that of gross misconduct, as pleaded. However, whatever the reason for dismissal the process was fundamentally flawed because no procedure was followed at all, and that the dismissal fell far outside the range of reasonable responses. Accordingly, the finding should be that the dismissal was substantively and procedurally unfair.

Respondent's submission

89. Miss Wood for the respondent submits that whether the reason for dismissal is misconduct or for a SOSR, this could justify the decision to dismiss the claimant. It is accepted that a fair procedure was not followed however this does not render the dismissal unfair, as in this case it would have been futile as the outcome would have been no different. On the facts, the dismissal was fair as it was within the band of reasonable responses.

Conclusions and analysis

90. I have applied the relevant law to the findings of fact to determine the issues, and have reached the following conclusions.

What was the principal reason for dismissal

91. There is no dispute that the claimant was dismissed.
92. The Respondent's pleaded case as set out in the Amended Grounds of Resistance, and advanced in this hearing is that conduct is the principal reason for the dismissal, and in the alternative for some other substantial reason, to protect service users from risk to their wellbeing given the findings made by the Council. (p49).

93. I have given consideration to the contents of the dismissal letter to ascertain what facts and information did Mr Gohel know at the time he took the decision to dismiss the claimant. As stated above, (Para 61) I have made a finding that he did not have a copy of the Report before him when he made his decision, but that he relied on the information imparted to him by Miss Smith, namely that the Council had unanimously upheld the complaint of emotional and psychological abuse of a service users by the claimant. (p64). This is expressly stated as a conduct reason in the dismissal letter.
94. In addition, Mr Gohel has referred to two further conduct complaints, namely that of (i) unprofessional conduct with professionals involved at services. Including telephone calls meetings and failure to provide up-to-date reports when requested and (ii) reports of unfair and intimidating treatment of staff members in the company. This included control of staff members working hours verbal abuse towards staff members and unfair treatment. These complaints were not the reason for the enquiry and neither has the Report made any determination on these except for summarising what the employees said in interview during the investigation process.
95. I conclude that Mr Gohel (based on what he was informed by Miss Smith) believed the claimant was guilty of misconduct. This is what was operating on his mind at the time. I therefore find that conduct was the principal reason for the claimant's dismissal. Conduct is a potentially fair reason for dismissal under section 98(2)(b) ERA 1996.

Did the Respondent have a Reasonable grounds for its belief

96. Miss Millin has invited the tribunal to find that the respondent could not have held a genuine belief in the claimant's guilt as this belief could not have been held on reasonable grounds as it did not carry out any investigation into the allegations, and that it could not rely on the Council enquiry as this was not a disciplinary procedure, but an enquiry to consider if any action should be taken to protect the service user.
97. I am satisfied Mr Gohel had a genuine belief in the claimants misconduct in in particular relating to the complaint of causing emotional and psychological abuse, which was the central reason for the suspension and enquiry. This was based on the findings of the enquiry, Mr Gohel was entitled to rely on this information conveyed by Miss Smith who I found had no reason to mislead Mr Gohel as to the findings contained in the Report.

Did the Respondent carry out a reasonable investigation and procedure

98. It is trite law that the employer should carry out such investigation as is reasonable in all the circumstances.
99. It is not disputed by the respondent, that they did not carry out their own investigation and disciplinary process into the claimants alleged conduct in accordance with its own disciplinary procedures, despite Miss Smith confirming to the Council during the enquiry process, that this would be done. The respondent's explanation is that it would have been futile to carry out their own investigation and disciplinary process as the outcome would have been no different and as the Council investigation was thorough. This

failure is a breach of the respondents own disciplinary procedures, the ACAS Code of Practice, and the rules of natural justice. The claimant has been denied the opportunity to know what were the precise allegations; respond to them, make her own representations and challenge the evidence.

100. The allegations, the details of which the claimant has no information about, were potentially career ending. In accordance with the observations of **Elias J, in A v B 2000 IRLR 405** it was important that the respondent took its responsibility seriously and carried out a fair investigation. It was incumbent on the respondent to approach this process with the seriousness and fairness it deserved.
101. The respondent failure to carry out any investigation is a fundamental flaw, which renders the dismissal unfair.
102. Again, on the facts, as no formal disciplinary process was undertaken, and that the claimant's request for an appeal hearing was unfairly and without justification to do so, also renders the dismissal unfair.
103. I reject the respondents argument that this was a case where the procedure could be dispensed with because it would have been futile. The respondent has provided no compelling reason to show why it would have been futile. In my judgment, the respondent has failed to take its responsibility seriously and fairly given the threat to the claimant's career.
104. Accordingly, I determine that the decision to dismiss and failure to follow any procedure, is not within the range of responses open to a reasonable employer in the circumstances of this case. I therefore find that the claimant's dismissal was substantively and procedurally unfair for the purposes of section 98(4) ERA 1996

Some other substantial reason

105. I have considered the alternative reason for dismissal put forward by the Respondent. On the facts, I do not find this reason is made out, given the lack of any evidence before this tribunal in support of this reason.

Polkey Principle – s123(1) ERA 1996

106. I have considered what decision the respondent would have reached had a fair procedure been followed.
107. The claimant was not informed of the precise details of the complaints made against her; given an opportunity to challenge the allegations and make her own representations. The evidence provided is limited to the Report, which the claimant has had no opportunity to challenge. The respondent has acted in contravention of its own disciplinary procedure, the ACAS Code and rules of natural justice.
108. Had a fair procedure been followed, the claimant would have been able to make her representations and challenged the allegations for which she was dismissed. The claimant in her witness statement and in oral evidence, has refuted the complaints and given her responses to the allegations.

Had the respondent taken into account the claimant's representatives, I am not convinced there is a realistic prospect that the claimant would have been dismissed fairly. I therefore make no Polkey deduction.

Contributory Fault – s123(6) & s122(2) ERA1996

109. Based on my findings, I am not satisfied the respondent, on the balance of probabilities, has proven that the claimant committed the acts of misconduct as alleged. Therefore, I do not find there is any evidence provided by the respondent to support a finding of blameworthy or culpable conduct to reduce the basic and compensatory award. I therefore make no reduction.

Wrongful dismissal

110. With regard to the wrongful dismissal claim, I have to determine whether or not, and to what extent, the claimant was in fundamental breach of contract by his conduct, entitling the respondent to dismiss without notice.

111. On the facts, and for the reasons stated above, I am not satisfied that the respondent has adduced evidence to prove that the claimant is in breach of contract. The allegations for which the claimant has been dismissed have not been proven. Accordingly, this claim fails.

112. In conclusion, the Claimant's claims are well founded and succeed.

Remedy

113. This case will now proceed to a remedy hearing as listed for 16 October 2023.

Apology to the parties

114. I apologise to the parties for the delay in my writing up this judgment and not informing the parties of my decision timeously.

Employment Judge Bansal
Date: 26 September 2023

Judgment sent to the parties on
27 September 2023

For the Tribunal office