EMPLOYMENT TRIBUNALS

Claimant: Ms P Jones (formerly Gibbins)

Respondent: Rebba Care Limited

Heard at: By video **On:** 6, 7, 8, 9 and 10 November 2023

Before: Employment Judge Harfield
Mr B Roberts
Mr M Lewis

Representation
Claimant: Ms Davies (lay representative)
Respondent: Mr Brotherton (Litigation Consultant)

JUDGMENT

1. The Claimant was unfairly dismissed;
2. The complaint of wrongful dismissal is not well founded and is dismissed;
3. The complaints of age discrimination are not well founded and are dismissed;
4. The successful unfair dismissal complaint will be listed for a remedy hearing.

REASONS

Introduction

1. By way of a claim form presented on 13 November 2022 the Claimant brings complaints of unfair dismissal, wrongful dismissal and age discrimination. Acas early conciliation took place between 25 September 2022 and 6 November 2022.

2. A case management hearing took place before EJ Webb on 28 March 2023. The case was listed for hearing and case management orders were made. Permission was given to the respondent to file an ET3 response form out of time. EJ Webb prepared a list of issues found at page [35] of the hearing file which is the list of issues we had to decide in this case. The relevant parts of the list of issues are set out in the Discussion and Conclusions section of this Judgment below.

3. We made a restricted reporting order and an anonymity order to protect the identity of the residents at the Respondent care home. Those orders remain in place indefinitely.

4. We had a hearing file of documents extending to 255 pages. References in this Judgment in brackets [ ] are to page numbers in that hearing file. We received written statements from and heard oral evidence from the Claimant. For the Respondent we received written statements from and heard oral evidence from Elin Reeve, Russell Reeve, Aly Chadwick, Melissia Chadwick, Libbie Hartley, Jessica Lewis and Dawn Ollier. Due to health reasons there was a particular window in which Ms Reeve was available to give evidence. We are grateful for the parties' flexibility in ensuring that all witnesses could be heard from.

5. We received written and oral closing comments from both representatives. We do not recite those closing comments in this Judgment, but they are incorporated by reference at appropriate places below. We took all closing comments into account in our decision making. We did strive to deliver an oral Judgment, but panel deliberations concluded in the afternoon of day 5 which meant there was insufficient time. We therefore notified the parties that the Judgment would be delivered in writing. Employment Judge Harfield apologises for the delay in handing down this written Judgment.

Summary of the law

Unfair Dismissal

6. Section 94 Employment Rights Act 1996 ("ERA") gives an employee the right not to be unfairly dismissed by their employer. Section 98 ERA provides, in so far as it is applicable:

> *"(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…*
>
> *(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) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

7. Under section 98(1)(a) of ERA it is for the employer to show the reason (or the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the

employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee.

8. The reason or principal reason for a dismissal is to be derived by considering the factors that operate on the employer's mind so as to cause the employer to dismiss the employee. In Abernethy v Mott, Hay and Anderson [1974] ICR 323, it was said:

> *"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*."

9. In considering whether or not the employer has made out a reason related to conduct, the tribunal must have regard to the test in British Home Stores v Burchell [1980] ICR 303. In particular, the employer must show that they believed that the employee was guilty of the conduct. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in all the circumstances.

10. The tribunal must have regard to the guidance set out in the case of Iceland Frozen Foods v Jones [1982] IRLR 439. The starting point should be the wording of section 98(4) of ERA. Applying that section, the tribunal must consider the reasonableness of the employer's conduct; not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. 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 that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

11. The band of reasonable responses test also applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23). As part of the investigation an employer must consider any defences advanced by an employee but there is no fundamental obligation to investigate each line of defence. Whether it is necessary for an employer to carry out a specific line of enquiry will depend on the circumstances as a whole and the investigation must be looked at as a whole when assessing the question of reasonableness (Shrestha v Genesis Housing Association Ltd [2015] IRLR 399).

12. The band of reasonable responses analysis also applies to the assessment of any other procedural or substantive aspects of the decision to dismiss an employee for a conduct reason. Any defect in disciplinary procedure has to be analysed in the context of what occurred. Where there is a procedural defect, the question that always remains to be answered is did the employer's procedure constitute a fair process? A dismissal may be rendered unfair where there is a defect of such seriousness that the procedure itself was unfair or where the results of defects taken overall were unfair (Fuller v Lloyds Bank plc [1991] IRLR 336.) Procedural defects in the initial stages of a disciplinary process may also be remedied on appeal provided that in all the circumstances the later stages of the process (including potentially at appeal stage) are sufficient to cure any deficiencies at the earlier stage; Taylor v OCS Group Ltd [2006] EWCA Civ 702.

13. That case also importantly reminds us ultimately the task for the tribunal as an industrial jury is a broad one. We have to ultimately consider any procedural issues together with the reason for dismissal. It was said:

> "*The two impact upon each other and the ET'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. So for example, where the misconduct which founds the reason for the dismissal is serious, an ET might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the ET might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee."*

14. Disparity in treatment by an employer between how it deals with employees in comparable situations can be a relevant consideration. However, whilst an employer should consider truly comparable cases of which it is known or ought reasonably to have known, the employer must also consider the case of each employee on its own merits which includes taking into account any mitigating factors. The tribunal should ask itself whether the distinction made by the employer was within the band of reasonable responses open to the employer or so irrational that no reasonable employer could have made it. Again, here the tribunal should not substitute its own views for that of the employer (London Borough of Harrow v Cunningham [1998] IRLR 256 and Walpole v Vauxhall Motors Ltd [1998] EWCA Civ 706 CA).

15. A finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Generally, to be gross misconduct the misconduct should so undermine trust and confidence that the employer should no longer be required to retain the employee in employment. Thus, in the context of section 98(4) it is for the tribunal to consider:

    15.1 Was the employer acting within the band of reasonable responses in choosing to categorise the misconduct as gross misconduct; and

    15.2 Was the employer acting within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, matters such as the employee's length of service and disciplinary record are relevant as is their attitude towards their conduct.

The relevant legal principles – wrongful dismissal

16. Wrongful dismissal claims are breach of contract claims. The claimant was summarily dismissed without notice. A dismissal in breach of the contractual term as to notice will be wrongful unless it was in itself a response to the claimant's own repudiation of the contract. The burden therefore falls on to the respondent to show that there was a repudiatory breach of contract by the claimant prior to the date of dismissal in order to avoid liability for what would otherwise be a breach of contract.

17. The necessary conduct entitling the employer to dismiss summarily is usually restricted to conduct said to amount to gross misconduct. The classic statement

of what constitutes gross misconduct is in Neary v Dean of Westminster [1999] IRLR 288 that the conduct:

> "*must so undermine the trust and confidence that is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment*."

18. It is therefore a matter for us to assess whether the allegations against the claimant are made out in fact on the balance of probabilities. If they are made out, we have to assess whether their nature and gravity is such as to fall within the ambit and meaning of gross misconduct.

Direct Age Discrimination

19. In the Equality Act 2010 direct discrimination is defined in Section 13(1) as:

> (1) A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Unlike other protected characteristics, it is possible for a respondent to justify direct age discrimination by showing the treatment is a proportionate means of achieving a legitimate aim.

20. Age is a protected characteristic and section 5 says that a reference to person who has a particular protected characteristic is a reference to a person of a particular age group. A reference to an age group is then said to be a reference to a group of person defined by reference, to age, whether by reference to a particular age or a range of ages.

21. The concept of treating someone "less favourably" inherently requires some form of comparison. Section 23 provides that when comparing cases for the purpose of Section 13: "*there must be no material difference between the circumstances related to each case."*

22. It is well established that where the treatment complained about is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes, conscious or subconscious, of the individual(s) responsible; see the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884. The protected characteristic must have had at least a material influence on the decision in question. Unfair treatment by itself is not discriminatory; what needs to be shown in a direct discrimination claim is that there is worse treatment than that given to an appropriate comparator; Bahl v Law Society 2004 IRLR 799.

23. Section 136(2) of the Equality Act provides that:

> "*If there are facts from which the court (which includes a Tribunal) could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred."*

Section 136(3) goes no to say that "*subsection (2) does not apply if A shows that A did not contravene the provisions."*

24. Guidance as to the application of the burden of proof was given by the Court of Appeal in Igen v Wong 2005 IRLR 258 as refined in Madarassy v Nomura International Plc [2007] ICR 867. The Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and

a difference in treatment for the burden of proof to shift to the respondent. They are not, without more, sufficient material from which a tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an act of discrimination. The guidance to be derived from these decisions was approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37. There it was also said that, in practice, if the tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Findings of fact

25. We do not need to make findings on every point in dispute between the parties; only those necessary for us to decide the issues in the case. Where there is a dispute of fact between the parties, we make our findings based on the balance of probabilities. We predominantly concentrate in this section of this Judgment on the factual background findings necessary to determine the unfair dismissal complaint because the approach we have to take when assessing that complaint is different to the other complaints, particularly the wrongful dismissal complaint. In our Discussion and Conclusion section of this Judgment below we do also make further factual findings on discrete points that relate to specific complaints, again particularly relating to the wrongful dismissal complaint and the age discrimination complaints.

The structure of the Respondent

26. The Respondent is a residential care home caring for around 32 residents. Mrs Reeve and Mr Reeve are directors and owners of the home. They generally employ around 27 members of staff including carers and other staff such as cleaners, cooks and laundry staff.

27. The Claimant started working for the Respondent on 18 February 2018 as a carer. In 2021 she was promoted to Senior Carer. The Claimant held a NVQ Level 3 in Health and Social Care Practice.

28. There used to be a registered manager and deputy registered manager for the home, but they were dismissed. It appears that happened some time in 2021 following some problems with a staff Christmas gathering in the home during the Covid19 pandemic. The other staff who attended, including the Claimant, received a written warning. The Respondent has not to date been able to recruit a replacement manager. So Mrs Reeve is the Responsible Individual for the home. It meant that Mrs Reeve was in the home or otherwise contactable most days.

29. When the managers left the Claimant was the only Senior Carer. We consider it likely and find that at the time the Claimant had a close relationship with Mrs Reeve. Mrs Reeve was reliant upon the Claimant to help out in the absence of a manager and deputy manager and when the Claimant was at that time the only senior member of staff. The pressures were such that for a temporary period the Claimant was paid to work additional hours from home on a work's computer. In particular, the Claimant she was drafting care plans for an upcoming inspection. There was, at least at that time, an intention that the Claimant would continue to progress with her qualifications and career. Her appraisal from 7 September 2021 [177] shows the Claimant aiming, with support, to complete her NVQ level 5.

30. At some point two other Senior Carers were appointed. One was "Debbie" said to be in her mid 40s. The other was Ms Lewis who has about 15 years experience working in the care industry and is in her mid 40s. Since the events in question

Ms Lewis has moved on and is working elsewhere. There is a dispute about whether Melissia Chadwick was also at the time a Senior Carer or an Advanced Practitioner training to be a Senior Carer. Melissia Chadwick had an NVQ2. We have ultimately found that Melissia Chadwick was an Advanced Practitioner at the time. We did note that the first time it had been suggested by the Respondent that Melissia Chadwick was an Advanced Practitioner, not a Senior Carer, was in Melissia Chadwick's oral evidence. We also noted, amongst other evidence, that Melissia Chadwick reported describing herself to a resident as being a senior. However, we accepted that as Ms Chadwick was training to be a Senior Carer and had, in effect, a status between Carer and Senior Carer, that there was probably a tendency for people to just refer to her as a Senior Carer. That would have included Ms Chadwick's own interactions with the resident in question, in circumstances where she was just trying to resolve the resident's concerns. Ultimately, we considered that Melissia Chadwick would best know her own career history, and we accepted her evidence about her job title at the relevant time.

31. There is also a dispute about whether the Claimant was on a level playing field with other Senior Carers/Melissia Chadwick. It is relevant to the issue of whether the Claimant was "in charge" of the home on 17 June 2022. On that day the Claimant and Melissia Chadwick were working. Aly Chadwick and Ms Hartley were also working as Carers. The Claimant asserts that she was not in charge on that day and that all Senior Carers, when they worked on the same shift, had equal responsibilities and were on an equal footing. She says that Melissia Chadwick was equally responsible for the home that day. Indeed, the Claimant asserts that Melissia Chadwick was more responsible than the Claimant for the residents in the garden on the basis that Melissia Chadwick was in the garden with the residents whereas the Claimant says she was not as she had to attend to other duties. These are points that were disputed in the disciplinary process and within the Tribunal hearing before us.

32. Ms Lewis' evidence was that the Claimant would have been in charge in the home on 17 June and the other carers on shift that day would not have much say. She said the Claimant's attitude was very much that what she said would go with the youngster's. Ms Lewis' evidence was that the Claimant thought that she ran the home. She said she had previously overheard the Claimant on the phone saying she was the manager, and the Claimant would want to take the lead with matters such as social workers and doctors' visits (albeit that did not mean that others did not on occasion do them). Ms Lewis said that when she and the Claimant were on duty together they worked jointly as Senior Carers. Ms Lewis said in evidence that the Claimant would not say anything to Ms Lewis as she was older and had more experience. The evidence from the other staff that we heard was likewise that the Claimant was in charge, had a forceful personality, and they had to do what she said which included the on the day in question.

33. Mrs Reeve's evidence was also that the Claimant was known and accepted as being in charge by other staff members, including when on duty with Ms Lewis due to the Claimant's qualifications, the perception of other staff, and the Claimant's experience. She said that she had, in effect, asked the Claimant to be her deputy or her second in command and paid the Claimant £2 an hour more, albeit it was not the case that the Claimant was given an official job title beyond Senior Carer. Mrs Reeve said that in general she together with the Claimant ran the home and Ms Lewis helped on the Claimant's days off. She said that when the Claimant was on shift the Claimant was in charge of the shift. The Claimant accepted that she was paid a higher hourly rate than others, albeit she said she did not know that at the time.

34. We considered all the evidence before us, and it is not possible here to record

every piece of evidence put before us on the point. We ultimately prefer the evidence of Mrs Reeve and other carers and find on the balance of probabilities that, while there might not have been an official job title change, the Claimant was, in effect, Mrs Reeve's second in command. The finding accords with the history of the Claimant's employment. The Claimant and Mrs Reeve had been through a lot together. Mrs Reeve had been reliant on the Claimant in the absence of a home manager and when initially the Claimant was the only Senior Carer. We consider it likely and find that the Claimant was generally seen by staff, residents and third parties (including the Claimant) as generally being in charge when she was on shift. We consider it likely and find that generally more junior members of staff, including Melissia Chadwick would follow the Claimant's instructions and considered that they were obliged to do because the Claimant was in charge when the Claimant was on shift.

35. The Claimant and Ms Lewis were not often on shift together because the intention was they would cover each other's days off. The Respondent's witnesses, other than Ms Lewis, generally saw the Claimant as still being in overall charge when they were on shift together. Ms Lewis saw them as having equal status. We considered this was probably due to there never being any formalising of a more senior job title for the Claimant. It is evident from the Claimant's supervision records in the hearing file that there had previously been times when carers were complaining about other carers and Ms Lewis' evidence was that she had previously taken issues about the Claimant to Mrs Reeve. Likewise, the Claimant had taken complaints to Mrs Reeve. We consider it likely that when the Claimant and Ms Lewis were on shift together it ultimately reached somewhat of an uneasy truce where they had to figure out a way of working jointly together because Ms Lewis had the experience, qualifications and personality style that meant she was inclined to stand up to the Claimant. However, we do consider that Ms Lewis was an outlier in that respect. We do not find that the joint style of working applied on other shifts when the Claimant was working with Melissia Chadwick. This included the events of the day in question.

The initial concerns following 17 June 2022

36. On 18 June 2022 Ms Lewis came on shift in the morning and noticed that Resident Y was looking red. Ms Lewis did a handover from the night staff who were concerned about Resident Y and Resident C, who had both had a disrupted night's sleep due to sunburn. Ms Lewis went to check on all the residents and found 11 had sunburn in places such as the face, scalp, arms, neckline, and lower legs. Two had blistering of the skin, including Resident C. Ms Lewis took photographs and telephoned Mrs Reeve, who attended the site.

37. The carers on duty the day before were the Claimant, Melissia Chadwick, Aly Chadwick and Ms Hartley. The exact sequence of events is not clear, but Melissia Chadwick, Aly Chadwick and Ms Hartley were contacted by either (or both) Mrs Reeve and Ms Lewis and were asked to provide written statements. Mrs Reeve also contacted the residents' families to tell them about the sunburn and to ask if they wanted any formal action taken.

38. Melissia Chadwick prepared a statement [63] dated 18 June 2022 saying Aly and Libby had asked her to check a mark on Resident B's bottom as the Claimant had refused. She said she reported it to the Claimant who was not concerned and said it would be from the resident wearing pads. Melissia Chadwick said she had told the Claimant it was due to pressure, and they need to let staff know to ensure there was a pressure cushion in the resident's room.

39. In her statement Melissia Chadwick said that around 10:20am Aly said she had heard on the radio that elderly people needed to stay indoors due to the heat.

She said they went to let the Claimant know who said that was for the south and north Wales doesn't get that hot. Melissia Chadwick reported that she had said to the Claimant she did not think it was a good idea taking the residents outside, that the front garden was a sun trap, and they could use the back. She reported that the Claimant was not bothered and just walked off.

40. Melissia Chadwick's account was that she went on lunch with Libby about 1:15pm and when they returned the residents were in the garden with their sleeves and trouser legs pulled up. Melissia Chadwick said she went to a resident who looked hot and asked if she needed sun cream and the Claimant said she had put it on everybody so they would be fine. The Claimant and Aly Chadwick then went on their lunch break.

41. Melissia Chadwick's account continued that she and Libby were looking after the residents inside and outside and following the Claimant and Aly's return from lunch there had been an incident with the Claimant allegedly refusing to get medication for a resident, saying that Aly could do it. Melissia said she had stepped into get the medication. She alleged that the Claimant was generally in the garden, other than 10 minutes spent showing two visitors around the home. Melissia said the carers brought a few residents in, moved some to the shade and got some cardigans to cover residents' shoulders. She said she and Aly told the Claimant it was too hot, but the Claimant insisted the residents have tea outside. She said when the Claimant took a call from the Claimant's partner, they then started bringing the other residents in.

42. Melissia said she and Aly later noticed the sunburn when getting the residents ready for bed and Aly told the Claimant. She reported that Aly had said that the Claimant had said to plaster them in Cetraben moisturiser. She said she challenged the Claimant how that would help, and the Claimant had said it will keep the moisture in. She said she googled it on her phone to try to prove it should not be used. Melissia also reported an interaction with a resident about a missing ring, and that she had asked the resident if there was anything she could help with as she was a senior. She said the resident had responded that the lady with the red hair (the Claimant) was the boss. Melissia Chadwick also alleged that at tea time the claimant did liquid medications without measuring any out.

43. As well as being Melissia and Aly Chadwick's mother, Mrs Ollier is also a long term friend of one of the residents, Resident X. In her statement Melissia said that on the night of 17 June her mother said she was not happy with how the Claimant dealt with Resident X when Mrs Ollier had visited at lunchtime. Melissia reported that her mother said that the Claimant had refused to assist Resident X when Resident X said she had an accident and needed changing. She said Mrs Ollier had also said the Claimant had made Resident X go outside when Resident X wanted to stay in her room, and that Mrs Ollier wanted to raise her concerns with Mrs Reeve.

44. Melissia made other allegations relating to medication and alleged in general that on a regular basis the Claimant was rude towards residents, refused to make them drinks, or to help with washing and dressing or answer call bells, preferring to do administrative work. She said: "*Overall I am writing this as a formal complaint due to the lack of care the service users are being provided by this individual and how they are spoken to. The garden party on 17.06.2022 was more for show so pictures could be taken and put on our group chat."*

45. Aly Chadwick provided a statement [61]. It is undated and it is therefore not possible for us to be certain whether Ms Reeve had it when deciding to suspend the Claimant, or afterwards. Certainly, Ms Reeve's witness evidence was that she recalled Aly's statement being operative [see paragraph 12 of Ms Reeve's

witness statement]. In her statement Aly Chadwick said at the start of the day she mentioned to the Claimant a small moisture mark on Resident B's bottom that the Claimant was not concerned about and left Aly and a colleague to deal with. She alleged she also later saw the claimant pouring Trazadone into a medication pot without measuring it out.

46. Aly Chadwick said that at 10am she heard a warning on the radio about keeping elderly people indoors and she instantly told the Claimant, but the Claimant said that was for the south and the north does not get that hot. She alleged Melissia said it was not a good idea to take them outside.

47. Aly Chadwick said that at 1:30pm the residents were in the garden with none of them covered up. She said she went to get sunscreen and started applying it. She said the Claimant told her she would finish it off.

48. Aly Chadwick said her mother came to visit Resident X and that Resident X had stated to the Claimant, in front of her and Mrs Ollier, that she did not want to go outside but the Claimant had insisted. She said: "*Before [Resident X] went outside, she had told myself and Paula she had had a continence issue, Paula ignored her and told her to sort it out herself and come outside. [Resident X] was not happy. This unsettled her for the afternoon and she did not enjoy herself."*

49. Aly Chadwick reported that the Claimant had refused to get Oramorph medication for a resident, telling Aly to get it herself. She said she was not comfortable with doing so, so had asked Melissia to measure it out. She alleged that the Claimant would not move out of the garden. She said that when the Claimant showed some visitors around, she and Melissia brought some residents in and grabbed cardigans for others. She alleged they had said to the Claimant to bring the residents in, but that the Claimant had insisted they stay outside until after tea. She alleged the Claimant was sat sunbathing and would not answer any phone calls or bells. She said the Claimant took a call from the Claimant's partner and that she and Melissia started to bring everyone in and "*Paula did not look happy*." She said after tea the Claimant saw how red some residents were and told her to put Cetraben on the residents.

50. Aly Chadwick raised some matters relating to 15 and 16 June 2022 and alleged in general that the Claimant had done things such as shouting at residents, talking about peoples' personal business and confronting staff in front of service users.

Suspension

51. On 18 June the Claimant was suspended by Ms Reeve. The Claimant was on leave at the time, and she was notified by email. The email is at [43]. It was mistakenly sent by Ms Reeve from a general email account that other staff could access. Ms Reeve deleted it as soon as she realised this. The email said: "*I am writing to you today as I have received complains about your actions at Beach Court yesterday. While I conduct a thorough investigation, under our disciplinary procedure you are suspended from work, with full pay, until I have received written statements from those concerned. You will be asked to attend a Disciplinary meeting to give your account of your action after I have completed my investigation. The allegations made against you are*

    1. *Residents being left out in the hot sun for hours.*
    2. *Refusing to help others with personal care duties.*
    3. *Allowing a care assistant to administer Oromorphine which is a controlled substance.*

Please return your keys and lanyard until this process has come to a conclusion."

Further statements

52. On 19 June Libbie Hartley sent Ms Reeve a statement by email [67]. Ms Hartley said that on the morning the Claimant had suggested to take the residents in the garden after lunch and to keep them out till tea time. Ms Hartley said that around 1pm she, Aly and Melissia followed the Claimant's instructions to take the residents outside (other than 5 residents). She alleged she suggested suncream but was ignored by the Claimant. She said she went for lunch around 1:20pm and when she came back she noticed the Claimant had put Cetraben cream on residents, which was prescribed for a particular resident. Ms Hartley said that around 2:30pm the claimant did a home viewing that lasted 15-20 minutes and the claimant then came into the garden, sunbathing.

53. Ms Hartley said that around lunchtime a resident had been incontinent and the Claimant had refused to help. She said she overheard the Claimant saying the resident could do it herself and did not need help. She said Mrs Ollier was present during this time. Ms Hartley generally alleged that she rarely saw the Claimant doing personal care. She concluded: "*Overall I'm writing this statement because of the lack of treatment of care to the residents on the 17th of June garden party."*

54. On 20 June Ms Lewis sent Ms Reeve a statement by email [69]. She said she had seen pictures of the residents in the group chat and whilst not on shift had messaged Melissia to ask if sun cream had been applied, as she was concerned in the photographs none of them were in the shade and were not wearing hats. She said that on 18 June she had asked Melissia and Aly if the residents had been outside for a long time and if they had been given water, shade, and suncream. She reported that Aly and Melissia had told her the whole story of that day including the use of prescribed Cetraben on residents, and that they had said they had repeatedly asked the Claimant to bring the residents indoors. Ms Lewis reported that on 19 and 20 June Resident C was still suffering the effects of sun burn on her face and arms requiring treatment such as the application of wet flannels.

55. On an unknown date Mrs Ollier handwrote a statement which Melissia Chadwick hand delivered to Mrs Reeve [59]. Mrs Ollier said that on 17 June Resident X was in a low mood "*as she had had an accident and already told Paula previously, but had not changed her, which was causing distress."* Mrs Ollier said the Claimant came into the room and said after lunch she was going to take all the residents outside into the garden with bottles of wine to enjoy the sunshine. Mrs Ollier reported that Resident X said she did not wish to go outside. She said: "*from what the girls have said [Resident X] did go outside after lunch but at least had the good sense to cover up well with sun lotion. Can this please not be ignored as I am concerned why she is getting ignored and her wishes not listened to. I am concerned for any repercussions from Paula towards [Resident X] in the future."*

Communications between the Claimant and Mrs Reeve

56. On 20 June the Claimant emailed Ms Reeve [44] saying false allegations had been made against her yet again and she had sought legal advice. The Claimant said she had been advised not to attend any disciplinary until she had a copy of the statements made against her and time to prepare her case. The Claimant complained about the suspension email being sent via the Beach Court email address where other staff could see it. She expressed concern it could jeopardise her chance of fair hearing and give her accusers chance to change their false

stories. She said the allegations were baseless lies and she looked forward to clearing her reputation and facing down her accusers.

57. On 21 June 2022 Ms Reeve sent the claimant a letter confirming her suspension pending investigation [45]. The allegations were set out in more detail and said to be:

"On 17/06/22 you left residents in the garden for a prolonged period in the hot sun without adequate protection, resulting on 11 residents suffering sunburn.

You failed to follow the drug administration procedure on 17/06/22.

On 17/06/22 you refused to assist a resident who had been incontinent with personal care."

58. The letter said no decisions had been made regarding potential disciplinary action. The Claimant was told that if she had any questions in relation to the matter she should contact Mrs Reeve.

59. On 23 June the Claimant emailed Ms Reeve [47]. She said it was a team decision to take the residents into the garden. She said that after the residents were moved outside one senior care assistant and care assistant went on their breaks which left her and another care assistant to finish bringing the residents out and to apply factor 50 suncream. She said that she and the other care assistant then went on their break, and she told the returning senior care assistant to monitor all the residents carefully. She said that after her break she was briefly outside to have a little dance with a resident but then left to show people around the home. She said she was outside at most for 40 minutes and it was the other senior care assistant [i.e. Melissia Chadwick] who had not made a judgment call that it was getting too hot for the residents and who was outside for the majority of the time. The Claimant said that when she got back the sun was going in and it became overcast and cloudy. The Claimant said the person administering medication was fully trained and it was a POM not a controlled drug. She said she could not remember refusing to help anyone with personal care. She asked whether the other senior care assistant was also being investigated.

60. On 24 June the Claimant was invited to an investigation meeting to be held on 27 June [48]. She was told Meleri Overthrow (Ms Reeve's PA) would be present to take notes. The Claimant objected to this, saying she had heard that Ms Overthrow had been discussing her suspension with the staff and she did not believe the investigation was impartial. The Claimant said she was happy to attend to have her say as she had felt she had to give her explanation over email which had not been responded to, and which made her feel very isolated and alone [49].

Investigation meeting

61. The notes of the investigation meeting are at [50]. They are not agreed. They say the Claimant was refused permission to record the meeting or to have a copy of the notes. They show the Claimant saying she was not the only senior on duty that day and there were two in charge with Ms Reeve saying: "*you know you're in charge."* They show Ms Reeve apologising for the original suspension email being sent from the Beach Court account and that she confirmed only one senior member of staff had seen it and it had then been deleted.

62. The notes say that Mrs Reeve read the allegations to the Claimant and the Claimant said factor 50 sun cream had been applied and that Aly could confirm

this. She asked who she was supposed to have refused care too. The Claimant complained that Ms Reeve had not replied to her emails and Mrs Reeve said it was a management decision not to. They record the Claimant saying she had informed Mrs Reeve that they were taking the residents outside.

63. The Claimant said again that she and Aly put suncream on the residents and that when Melissia and Libby returned from their break at 1:45 she had told Melissia the lotion was on the drinks trolley outside. She said she went for her break and then went to check upstairs before the visitors arrived at 2:20pm for 30 minutes. She said she then went outside to ask if the residents had had ice creams which Melissia had forgotten to give out. She said that by 3:15pm the sun was not on the residents, and some had gone back in because it was too cold. She said the staff were in the garden and that she had brought the residents in at 3:55pm but the sun had gone in at 3pm. The notes record the Claimant saying she was not prepared to take responsibility as there was another senior on duty and she was not there most of the time anyway. The notes say the Claimant was asked about a weather warning which had been issued for that day, and that the Claimant said again that Ms Reeve knew she was taking the residents outside.

64. It was put to the Claimant that Melissia had said the residents should not go outside and the Claimant denied this. The notes say: "*She asked Aly to go to [Resident Y] at bedtime and put cream on her and Aly said she had put cream on. Rather confusingly she then stated that she never asked anyone to put anything on and that [Resident Y] was the only burnt one."*

65. The Claimant was asked if she made people go outside and she denied this and said the whole thing was a witch hunt. Ms Reeve said the pictures showed the residents were not in the shade, or wearing sunhats and there were no parasols or cushions out. The notes show the Claimant asking where the parasols were kept and that she was told they were in the shed where they were always kept. The notes record the Claimant saying the evidence was falsified and Ms Reeve was not impartial but was coming back with negative answers when the Claimant tried to explain herself. The Claimant said she had brought a serious allegation to Ms Reeve about people leaving early and the next day she had been suspended. She said the residents burning was not her fault as she was out of the equation for over an hour. She said people had lied and had got in in for her.

66. In relation to the medication allegation, the notes record the Claimant said she would not use Trazodone without measuring it. She said she had not refused a resident Oramorph but was unable to do so as she was dealing with the people coming to view the home. She said the family asked Aly to give the drug and eventually Aly did. The Claimant said it was not a controlled drug and that anyone should know that. The notes say Ms Reeve apologised to the Claimant for not knowing that as it had been a controlled drug in the past but that it was still a prescribed drug for the resident.

67. In relation to the allegation of refusal to give care, the notes say Ms Reeve said the complaint had not come from staff, but the complainant had overheard the Claimant refusing care and telling the resident she could change herself. The notes say that the Claimant said she did not know what day Ms Reeve was talking about. The Claimant was asked about the other resident having a sore on her buttock and the Claimant said she got a foam cushion and Aly or Libby put it in the room. The Claimant said she was pretty sure she told the night staff to check and had told staff to stop putting a pad on. The Claimant said it looked more like a moisture mark.

68. The notes suggest that the Claimant said she had nothing else to add but went on to say other seniors were not reviewing care plans, were leaving the meds

trollies open, and were not staying for the whole shift. She said others were lying to Mrs Reeve and taking advantage of Mrs Reeve.

Investigation meetings with other staff

69. On 27 June 2022, after the Claimant's interview, Ms Hartley attended an investigation meeting [68]. Ms Hartley said when she left the shift at 3pm the Claimant was writing handover sheets for that evening. Ms Hartley confirmed she had been asked to apply Cetraben to Resident C as a sun cream before the resident went out (using another resident's cream).

70. Melissia Chadwick was also invited to an investigation meeting that day [70]. She said the viewing had taken the Claimant 10 minutes and that when Melissia and Aly brought the residents in the Claimant was sat in the garden listening to music and did not help. Melissia said it was the cook who instigated the ice creams. She said the residents that Aly had applied cream to had not burnt whilst those the Claimant had, had burnt. She said the Claimant had said to use Cetraben on sunburn as it was like Sudocrem and that it was Aly who noticed a resident's sunburn not the Claimant. She said, when put to her the Claimant was saying there were two seniors in charge, that the Claimant was in charge and did not give her a say in anything, not even the breaks. Melissia said this did not happen when she worked with the two other seniors.

71. Aly Chadwick also attended a meeting [72]. She denied that the Claimant was away for an hour on a break and doing a viewing. She said she had found the sunburnt resident and again that the Claimant had told her to put Cetraben on the burnt bits. She said she put lotion on some residents and that the Claimant said she had put sun cream on the other residents. She denied there was lotion on the drinks trolley outside saying it was in the office and there was no sun cream outside. She said the Claimant had told Resident X that she had to go outside. She said that she had taken the Oromorph to the resident in question, but that Melissia had measured it out. She said when she told the Claimant about the mark on Resident B's bottom the Claimant told her to put cream on it, and that she and Ms Hartley then went to Melissia who checked it and got a pressure cushion.

Second investigation meeting

72. The Claimant attended a second investigation meeting on 14 July 2022. The notes are at [54]. Again, they are not agreed. Ms Reeve said after the first investigatory meeting with the Claimant she had held further impromptu meetings with other staff, and there seemed to be significant differences in the version of events.

73. The notes say the Claimant was told she was the most senior person on duty on 17 June and responsible for any actions which might harm the wellbeing of service users and was asked to explain why she might not be in charge. The Claimant said she wasn't and how could she be in charge if she was on a break. She said she didn't expect to come in and run the shift all the time. She said sun cream was applied and to those with long sleeves only faces were done. She said no one mentioned a weather/heat warning to her. She said only Resident B had Cetraben applied, and it was Resident B's prescribed medication. She said she this was the only resident with sunburn and she had noticed when helping the resident to bed. She said she did not instruct anybody to put any cream on.

74. The Claimant said she did not recall Resident X asking for help having been incontinent. She said Melissia and Aly had told her about Resident B's mark and that Melissia had said it was a moisture lesion. She said she had asked for a

foam cushion to be put in the room and found one in the lounge. She said she did not put it in the resident's room herself as she was called away and that she passed the concern over to nights for it to be monitored. The Claimant said all liquid medicines had been measured.

75. At that meeting the Claimant noticed that all of her annual leave had been removed from the staff holiday planner. Mrs Overthrow told her she had done this in error. Mrs Reeve told us in evidence that Mrs Overthrow had done this without Mrs Reeve's knowledge and Mrs Overthrow had said she thought the Claimant was going.

Invite to Disciplinary Hearing

76. On 18 July the Claimant was invited to a disciplinary hearing on 21 July [56] with Ms Reeve. The email said: "*The most qualified and experienced member of staff on a shift is deemed to be responsible for the wellbeing of residents and staff members and is "in charge" and always has been, in the absence of a manager/deputy manager. The Disciplinary Hearing is to consider the following allegations:-*

Failure to adhere to Care standards policy and procedure, namely that on 17/06/22 you left residents in the garden for a prolonged period, in the hot sun without adequate protection, resulting in 11 residents suffering from sunburn. Furthermore, you administered Cetraben cream, which should not have been administered, either as protection from the sun or as a remedy for sunburn.

Failure to follow the drug administration procedure on 17/06/22. In that you did not measure liquid medicines, which could have the potential to either under dose or overdose residents.

Failure to comply with care procedures, namely on 17/06/22 you refused to assist a resident who had been incontinent, with personal care. You also failed to assess a resident who may have had pressure areas/moisture lesions."

77. The Claimant was told a letter was being sent with enclosures to include minutes from the investigation meetings, statements from 5 colleagues, minutes from 3 investigation meetings with colleagues and pictures of sun burnt residents. The Claimant was told if the allegations were believed to be proven it would be considered gross misconduct under company disciplinary rules and the claimant's employment may be summarily terminated. She was told of her right to be accompanied.

78. The Claimant replied that day to say until she received the statements and notes she was not sure she would have adequate time to prepare, and that people usually got between 48 hours and 5 days to prepare. She said she was shocked that the people who took her informal chats were now heading her disciplinary. She said the investigation was not impartial. She said she had been isolated and excluded by the girls for months, she had been isolated and excluded in the investigation, and she had made her own complaints which had not been investigated. She said it had greatly affected her mental health.

79. The following evening the Claimant emailed further [74] to say she was without statements or notes, and she was allowed 48 hours from receiving these to properly prepare her defence. She asked for a new date for the hearing.

80. The Claimant received the statements and interview notes on 20 July. She was not sent a copy of any policies. We do not have the correspondence relating to it, but it is not in dispute the Claimant's disciplinary hearing was moved to 25 July

2022, chaired by Ms Reeve.

Disciplinary Hearing

81. The notes of the disciplinary hearing are at [76] (with the Claimant's version at [83]). On the face of the notes, they record the Claimant saying the minutes of the two investigation meetings were accurate. The Claimant says that is not correct and she had not been asked about previous notes and whether she agreed them.

82. The Claimant read out a statement found at [85]. The Claimant said she was working alongside another senior care worker that day and was not solely outside with the residents. She asked what risk assessment was carried out to allow residents outside in hot weather conditions and what training and guidance was given to employees about the application of suncream. She said a manager should be employed in the home along with supervision and assessments of staff and in the last 12 months she had not received any. She said meeting minutes had not been agreed by her, that her email queries had not been responded to, and she was still waiting for copies of grievance and disciplinary policies. She said this led her to believe that Mrs Reeve no longer wished her to continue in employment and that she felt it was impossible to return. She said her mental health and suffered, and she was receiving counselling as a direct result of the discrimination inflicted on her.

83. The notes say that after the Claimant read out her statement, Mrs Reeve asserted that the Claimant was the most senior person in charge on the day and therefore responsible for any actions that may harm the wellbeing of service users. The Claimant disputed that she was either the most qualified or that she was in charge. Mrs Reeve said the Claimant did not allow the other senior in on the day to make decisions, and the Claimant disagreed. Mrs Reeve pointed out that the Claimant had NVQ3 and Melissa Chadwick NVQ2 and the Claimant said that did not make a difference.

84. The Claimant said that Ms Hartley's statements contradicted each other. She said she had first noticed the resident had sunburn and not Aly. The Claimant said that Cetraben had not been used as a suncream, that proper suncream had been used, and the only resident who had Cetraben later was the resident she noticed had caught the sun. The notes say that Mrs Reeve pointed out that there were photos of the other residents who had burned, and that the Claimant said the residents were not out for as long as stated, because they only started going out at 1;10pm and by 3pm the sun was no longer out. She said Melissia had got burnt too but the Claimant had not. She showed a photograph of two residents eating ice cream at 3:18 pm in the shade and covered up and said that by then the sun had gone in. She said the residents were asked about going in but said they wanted to finish their ice cream. She said nobody was forced to go outside.

85. Regarding Resident X, the Claimant said that the statements all contradicted each other, and that the complainant was Aly and Melissia's mother. She said the resident did not know the Claimant's name and it could be anyone that the resident was referring to. She said it was a witch hunt with Mrs Ollier backing her daughters. She said the resident was always in low mood.

86. Mrs Reeve said that the allegation of failing to follow the drug administration procedure by not measuring liquid medicines had been dropped. We did not hear any evidence from Mrs Reeve as to why it had been dropped.

87. The Claimant said the statements were all contradictory and that her own phone records showed Aly was wrong as she spoke to her partner at 10:11 and 12:08

and there were no calls from him in the afternoon. Mrs Reeve asked the Claimant to email the phone records in. Mrs Reeve said they were a small business and Mr Reeve could not get involved as he would hear any appeal.

88. The Claimant said she was now receiving counselling and that the allegations were fabricated lies. She referred to her name being taken off the holiday board. She said she had been given no support and had no one to ask questions to and Mrs Reeve did not answer her emails.

89. The Claimant says that a health and safety/weather risk assessment policy document was produced from the filing cabinet after she read out her statement but was not mentioned in any further meetings. Mrs Reeve accepted in her oral evidence that this was the case but that it did not form part of the disclosure or hearing file in the Tribunal claim. There is on the Tribunal file (but not in the hearing file) an email from the Respondent's representative of 16 June 2023 saying there is an Extreme Weather Risk Assessment Record and Heatwave Policy and Procedure that were freely available to all staff on an app and that the Claimant was aware of the accessibility of this information. But this does not appear to have led to the disclosure of a copy.

Decision to dismiss

90. The decision letter is dated 27 July 2022 [86]. It said that the Claimant had failed to provide an acceptable explanation for:

- Accepting responsibility for being the person in charge on the shift that day;

- Failure to adhere to care standards policy and procedure, namely that on 17/6/22 she left the residents in the garden for a prolonged period, in the hot sun, without adequate protection, resulting in 11 residents suffering from sunburn;

- Furthermore that the Claimant administered Cetraben cream which should not have been administered either as protection from the sun or as a remedy for sunburn;

- Failure to follow the drug administration procedure on 17/6/22 in not measuring liquid medicines;

- Failure to comply with care procedures, namely on 17 June 2022 refusing to assist a resident who had been incontinent with personal care, and failing to assess a resident who may have had pressure areas/moisture lesions.

91. The letter said Mrs Reeve considered the actions amounted to gross misconduct and had decided to summarily dismiss the Claimant with effect from 27/6/22 without any notice pay. The Claimant was offered the right of appeal to Mr Reeve.

92. Ms Reeve accepts that the drug administration allegation was dropped and should not have appeared in the dismissal letter. She says it was there in error.

Handling of the appeal

93. On 1 August the Claimant was sent the minutes from the disciplinary hearing [101]. On 2 August the Claimant lodged her appeal [102]. The Claimant relied on alleged inconsistencies in the staff statements including:

- Different time scales for the visitors' tour;

- Inconsistent statements about whether the Claimant had refused to support Aly with administering Oramorph and who had measured it and given it to the resident;

- That Ms Lewis had messaged Melissia Chadwick when seeing the photos in the group chat; but why not message the Claimant if the Claimant was in charge.

94. The Claimant said that the outcome was too harsh given no factual evidence and two senior care workers were working that day. She said she felt it was discrimination. The Claimant said the allegation about not accepting responsibility for being the person in charge on the shift that day was not one of the original allegations. She said again that two senior care workers were working that day. She pointed again to the fact that Ms Lewis had contacted Melissia Chadwick that day and not the Claimant. She questioned why Melissia Chadwick had not contacted Mrs Reeve if she felt residents were at risk. She said that Melissia Chadwick's own statement recorded Melissia Chadwick telling a resident that the Claimant was not the boss and was a senior like Melissia.

95. The Claimant said that there had been no training or procedures implemented after weather risk assessments completed as confirmed by Ms Reeve. She said there were 4 staff members on duty that day and there were inconsistent statements contradicting her failure to adhere to care standards. The Claimant pointed out the measuring of liquid medications had previously been dropped. In relation to care of residents she said there were inconsistencies in staff statements to collaborate that issue. She referred to her 4 ½ years' service with no grievances or disciplinary concerns raised and that she had been nominated for an award the previous year. She said she had not to date agreed any minutes. She said she was not working towards NVQ level 5 and had not been asked to.

96. On 5 August Mr Reeve wrote to the Claimant to say the dispute about the minutes of the disciplinary hearing should be resolved before an appeal hearing took place [103]. On 12 August the Claimant sent Mr Reeve an email. We do not have a copy of it but understand it set out the changes she wished to be made to the disciplinary hearing minutes. On 16 August Mr Reeve replied [105] saying the notes were the best recollection of a meeting but were not verbatim. He disputed various of the points the Claimant had raised and in response to others, pointed out where he said they were already in the minutes.

97. On 17 August [107] the Claimant emailed to say that the decision letter had not said that minutes needed to be agreed before an appeal hearing could be arranged. She said it appeared they could not agree on the minutes and that she had a legal right to appeal the decision. She asked for an appeal hearing to be arranged with immediate effect saying she was receiving counselling and was unable to seek alternative work with her appeal outstanding.

98. On 23 August Mr Reeve emailed to offer an appeal hearing on 29 August [107]. We do not have the original email, but at some point the Claimant emailed asking for an independent person to hear the appeal. On 26 August Mr Reeve replied to say he had been independent of the process until the Claimant's appeal letter was received and as a small company there was nobody else who could hear the appeal [110]. The Claimant replied again saying that organisations such as Acas or Care Inspectorate Wales could provide support, and asking again for an independent party to hear the appeal [109]. On 27 August Mr Reeve said he had arranged for an independent party to hear the appeal and they would be in touch in the next few days to rearrange a new date and time [112].

99. On 31 August Mr Reeve emailed the Claimant to say the independent party had

requested copies of all documents which would take some time but was in motion. He also responded to a subject access request that had been made saying it would incur a fee.

100. On 4 September the Claimant complained that matters were taking so long, saying again it was causing her mental distress and she was unable to look for alternative employment until her appeal was held. She said she had not been asked or given permission for her personal data to be given to a third party organisation, and also asked who the independent person was, what organisation they were from, and a timescale of when the hearing would be held.

101. On 13 September [116] Mr Reeve said that the delay was mainly due to a sudden bereavement he had faced. He said that details of the case needed to be sent to the independent consultant as they would be unable to conduct the appeal without a clear understanding of the nature of the issues.

102. On 14 September [119] the Claimant asked again for the named person and organisation who was hearing her appeal and for an appeal hearing time, date and location. She said if she did not receive a response by 5pm on 16 September she would be starting early conciliation with Acas. She said she was absent on holiday from 17 September to 24 September. On 16 September Mr Reeve said that the diaries of the consultants, subject to the Claimant's agreement that information could be released to them, were susceptible to change so the name of the consultancy could not be provided at that time. He suggested if they decided on a date, such as the week commencing 10 October, he could arrange for full details and an invitation letter to be sent to the Claimant. He said he was himself away on holiday from 28 September to 7 October.

103. On 8 October Mr Reeve emailed the Claimant to say a consultant from Croner's Face2Face department would conduct the appeal hearing. He said they had the authority to disagree with any previous advice and authority to reverse any previous decisions. He said the consultant would be in contact directly with the Claimant in due course.

Appeal hearing

104. The disciplinary appeal hearing took place on 12 October 2022. The consultant from Croner Face2Face was Rhian Shepherd who produced a report dated 2 November 2022 [123].

105. The report records Mr Reeve telling Ms Shepherd that it was common knowledge that the Claimant was always in charge when on duty, she had the highest qualification of a staff member on duty that day and was the highest paid member of staff on duty that day. He said the Claimant had issued all the instructions to all other staff members that day. He said that the claimant was acknowledged as the senior person to liaise with by Care Inspectorate Wales, doctors, district nurses, social workers, residents families and friends, directors of the company and working colleagues when on shift and the Claimant received enhanced remuneration for additional responsibilities. He said the Claimant was trying to deflect attention.

106. Ms Shepherd noted that staff statements were consistent that the Claimant had issued instructions on the day in question, but the email inviting the Claimant to the hearing did not clearly set out if it was an allegation and therefore should not have been upheld in the outcome letter. She recommended that the point be overturned. The allegation Ms Shepherd was recommending be overturned was: "*accepting responsibility for being the person in charge on the shift that day."* She was not, as suggested in the Claimant's witness statement, saying the

allegation for failure to adhere to care standards in leaving resident in the garden should be overturned. The Claimant there has misunderstood the structure of Ms Shepherd's report where Ms Shepherd has set out a heading (such as "Accepting responsibility for being the person in charge on the shift that day") and has then addressed that the topic summarised by the heading in the paragraphs that follow *underneath* the heading.

107. Ms Shepherd noted that the staff statements were consistent in advising the Claimant insisted on taking residents outside after staff raised concerns about the weather and would not allow them to come back in, and that staff moved residents into the shade. She noted that Aly and Melissia Chadwick were consistent in saying they had brought the residents in with the Claimant staying outside. She recorded that Mr Reeve told her that there were two pictures taken by the Claimant at 13:29 hours in the garden on the WhatsApp group and a video of the Claimant dancing with the residents in the garden at 13:41 hours. She recoded that as the information was not part of the evidence pack she could not, however, take it into consideration. She recorded the Claimant saying she considered there were inconsistencies in the statements about suncream, that her employer knew they were taking the residents outside and she was not aware there was a parasol to be used or a policy in place for extreme heat. Ms Shepherd said the policy was not part of the evidence pack and therefore would not be taken into account. She noted that the Claimant said residents wore long sleeve tops but that the photos showed sunburn on faces, head, shoulders and a resident's legs.

108. Ms Shepherd held that there was evidence to suggest the Claimant had instructed staff to take residents outside and did use suncream but with no other protection from the sun. She said Ms Hartley's statement that she was asked to use Cetraben as a suncream was not supported by other witness statements. Ms Shepherd found that while there was another senior on site it was clear the staff operated under the claimant's instructions on this matter. She found the Respondent had acted reasonably in upholding the allegation as gross misconduct.

109. Ms Shepherd found it was not reasonable to uphold the allegation of not measuring liquid medicines as the Claimant had been told the matter was dropped. Ms Shepherd found it should be overturned and not upheld. She did not, as the Claimant suggests in her witness statement, uphold the allegation. Again, the Claimant here has misunderstood and misread the structure of Ms Shepherd's report.

110. Ms Shepherd also found the two allegations relating to personal care were supported by staff statements and that the claimant had not provided a sufficient explanation for her actions. She said that even with some of the allegations overturned there was sufficient cause to dismiss the Claimant.

111. Ms Shepherd held that as staff operated under the Claimant's instructions it would not have been reasonable to conduct a disciplinary investigation with the other senior (i.e. Melissia Chadwick). She said the mistake with the original work's email did not change the outcome of the hearing and the Claimant would still have been dismissed. She recommended that the appeal be upheld in part, but the original sanction of dismissal should stand. Her report says that the consultant is not the decisionmaker and it is for the employer to decide if they agree with the findings made and whether to follow the recommendations or not.

Appeal outcome

112. On 4 November Mr Reeve wrote to the Claimant with a copy of the report and a

link to a transcript of the meeting. He said:

"*Having carefully considered the report of their findings and recommendations, it is my decision not to uphold your appeal in full.*

This means the decision to dismiss you, will stand for the following reasons:

1. *The correct disciplinary action was taken,*
2. *There was failure on your part to adhere to Care standards policy and procedure.*
3. *Failure to comply with care procedures, namely on 17/06/22 you refused to assist a resident who had been incontinent, with personal care. You also failed to assess a resident who may have had pressure areas/moisture lesions."*

Discussion and conclusions

113. We address the list of issues as follows, and by applying the law and our findings of fact.

"1.Unfair dismissal

What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. The Tribunal will need to decide whether the Respondent genuinely believed that the Claimant had committed misconduct."

114. We find the decision to dismiss the Claimant was made by Mrs Reeve. Mrs Reeve's principal reason was she considered the Claimant had failed to provide the care standards due to protect the 11 residents from the sun. That was a reason related to conduct. There were other reasons why Mrs Reeve decided to dismiss the Claimant, but we find that the sunburn suffered by residents was the principal reason. The lack of care to prevent sunburn in a heatwave to a sizeable group of vulnerable residents would have been a significant event. As well as the personal harm to those residents, it would have represented a reputation risk to the Respondent.

115. In terms of other reasons, based on Mrs Reeve's decision letter which we accept largely reflected her actual reasoning, we find she also concluded that:

(a) The Claimant was responsible for the administration of Cetraben as a sun cream;
(b) The Claimant was responsible for the administration of Cetraben on residents as an aftersun;
(c) The Claimant had refused to assist Resident X with personal care following an incontinence incident;
(d) The Claimant had failed to assess Resident B who may have had pressure areas/moisture lesions;
(e) The Claimant had failed to accept responsibility for being the person in charge on shift that day. Here the actual wording used was "*failure to provide an acceptable explanation for accepting responsibility for being the person in charge on the shift that day.*" But that makes no sense and, we conclude, must have been missing the word "not" before "accepting."

These are all also reasons that relate to conduct and even if taken into account the principal reason for dismissal would remain conduct.

116. We do not find that Mrs Reeve concluded that the Claimant had failed to follow the drug administration procedure in not measuring liquid measurements. We

accept that it was included in error in the decision letter and was not a factor that lay behind the decision to dismiss. To be clear we also do not find (and it was not ultimately suggested by the Claimant) that there was some other underlying factor behind the decision to dismiss; for example, the Claimant raising concerns with Mrs Reeve about other members of staff.

117. At appeal stage where the Claimant's dismissal was maintained, we find that Mr Reeve decided to adopt the findings proposed by Ms Shepherd. His outcome letter, however, was not detailed. The finding that the Claimant had failed to follow the drug administration procedure was removed because it was accepted it had been incorrectly included in the original outcome letter. Following Ms Shepherd's advice, the express finding that the Claimant had failed to accept responsibility for being the person in charge on shift that day was also removed; because it was not a specific written allegation that had been put to the Claimant.

118. Mr Reeve upheld the findings that the Claimant had failed to assist Resident X and had failed to assess Resident B. Mr Reeve also wrote the very general words: *"There was a failure on your part to adhere to Care standards policy and procedure."* It is poor, vague wording. However, given that Mr Reeve was adopting the recommendations of Ms Shepherd we find that must be a reference to a failure to prevent the residents suffering sunburn on the day in question. Ms Shepherd's conclusions on the use of Cetraben are not entirely clear and were not clear in Mr Reeve's written appeal outcome either. In particular, Ms Shepherd commented that Ms Hartley was the only individual to give evidence that Cetraben was used as a suncream. But she also did not go on to specifically say that the finding should not be upheld. Her recommendation was that as a whole the composite allegation should be upheld. The allegation was written, as a composite heading, to include the sunburn and Cetraben allegations. So we conclude on the balance of probabilities her ultimate conclusion and recommendation, and that of Mr Reeve in turn, was also to uphold the findings relating to use of Cetraben as a suncream and aftersun. Again, at appeal stage these were all reasons related to conduct.

119. The beliefs of Mrs Reeve (and Mr Reeve at appeal stage) were also genuinely held beliefs.

"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:

- ***There were reasonable grounds for that belief;***
- ***At the time the belief was formed the respondent had carried out a reasonable investigation;***
- ***The respondent otherwise acted in a procedurally fair manner;***
- ***Dismissal was within the range of reasonable responses."***

Were there reasonable grounds for the belief?

120. We find there were reasonable grounds for Mrs Reeve's beliefs. In respect of the principal reason for dismissal, the Claimant was a carer for vulnerable residents who suffered sunburn having, at least for some of the time, been sat in direct sun in the middle part of the day in the summer in a heatwave. There was some provision of suncream but there were no hats, or umbrellas or other shade, and the sunburn and photographs Mrs Reeve saw showed residents burning in other exposed areas like the neckline and other hemlines.

121. Whether there was a reasonable basis for Mrs Reeve's belief that the Claimant had responsibility for the residents suffering such sunburn is closed allied to the

basis of Mrs Reeve's belief that the Claimant had not accepted responsibility for the person in charge on shift that day. Mrs Reeve had before her, as summarised in the findings of fact above, the accounts of the other carers telling her they were following the Claimant's instructions that day, that they had told her they did not think it was a sensible course of action, that the Claimant had insisted and had insisted in the residents staying out. Mrs Reeve had the carers' accounts that the Claimant was in charge both on that day and in general when on shift, and that the carers considered they had to do as the Claimant said.

122. The Claimant disputed the other carers' accounts saying she was not in charge in general or on that day, and that in fact she had lesser responsibility than Melissia Chadwick (who she said had equivalent status to her), that afternoon because the Claimant was not generally with the residents in the garden but off doing other duties. The Claimant pointed to the fact that Melissia Chadwick's statement recounted a conversation with a resident where Melissia Chadwick told the resident that the Claimant was not the boss and Melissia was a senior like the Claimant. The Claimant said that Ms Lewis' evidence was that on 17 June, when Ms Lewis saw on WhatsApp the residents were sat in the sun, Ms Lewis contacted Melissia Chadwick out of concern. The Claimant said that if Ms Lewis thought the Claimant was in charge that day Ms Lewis would have contacted the Claimant and that it shows Ms Lewis saw Melissia as equally responsible. The Claimant said that Melissia Chadwick and Aly Chadwick alleged that they ultimately went against the Claimant's wishes and brought the residents in, which again must mean the Claimant was not in charge. The Claimant said her assertion she was not Senior Carer in charge supervising the residents in the garden was supported in part by the statements of the other carers who mentioned other activities the Claimant was engaged in. She said that on the day in question, whether by phone or by WhatsApp, Mrs Reeve had not expressed concerns about the residents being taken into the garden. The Claimant says her responsibilities were no different to Melissia Chadwick's and there was no evidence provided that the Claimant was in charge. The Claimant said there were inconsistencies or errors in the accounts of the carers and Mrs Ollier which meant their accounts should not have reasonably been accepted in preference to hers. For example, she says her phone records showed she did not take a phone call from her husband that afternoon when the carers said they brought the residents in. The Claimant says Mrs Reeve did not adequately notice or look into such inconsistencies. The Claimant also said that the other witnesses were colluding against her.

123. Notwithstanding the Claimant's points, we are satisfied that there were reasonable grounds for Mrs Reeve to conclude that the Claimant was in charge that day and bore overall responsibility for the wellbeing of the residents in the garden. Mrs Reeve had the evidence of the other carers which were consistent in key respects of saying they were following the Claimant's instructions that day, the activity was led by the Claimant who was insistent the residents stay out, and they felt they could not countermand the Claimant. Human recall and memory are fallible and people experiencing the same event can often come away with a different focus from each other. It is not unusual for witness evidence to not always match in every detail. Mrs Reeve had to weigh all the evidence, including the Claimant's, and including any imperfections, into the equation. But it was, in our judgement, then within the range of reasonable responses for her to consider there was sufficient consistency in key things she was being told to conclude the Claimant was in charge and had overall responsibility.

124. Furthermore, whilst Mrs Reeve was not there that day, she was the Responsible Person and owner of the business and was frequently on site. She fundamentally knew how generally things ran at the home, she knew the history of the Claimant's employment and that the Claimant was her de facto second in

command and the Claimant's personality type. It was within Mrs Reeve's own knowledge that the Claimant was, when on shift, generally in charge. She also knew that Melissia Chadwick was learning and had less experience and less qualifications than the Claimant. Mrs Reeve knew the Claimant had a forthright personality. All of that knowledge also accorded with what the other carers were saying both about what had happened that day and about working with the Claimant in general. On that basis it was also in the reasonable range for Mrs Reeve to believe that whatever other activities the Claimant was engaged in that afternoon, the Claimant had overall responsibility for the wellbeing of the residents and the Claimant was not on an equal footing with, or indeed had less responsibility than Melissia Chadwick.

125. We would add that she specific points that the Claimant was raising were not "knock out" blows. Ms Chadwick's account of her exchange with the resident was in one sense supportive of Mrs Reeve's conclusion because the resident quite clearly saw the Claimant as being in charge and the boss (indeed more so than Mrs Reeve). One interpretation of what Melissia Chadwick said in response would be that she was in training to be a senior, and so referred to it in that way as shorthand and because she was trying to keep things simple and sort out the problem the resident had. Ms Lewis could have contacted Melissia Chadwick with concerns because she had a better relationship with her. Mrs Reeve saw the carers' actions in finally bringing the residents in as the carers being in a difficult situation but ultimately deciding and having the confidence as a pack to do something and taking the opportunity to do so whilst the Claimant was engaged elsewhere. There were reasonable grounds, on the evidence before Mrs Reeve, for her to find that (and indeed to find that even if the Claimant's phone record of paid mobile phone services did not show a phone call in from the Claimant's husband that afternoon).

126. Likewise, the Claimant's views that the other witnesses were colluding against her and the similarity she drew between the closing section of Melissia Chadwick's statement and Ms Hartley's statement were before Mrs Reeve. Mrs Reeve knew that Melissia Chadwick and Aly Chadwick were sisters and Mrs Ollier was their mother. Again, Mrs Reeve had to consider these points, but it was ultimately within the reasonable range for her to conclude that the key themes that came from the accounts had some credible consistencies (as well as differences in some respects) as opposed to being manufactured collusion. She was also, again, supported in her thinking by her own knowledge of the Claimant and the dynamic in the workplace. Mrs Reeve had the simple fact that the residents did suffer sunburn, and her own knowledge that the Claimant would have been in charge that day. Mrs Reeve also took steps to interview all three witnesses straight after the Claimant's investigative interview so that she could put to the other carers key points the Claimant had raised and gauge their responses.

127. The above addresses Mrs Reeve's reasonable belief in the principal reason for dismissal but we also address the other reasons because they could be relevant to overall considerations of fairness under section 98(4). Turning to use of the Cetraben cream, Mrs Reeve had Ms Hartley's evidence (from the investigation meeting rather than Ms Hartley's original written statement) that the Claimant had asked Ms Hartley to apply Cetraben to Resident C as a suncream before the resident went out, using another resident's cream. Resident C suffered (as shown by Ms Lewis' account) particularly long lasting sunburn. This specific allegation was not made in the other carer's accounts or directly within Ms Hartley's first statement and the Claimant denied this had happened. But that does not mean that Mrs Reeve was bound to reject Ms Hartley's account or that it rendered the belief unreasonable. Mrs Reeve just had to weigh it all in the account. We are satisfied she did so, and it was in the range of reasonable

responses for Mrs Reeve to accept Ms Hartley's account about the use of Cetraben as a suncream.

128. In relation to use of Cetraben as an aftersun, the Claimant only admitted to its use on the one resident's whose prescription it actually was. The Claimant denied its more general use on other residents or that she saw sunburn on other residents. Aly Chadwick and Melissia Chadwick gave evidence to Mrs Reeve that the Claimant was directing that it be used. Again, Mrs Reeve had to weigh the evidence, but she was entitled, as part of that, to ultimately prefer the evidence of Aly Chadwick and Melissia Chadwick. It was in the range of reasonable responses for Mrs Reeve to do so. The finding was also consistent with other residents being sunburned (not just the one) and indeed with Ms Hartley's evidence, albeit in a different context, that one resident's prescription Cetraben was, on the Claimant's direction, being used on other residents.

129. Turning to the Claimant's involvement with Resident X, Mrs Reeve had Aly Chadwick's evidence that Resident X had told Aly and the Claimant that she had a continence issue, that the Claimant had ignored Resident X and told Resident X to sort it out herself. She had Ms Hartley's account that Ms Hartley had overheard the Claimant saying Resident X could do it herself and did not need help. The Claimant denied this, and she says that it was unreasonable for Mrs Reeve to find against her on the basis of alleged inconsistencies in accounts and the risk of collusion. The Claimant points, for example, to Ms Chadwick not mentioning Mrs Ollier's presence when Ms Hartley did so. She says Mrs Ollier seemed to recount Resident X telling Mrs Ollier she told the Claimant about her accident earlier in the day, instead of describing a contemporaneous discussion about it between Resident X, Aly Chadwick, the Claimant and with Ms Hartley and Ms Ollier also present. The Claimant says that with Resident X's dementia Resident X would also not be able to identify the Claimant by name. There was, however, before Mrs Reeve accounts that had a clear consistent theme of staff apparently directly witnessing Resident X seeking assistance from the Claimant, it being declined, and the resident being told to sort herself out. Mrs Ollier's account of what Resident X had apparently said to her when she visited at lunchtime, whilst not identical was also very similar in theme. In our judgment, it was a sufficient basis and within the reasonable range for Mrs Reeve to conclude the allegation was well founded.

130. In relation to Resident B, again Mrs Reeve needed to take into account the Claimant's evidence that she had acted properly in caring for the resident who had had the mark looked at by other carers, including Melissia Chadwick, and in sourcing a cushion for the resident and asking night staff to keep an eye on it. However, Mrs Reeve was, in our judgment, entitled to consider that the Claimant should have assessed the Resident for herself. Mrs Reeve reasonably saw the Claimant as being the senior, experienced person in charge that day. Mrs Reeve also she had before her the accounts of the carers that the concerns had been taken to the Claimant who had, on their accounts, declined to personally assess Resident B such that they had asked Melissia Chadwick to take a look and who had in turn apparently also voiced her concerns to the Claimant. Mrs Reeve's conclusion in that regard was reasonably open to her on the evidence before her.

<u>Was there a reasonable investigation /Did the Respondent act in a procedurally fair manner?</u>

131. We find that at the time Mrs Reeve formed her belief a reasonable investigation had been undertaken. The Claimant had attended two investigation meeting where she had the opportunity to say what she wished and had that opportunity again at the disciplinary hearing itself. She also handed in a pre-prepared witness statement. Those witnesses that were also present on the day had produced

statements and had attended a subsequent investigation meeting. In cross examination at the Tribunal hearing the Claimant was unable to identify any other additional witnesses that should be spoken to.

132. We turn therefore to the fairness of the wider process followed. Before addressing the specific procedural points the Claimant makes it is also important to set them in the context of the whole procedure followed. As just stated there was an investigation with the Claimant attending two investigatory interviews before the disciplinary hearing. She was allowed to hand over a written statement she had prepared and other documents she wanted to rely upon. Relevant witnesses provided statements and attended investigatory interviews. The Claimant was allowed to say whatever she wanted to say at the various meetings and hearings. She was given the right of appeal, and on her request her appeal was investigated by a third party.

Suspension

133. We consider that the decision to suspend the Claimant was within the range of reasonable responses. The immediate concerns raised related to the care rendered to vulnerable residents which, as we have already found, Mrs Reeve had reasonable cause to believe was the primary responsibility of the Claimant that day.

134. It was not reasonable for the suspension email to have been sent from the general email account that was accessible to staff. We do accept that was a genuine mistake on the part of Mrs Reeve which she accepted at the time and remedied to an extent and to the best she was able by deleting the email from that general account. Sufficient precautions should, however, have been taken in the first place.

135. The Claimant raises the fact that the original suspension email of 13 May 2023 [43] said: "*You will be asked to attend a Disciplinary meeting to give your account of your action after I have completed my investigation*." She says that contrasts with the letter of 21 June 2023 [45] where it is said that no decisions have been made regarding potential disciplinary action and that after the investigation there would either be a decision to take no disciplinary action or an invite to a disciplinary hearing. We consider that the first email was clumsily worded by Mrs Reeve. It is likely that the letter of 21 June 2023 was drafted more accurately with some professional HR support. But we do not consider that the wording initially used by Mrs Reeve in her email represented pre-judgment on her part. The Claimant in fact did not just proceed straight to a disciplinary hearing; she was called to an investigation meeting. The correct position was also then clearly stated in the letter of 21 June 2023.

136. The Claimant says she was not asked to provide a statement but was instead suspended and then called to an investigative interview. She says that other staff on shift that day were asked to provide statements. This happened because the Claimant was the subject of the concerns raised and because of the nature of the concerns raised which related to the care of residents, Mrs Reeve decided she needed to promptly suspend the Claimant. In the Tribunal's industrial experience the common practice would be to hold an investigative interview rather than asking for a written statement, and it was in the reasonable range of responses to adopt such a strategy.

Mrs Reeve conducting the investigation and the disciplinary hearing

137. The Respondent's Discipline Policy and Procedure [143] says that the Respondent will ensure that each stage of the disciplinary process is overseen by

a different manager of appropriate seniority in accordance with the ACAS Code of Practice if this is at all possible. The HR Manager's Guidance Note at [152] also says that: "*An investigation should not be carried out by the same person who will hold the disciplinary hearing or any appeal hearing. Where possible, it should be conducted by someone impartial such as an HR manager."* It also says the person conducting the disciplinary hearing should not have been involved in the investigation in any capacity and to bear in mind that a more senior member of staff may be required to hold any subsequent appeal hearing. Under the guidance about appeals it says: "*So far as possible, any appeal should be heard or chaired by someone who has not been previously involved. Ideally they should be more senior that the Chair of the disciplinary hearing and, where possible, outside their direct reporting line. If there is no-one suitable to hear the appeal, it is possible to engage a third party to chair the appeal meeting. Please contact us for advice if needed*." The reference to advice is to Quality Compliance Systems Ltd or QCS, providers of the Respondent's HR documents.

138. The Claimant says it was unfair that Mrs Reeve conducted both the investigation and the disciplinary hearing. The Disciplinary Policy and Procedure appears to be a generic QCS document and was drafted the Respondent had more senior staff: the manager and deputy manager. If that situation had remained there would have been potentially 4 senior staff amongst which to divide the 3 roles of investigatory manager, hearing manager and appeal hearing manager. But by the time of the events in question that was not the case: only Mrs Reeve and Mr Reeve were more senior to the Claimant. Whatever the Disciplinary Policy said the reality was it meant they only had 2 people to cover the 3 potential roles.

139. In those circumstances we do not find it was outside the reasonable range for a decision to be made for Mrs Reeve to conduct the investigation and the disciplinary hearing with thereafter Mr Reeve being reserved to deal with any appeal. It was within the reasonable range to consider that the priority should be given to the disciplinary hearing and the appeal hearing being heard by 2 different people. We do not consider that it was outside the range of reasonable responses to not appoint an external person from the outset. We do not consider that at that time there was any obvious reason that should have occurred to the Respondent to do so. As a small business it was in the reasonable range to seek to find a way to divide the process up between the internal staff. At appeal stage when the Claimant asked for an external person to be appointed that was ultimately facilitated.

Welfare Contact

140. The Claimant complains that there was no duty of care shown towards her, that she was not provided with a point of contact for her personal welfare, and that Mrs Reeve deliberately ignored her requests and correspondence when the Claimant was feeling distressed and isolated. We do not consider that it would have been within the reasonable range for the Claimant to have been given her own, separate welfare point of contact in the Respondent. As already said, this was a small business with limited individuals available who were more senior to the Claimant. For reasons already given in relation to the division of roles discussed above, the reasonable reality was that responsibility for contact with the Claimant prior to appeal stage had to fall to Mrs Reeve.

141. Mrs Reeve's evidence was that it was difficult to respond to some of the Claimant's communications and that she decided to concentrate on getting the investigation done and progressing the process. We consider that in the particular circumstances that philosophy and approach was within the reasonable range open to the Respondent. Much of the Claimant's contact was her reaction to the process she was facing and what others were saying about her; it would

not have been appropriate for Mrs Reeve to get involved in correspondence exchanges about that. The Claimant was also speaking about the impact on her mental health, and it was understandable therefore that Mrs Reeve was seeking to get through the process. Whilst the Claimant was not getting correspondence responding to everything she was saying, the Claimant was receiving correspondence about what was happening in the disciplinary process and when. The Claimant knew and acknowledged she would in the disciplinary investigations and meetings have the opportunity to have her say.

142. With the power of hindsight, we accept it could be said that Mrs Reeve could have communicated better with the Claimant about what Mrs Reeve could and could not respond to, and why Mrs Reeve was focussing on progressing through the disciplinary investigation and hearing stages. But we do also consider that is at risk of setting a counsel of perfection. When considered in the whole circumstances we considered that Mrs Reeve's overall approach to communication was within the reasonable range.

27 June investigatory meeting

143. The investigation meeting notes for 27 June 2022 [50] record the Claimant asking if she could record the meeting, Mrs Reeve saying the Claimant could not, the Claimant the asking if she could have a copy of the notes but also being told no. It is reasonable for an employer to provide a copy of notes of an investigation meeting, and it was not reasonable for the Claimant to initially be told she would not be given a copy. However, it was remedied as the Claimant was sent the minutes with the pack of documents in advance of the disciplinary hearing.

144. The Claimant says that at the investigation meeting on 27 June 2022 Mrs Reeve kept coming back in response to the Claimant trying to explain herself with negative answers. The Claimant says that this demonstrates a lack of impartiality. The Claimant's comments to that effect are recorded in the minutes at page [51]. We have read the minutes and the Claimant's comments on them and we take into account the totality of the evidence that we heard. We do not find that Mrs Reeve was overstepping the mark in the investigation meeting or displaying a lack of impartiality. We consider that Mrs Reeve was legitimately responding to the Claimant as part of the dialogue in the investigation process and allowing the Claimant to again respond in turn. For example, it was relevant and legitimate to put to the Claimant that the residents were not in the shade or wearing sunhats, there were no parasols out, to question why there had not been better preparation and to say (in Mrs Reeve's own knowledge) where the parasols were and that she believed the Claimant would know that.

Mrs Overthrow

145. The Claimant complains that Ms Overthrow was in the investigation meetings and the disciplinary hearing. She says Ms Overthrow was not impartial (including Ms Overthrow removing the Claimant's holiday dates from the board) and that the notes prepared by Ms Overthrow were not impartial. Ms Overthrow's actions were not ideal. The Claimant should not have been removed from the holiday board let alone on the basis of an expectation the Claimant was going to be dismissed. However, we do accept that Ms Overthrow's only involvement was to take notes and we do not find that Ms Overthrow's belief reflected a pre-judgment on the part of Mrs Reeve, who was the actual decision maker, that the Claimant was going to be dismissed. On the evidence before us we consider that Mrs Reeve herself was fair minded and did not take lightly her decision to dismiss the Claimant, bearing in mind the history of their working relationship and the degree to which Mrs Reeve had depended upon the Claimant.

146. We acknowledge that Ms Overthrow was Mrs Reeve's PA rather than being, for example, an HR professional. We also acknowledge that minute minutes are a summary of the main things that are said rather than being a verbatim account. But we do also consider that the notes do at times digress into matters of subjective opinion which would have been best avoided. For example, Ms Overthrow says "Rather confusingly she then stated…" about something the Claimant had said about applying Cetraben cream and at various times she described the Claimant's attitude as becoming quite aggressive. But again, the impact in terms of overall fairness is limited because Ms Overthrow was not the decision maker. Mrs Reeve was the decision maker and Mrs Reeve was present at the meetings to hear directly what it was the Claimant was saying and reach her own view.

Access to documents

147. On 19 July 2022 the Claimant emailed Mrs Reeve saying she had not yet received in the post the statements and meeting notes. The Claimant said she had insufficient time to prepare for the disciplinary meeting as she would have barely a day to prepare. Any potential unfairness here was remedied as the disciplinary hearing was then moved to the 25 July 2022.

148. When the Claimant was sent the invite to the disciplinary hearing (or indeed prior to that stage) she was not sent a copy of the disciplinary policy. The HR Manager's Guide to the disciplinary process says that when sending the invite letter the employee should be provided with a copy of the company's disciplinary procedure if a copy has not already been provided [153]. The Respondent's position on this is that in June 2021 the Claimant had signed to confirm that she had read the staff handbook [208] and that the Claimant also had access to the handbook and other policies on a QCS app. The Claimant's representative said to Mr Reeve in cross examination that she understood the app access did not work for the Claimant and the disciplinary policy had only been received in the Tribunal litigation. Mr Reeve said they had not been told this at the time.

149. In the Tribunal's industrial experience, it is fairly standard to provide a copy of a disciplinary procedure to an employee going through the process. At that point the policy has a very difference relevance compared to someone receiving a handbook as part of, for example, staff training or a general update of corporate policies and procedures. The policy sets out the procedure that it is intended will be followed and it also often contains definitions of relevant matters such as what might be considered to amount to gross misconduct. It was not a big job to send the Claimant a copy. It would have been reasonable to send the Claimant a copy, or at the very least send to her again the app details for her to access remotely. It is, however, also relevant to note that the Respondent's correspondence with the Claimant in general did, however, set out what was happening in the process and when. The Claimant must also have had some knowledge of the disciplinary process in order to know to ask for a third party to be appointed at appeal stage.

150. Likewise, if the Respondent was relying upon any other written policies or procedures such as the hot weather policy that was produced at the meeting, it was reasonable for a copy to have been provided to the Claimant or again the Respondent should have ensured the Claimant knew they were on the app and that the Claimant had access to them. That said we do not consider that any lack of compliance with a written hot weather policy was why the disciplinary case was pursued or upheld against the Claimant. The disciplinary case was instead founded on an expectation that the Claimant should have known, based on her experience, responsibilities and common sense, not to sit residents out in the sun in the way they were and without adequate protection.

151. We do not know when they were originally requested, but the Respondent should also have reasonably sent the Claimant a copy of her contract of employment and the signing in book. The documents must have been requested because in the statement the Claimant handed in at the disciplinary hearing she referred to them, as well as saying she was still waiting for copies of disciplinary and grievance policies and that no meeting minutes signed and agreed. They are not, however, documents that we can see were likely to change the outcome in the case. If the Claimant was in charge that day, time spent dealing with visitors would not have meant she did not retain overall responsibility for the residents. But nonetheless she was entitled to ask for them and they should reasonably have been provided.

Minutes

152. The Claimant complains that the minutes for 25 July 2022 purport to record her agreeing that the minutes of the investigation meetings were true and accurate when she had not said that. The Claimant, however, had the minutes of the investigation meetings, and if there were things that she wanted to correct or clarify at the disciplinary hearing she had the opportunity to do so. She also again had the opportunity to set out her points of dispute at appeal stage, and did so.

Historic concerns

153. The Claimant says that she had previously raised concerns in the home including behaviour by other staff members and including those documented in staff supervision documents and which had the potential to raise safeguarding issues. She did not, however, submit that this lay behind the decision made by Mrs Reeve to dismiss her, and the carers concerned did not know about the most recent concerns the Claimant had taken to Mrs Reeve so as to motivate a backlash against the Claimant. We therefore did not consider that the history was material to the decision to dismiss or the fairness of the procedure adopted.

154. The Claimant also says that other staff had previously raised complaints about her to Ms Lewis and to Mrs Reeve but that these were not investigated other than Mrs Reeve having a chat with staff. Again, we did not consider that this history was material to the decision to dismiss or the fairness of the procedure adopted other than being part of the general backdrop. It struck us that this is the type of industry in which it is fairly common for disputes to arise between carers together with feelings of resentment about who should do which caring duties, and was part of Mrs Reeve's management responsibilities to navigate.

155. For the sake of completeness we would also observe that the most recent supervision recorded at [180] on the 9 June 2022 recorded that relationships had improved and were much better.

Other investigations by Mrs Reeve

156. The Claimant says that there were inconsistencies in the accounts of the other staff that were not properly taken into account or investigated by the Respondent. We have dealt with this point above when looking at the reasonableness of Mrs Reeve's belief. We would add here that we consider that Mrs Reeve appropriately had in mind the need to focus on the central issues, and the allegations that were being made that related to care standards for residents. We consider that and her investigation and questioning of other staff in investigation meetings in response to what the Claimant was saying in return was reasonable and proportionate in focussing on the central points and issues of concern to her about care of the residents. Once she was of the considered view that the Claimant was in overall charge and had responsibility that day, to act within the

reasonable range did not require Mrs Reeve to definitively establish the exact time line of the afternoon in relation to such matters as to applied suncream to whom, or how long the home viewing with the visitors took or whether and when the Claimant was inside doing paperwork, or who was sunbathing.

Mrs Reeve's decision letter

157. In relation to Mrs Reeve's decision letter, we find that she generally did set out her findings in a way that was sufficient to be within the range of reasonable responses. However, the decision letter should not have included as a finding the allegation that was dropped in relation to medication. To include it was outside the reasonable range, albeit we accept it was done through error and in Ms Shepherd's report at appeal stage did address this.

158. The decision letter also should not have added in as a specific disciplinary finding that the Claimant had failed to take responsibility because that was not a specific stand-alone allegation that had been put to the Claimant to answer. The Acas Code of Practice says:

"*If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. The notification should contain sufficient information about the alleged misconduct… to enable the employee to prepare to answer the case at a disciplinary meeting.*"

159. The importance of an employee clearly understanding the allegations they are facing and that the findings made against them should be in response to those allegations has also been emphasised by the courts as part of the principles of natural justice. For example, in Strouthos v London Underground Limited it was said:

"*However, it does appear to me to be a basic to legal procedures, whether criminal or disciplinary, that a defendant or employee should be found guilty, if he is found guilty at all, only of a charge which is put to him. What has been considered in the cases is the general approach required in proceedings such as these. It is to be emphasised that it is wished to keep proceedings as informal as possible, but that does not, in my judgment, destroy the basic proposition that a defendant should only be found guilty if the offence with which he has been charged… It does appear to me quite basic that care must be taken with the framing of a disciplinary charge and the circumstances in which it is permissible to go beyond that charge in a decision to take disciplinary action are very limited. There may, of course, be provision, as there is in other tribunals, both formal and informal, to permit amendment of a charge, provided the principles in the cases are respected. Where care has clearly been taken to frame a charge formally and put it formally to an employee, in my judgment the normal result must be that it is only matters charged which can form the basis for a dismissal."*

160. Again, however it was a point that was addressed on appeal by Ms Shepherd in her recommendations. It was also not a failing in the circumstances that particularly disadvantaged the Claimant because the allegation was closely allied to the existing allegation about failing to protect the residents from sunburn where Mrs Reeve already had in mind (and which was within the reasonable range) that the Claimant bore responsibility by reason of being in charge that day.

Appeal process

161. Turning to the appeal, it is said that Mr Reeve took 27 calendar days to first arrange an appeal hearing. The disciplinary policy says that arrangements to hear the appeal will normally be made within 5 working days of receiving a

written request. In our judgment the initial delay was due to Mr Reeve believing that it was necessary to agree the minutes of the previous stage before it could progress to appeal. That would be a difficult task for him given he was not there. Speaking from hindsight and with our industrial experience we would observe that it may be better to simply note a statement of the points where the employee disagrees. But Mr Reeve is not a lawyer or a HR professional, and we accept he was legitimately doing what he thought he needed to do. He was in dialogue with the Claimant about it, who therefore knew what was happening. When agreement could not be reached, Mr Reeve did then look to progressing the appeal. In the wider circumstances we therefore do not consider the delay at this point was outside the reasonable range.

162. The Claimant complains that Mr Reeve proposed that Ms Overthrow take the appeal minutes, meaning that Ms Overthrow would be involved at all 3 stages of the disciplinary process. In the event this did not actually happen. But as Ms Overthrow was a notetaker not a decision maker and bearing in mind the limited personnel the Respondent could make use of; it is not something that we would have considered to be outside the reasonable range.

163. The Claimant complains that Mr Reeve said the appeal documents had been sent to Croner but that he then said he was seeking her permission to send them. We do not find there was any inconsistency or unreasonableness in this regard. We consider that Mr Reeve was saying that he was in the process of gathering the documents to send to Croner which may take some time. The Claimant then said (despite having requested a third party be appointed which could reasonably be interpreted as giving consent to that information being passed to a third party), that she had not consented to her personal data being passed to a third party. So, Mr Reeve then had to seek the Claimant's specific consent before he could further progress the external appointment.

164. The Claimant also complains that the outcome of the appeal was 72 days after the respondent received her written appeal request. The Acas Code of Practice says: "*Appeals should be heard within unreasonable delay…"* The appeal process therefore took about 10 weeks. We have carefully looked at all the stages of the appeal arrangement processes and in the wider circumstances we did not consider that the timescales were outside the reasonable range. There was a period of time where there was Covid in the home which took Mr Reeve away from the appeal, and he was at a time also dealing with a bereavement. Some delay was also caused by the need to appoint an external appeal investigator, Ms Shepherd and for her to then undertake her enquiries. But we do not consider that it was outside the reasonable range for Mr Reeve to have sought to personally deal with the appeal in the first instance and then, following the Claimant's request, ultimately accede to her request to appoint a third party. Some delay was also caused by the Claimant suggesting she had not given consent for her personal information to be passed to the third party. There were also periods of time where both the Claimant and Mr Reeve were absent on holiday.

165. The Claimant says that Mr Reeve said he had not had access to or been involved in the Claimant's investigation and disciplinary and then confirmed that all correspondence was directed through an email account he shared with Mrs Reeve. We did not consider that this arrangement rendered the process or decision making outside of the reasonable range or meant that they were inappropriately colluding. The reality was that Mr Reeve and Mrs Reeve were married and with no managers left there was no one else internally that could deal with the disciplinary proceedings. As they said in their oral evidence, they had an arrangement in place that they generally would not read or become involved in the communications that related to the stage the other was dealing

with. Further, Mr Reeve did not ultimately deal with the appeal investigatory stage in any event as that was passed to Ms Shepherd.

166. The Claimant also points to the fact that after the dismissal stage, but before her appeal was heard, Mrs Reeve requested confirmation from the training provider about the Claimant's progression through NVQ. The Claimant says that this was inappropriately done to support Mr Reeve in the appeal process, and should have been done earlier (as Mrs Reeve accepted) as part of the disciplinary investigation. We do not find that this step rendered unfair the appeal process or outcome. It was not put to Mr Reeve that it tainted or showed the tainting of his decision making or appeal outcome in some way that was ultimately investigated by Ms Shepherd. Progression to NVQ level 5 was also not something that we could see that did or would influence the decision to dismiss.

Appeal outcome

167. In terms of the Mr Reeve's appeal outcome decision it is said that Mr Reeve did not reference the Claimant being in charge or residents being sunburned and that his decision bore little resemblance and the allegations and reasons set out in Mrs Reeve's outcome letter.

168. We do find that Mr Reeve's outcome decision was poorly written in relation to the findings relating to the sunburn of residents. Whilst Mr Reeve is not a lawyer or a HR professional, nonetheless he could and should have spent the additional time (which would have taken a matter of minutes) setting out the full finding rather than paraphrasing it in such a short hand way.

169. We do acknowledge that the Claimant was sent Ms Shepherd's report and recommendations to be read alongside Mr Reeve's outcome decision. We also acknowledge that some misunderstanding on the part of the Claimant was borne by her own misreading of the structure of Ms Shepherd's report which neither Ms Shepherd nor Mr Reeve could reasonably have anticipated the Claimant would do.

170. However, Mr Reeve did not definitively and expressly state in his decision that he was adopting all the findings and recommendations of Mr Shepherd (which is what we have ultimately found as a matter of fact he did do). He did not make a clear reference to his findings about the sunburn and the Claimant's responsibility for it or indeed the Cetraben allegations (albeit we accept that is what he was intending to refer in his paraphrased, very short hand finding).

171. We do also accept that reading Mr Reeve's report against the known history of the disciplinary proceedings (where the main focus was on the sunburn allegation) and alongside Ms Shepherd's report would have given the Claimant a reasonable supposition (if the Claimant herself had read the structure of the report in the proper way) that Mr Reeve was referring at least to the sunburn allegation. But we do not ultimately consider that the Claimant should have to engage in such educated supposition. We have set out above the importance principle of natural justice in an employee knowing the charge they are being asked to answer. We consider that the same natural justice principle applies to the need for an employee to have a clear understanding of the exact disciplinary findings made against them for which they have been summarily dismissed from employment. That principle was even more important in this instance due to the mistakes made by Mrs Reeve at the disciplinary hearing decision stage, where an allegation not upheld had been mistakenly included in the outcome, and where Mrs Reeve had included a finding that had not been put to the Claimant as a specific allegation. Such a history increased the importance, at appeal stage, of being crystal clear about which had been upheld on appeal and on what basis

the decision to uphold the decision to dismiss had been made.

172. In those particular circumstances we do find that the wording of Mr Reeve's decision outcome was outside the reasonable range open to the employer in the circumstances. We would add, however, that even if Mr Reeve had fully set out in writing the finding he had made, it would not have affected the actual appeal outcome. The actual finding itself of gross misconduct had been made and there were reasonable grounds for that finding. The procedural failing was not setting out the full wording of what was in substance a legitimate disciplinary finding when writing the appeal decision outcome.

Was dismissal in the range of reasonable responses?

173. The Claimant here points to her length of service, the assistance she had given to Mrs Reeve in previous times of difficulty, and what she says was a clean disciplinary record, including having previously been nominated for an award. She points to the previous incident with the staff gathering during covid19 restrictions where she says all staff were investigation and disciplined. She seeks to contrast that with the 17 June allegations where she says there were in fact no complaints made by families about the sunburn, and that she was the only member of staff investigated and dismissed. The Claimant says she was subject to disparate treatment, in particular, when compared to Melissia Chadwick.

174. Whether the Claimant was or was not within the warning period of a previous written warning is not clear as there is no documentation relating to it before us. The impact of the Claimant potentially already being on a written warning is not something that we take into account when considering whether the decision to dismiss was within the reasonable range, because there is nothing at all to suggest that Ms Reeve or Ms Shepherd or Mr Reeve took any such written warning (whether live or spent) into account in any event.

175. From what we do know of the events relating to the staff gathering, we do not consider that it offers comparability that assists the Claimant in showing that the action taken against her following 17 June was outside the band of reasonable responses. The situations were in our judgment fact specific. In respect of the gathering, all staff attending were investigated and disciplined because they were considered to be in breach of restrictions and the Respondent had to take action under the oversight of the regulator. In relation to the events of 17 June, only the Claimant, and not the other carers, was suspended, investigated and ultimately dismissed because the allegations were focussed on her. The allegations relating to Cetraben, Resident X and the resident with the potential moisture lesion specifically related to care rendered by the Claimant. The allegation relating to the sunburn came against a background of it being alleged that the arrangements that day were at the Claimant's direction, control and responsibility. It also came on a background of Mrs Reeve having knowledge of the dynamic in the home and that the Claimant was generally seen as being in charge. It was within the reasonable range for Mrs Reeve to subject just the Claimant to the disciplinary investigation based on what was before Mrs Reeve and in her knowledge.

176. In terms of the decision to dismiss, there is actually some consistency between both scenarios. In relation to the staff gathering, the manager and deputy manager who had managerial responsibility were dismissed. In respect of 17 June, on the facts the Claimant was considered to have specific responsibility for safeguarding the care of the residents concerned and was also ultimately dismissed.

177. Addressing in particular Melissia Chadwick, we do not consider that the lack of action against her compared to the action taken against the Claimant was outside

the band of reasonable responses open to the Respondent. It was a point made by the Claimant that Mrs Reeve, Ms Shepherd and Mr Reeve were attune to. But the finding ultimately made was that the Claimant was in charge that day and others, including Melissia Chadwick, were acting at the Claimant's direction and were junior to the Claimant. Mrs Reeve also considered that Melissia Chadwick and others found it difficult to stand up to the Claimant and therefore did their best to countermand the situation when they could by, for example, trying to cover up residents, or ultimately take them in when the Claimant was engaged elsewhere. Mrs Reeve had the benefit of knowing the dynamic in the home and the personalities at play. Whilst the Claimant rejected that version of events, Mrs Reeve was entitled to find it to be the case and her doing so was within the reasonable range. Furthermore, the simple finding that the Claimant was in overall charge that day (including of Melissia Chadwick) would justify action being taken specifically against the Claimant because it would be in the reasonable range to see her as having overall responsibility for the wellbeing of the residents (irrespective of wherever the Claimant was in the building or grounds that afternoon).

178. In general, the Respondent was acting in the band of reasonable responses in choosing to categorise the misconduct as gross misconduct. The Respondent's disciplinary policy says that matters which may justify summary dismissal include actions which may harm the well-being of a service user. The allegations upheld against the Claimant all related to the care rendered to, and wellbeing of, vulnerable service users on the day in question. The Respondent was also acting in the band of reasonable responses in deciding that he appropriate sanction for gross misconduct was dismissal.

179. We are satisfied that the Respondent did take into account the Claimant's length of service and the previous help that the Claimant had given to the Respondent in difficult times. The written warning for the party was not taken into account. As we have said we consider that Mrs Reeve had relied heavily on the Claimant in the past and we do not consider that she took lightly at all the decision to dismiss the Claimant. We consider that Mrs Reeve ultimately concluded that these were serious findings relating to a lack of care and protection by the Claimant of vulnerable service users, that this destroyed trust and confidence in the Claimant being able to continue in such a trust role, and Mrs Reeve ultimately had no choice other than to invoke a sanction of dismissal. That position was not changed by the appeal, and it was within the band of reasonable responses open to this employer.

<u>Unfair Dismissal overall conclusions</u>

180. We have found some procedural failings on the part of the Respondent albeit some were remedied at appeal stage. Our task is to then decide in all the circumstances of the case whether the Respondent acted reasonably in treating the reason they found as sufficient reason to dismiss. The procedural deficiencies that were not sufficiently remedied in the process (for example sending the original suspension email from the general account, not sending requesting documents to the Claimant, and the errors in decision letters) have to be weighed into the equation as does the seriousness of the misconduct.

181. The misconduct found by the Respondent was serious; it related to the care of vulnerable residents. Undertaking that weighing task we would not find that most of the procedural failings would be sufficiently severe whether individual or cumulatively to render the dismissal unfair. However, we were particularly concerned by Mr Reeve's drafting of the appeal outcome letter as against a history of the deficiencies in the drafting of Mrs Reeve's disciplinary hearing outcome letter. As said above, it must be a principle of natural justice that the

Claimant be left with a clear statement of exactly what she was dismissed for, rather than having to suppose it from the history of the proceedings and other documents. Due to the particular impact of that procedural, natural justice point on top of the other more minor procedural points, and notwithstanding the seriousness of the misconduct found, we find the Respondent did not act reasonably in treating the reason they found as sufficient reason to dismiss. Although we would again emphasise that in our judgment that was a failure by Mr Reeve to fully and clearly set out in writing that that the unclear passage he wrote related to the Claimant's responsibility for the sunburned residents and the Cetraben allegations. We have otherwise found that Mr Reeve did in fact make the decision that the Claimant was responsible for the sunburned residents (by adopting Ms Shepherd's findings and recommendations) and that such a finding, and the overall decision to dismiss, were within the reasonable range open to the Respondent. It is therefore not a failing that would on the face of it alter the outcome of dismissal. Nonetheless it was a procedural failing sufficient serious such as to render the dismissal unfair. Ultimately the Respondent should have been crystal clear with the Claimant what she was actually dismissed for.

182. The Claimant was therefore unfairly dismissed, and the case will be listed for a remedy hearing if needed by the parties. But it is important that the Claimant is aware of the potential implications of our overall findings in terms of remedy. In particular, there would be two key considerations at any remedy hearing that have not yet been formally assessed by the Tribunal. First, the question of whether there should be any reduction to any basic award or compensatory award for contributory conduct by the Claimant. Second, when assessing any compensatory award, the Tribunal will have to address the prospect of, if this Respondent had acted procedurally fairly, the Claimant still being dismissed (sometimes called a "Polkey" deduction). These are not issues that were expressly addressed at the hearing because of a wish to keep the issues at a manageable level for the Claimant who did not have professional representation. Therefore, we make here in this Judgment no formal finding on contributory conduct or a "Polkey" deduction. But it is important that the Claimant is aware of, and takes into account from here, their potential relevance to any future basic award or compensatory award. Employment Judge Harfield will write separately to the parties with remedy case management orders and the listing of a remedy hearing if the parties are unable to resolve remedy between themselves.

"*Wrongful Dismissal / Notice pay*

What was the Claimant's notice period?

Was the Claimant paid for that notice period?

If not did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?"

183. In the wrongful dismissal notice pay claim, we are not constrained by the band of reasonable responses. We have to decide for ourselves, on the evidence put before us, on the balance of probabilities whether the Claimant committed gross misconduct entitling the Respondent to dismiss her without notice.

184. We do find on the balance of probabilities that the Claimant was responsible for failing to protect the residents from sunburn on the day in question. On the balance of probabilities on the evidence before us we find that the Claimant was in charge that day and that the activity was not adequately planned or managed. We find that the Claimant was generally perceived by staff and Mrs Reeve as being in charge when on shift and that the Claimant also saw herself that way and acted that way. We accepted Ms Lewis' evidence that she had overheard the

Claimant describing herself as the manager on the telephone. It did not need a formal job title for that to be the reality of the situation. Such a finding is not based on disputes as to who wore what uniform, or that other senior carers had access to the computer or the office, or held keys. It is based on the evidence of Mrs Reeve, and the other carers we heard from who we ultimately preferred on the point that generally the Claimant did take charge and was seen to be in charge, including by the Claimant herself. Our finding was supported by the history of the Claimant's employment, with her at one point being the only Senior Carer and heavily relied upon by Mrs Reeve to support the running of the home. It was supported by the evidence we accepted that generally the Claimant led on matters such as home visits and visits from medical practitioners (albeit that did not mean that others did not at times do these things).

185. The residents were vulnerable individuals who were sat in the heat of the sun for a sustained period of time without adequate protection. Most were not, initially at least, sat in the shade; they were not wearing hats; they were not sat under umbrellas. Sun lotion was applied at least to some residents, but it did not give adequate protection and bearing in mind the photographs we consider on the balanced of probabilities it was not applied to all vulnerable places such as the top of heads, necklines, and the bottoms of sleeves and trouser legs. Given the long lasting nature of the sunburn suffered by Resident C on the balance of probabilities we also accept Ms Hartley's evidence that at the Claimant's direction Cetraben was applied to Resident C in place of suncream, probably before Aly Chadwick went and found the suncream that was then applied partially to other residents.

186. Notwithstanding that the Claimant may have been in and out of the garden that afternoon attending to other matters, we consider that responsibility for the protection of the residents that day lay with her. She was in charge, led the activity, and cannot abdicate her overall responsibility. She failed to meet her duty of care to the residents and her actions or inactions harmed the wellbeing of vulnerable residents.

187. On the balance of probabilities, we also find that the Claimant did refuse that day to help Resident X with a continence issue when brought to her attention by Resident X. Again, on the balance of probabilities, we find the Claimant said words to the effect that Resident X could sort herself out. Resident X's condition that day was as such that she was unable to do so. Such conduct again demonstrated a lack of care and prioritisation of the wellbeing of a vulnerable resident. In particular the Claimant's comment was directed at Resident X herself and not as a delegation to another member of staff to assist (albeit we accept that in fact Aly Chadwick did assist Resident X). In reaching that finding we preferred the evidence of Aly Chadwick, Ms Hartley and Mrs Ollier to that of the Claimant who denies the allegation.

188. Here we took into account the alleged inconsistencies the Claimant points to in the witnesses' evidence and to her allegation that they were colluding against her. These alleged inconsistencies included Mrs Ollier not clearly setting out in her letter she sent to Mrs Reeve the second conversation she says she witnessed about Resident X prior to the residents going outside, and the fact that Ms Hartley thought it was Melissia Chadwick who had been there, not Aly Chadwick. However, we considered that there were sufficient consistencies in the central thrust of the evidence of Ms Chadwick, Ms Hartley and Ms Ollier on this issue to satisfied us that the Claimant had said, and had been overheard saying, that Resident X should sort herself out. We took into account the fallibility of human recall and with it the fact that it is often the case that witnesses all recounting the same events will have differences in recall on certain details, but that does not mean that the central event they are recounting did not happen. On

the balance of probabilities, we rejected the notion that it was a concocted allegation by collusion between the Chadwick family and Ms Hartley. That did not seem plausible to us, even taking into account the similar end paragraph of Melissia Chadwick and Ms Hartley's written statements. Further, and whilst we weighed into the equation the fact that the other carers working that day still work for the Respondent and that they would wish to avoid being made responsible for the sunburnt residents, on balance we still considered the carers to generally be credible witnesses. For example, Ms Hartley's evidence about the use of Cetraben as a suncream married with the serious long term sunburn suffered by that particular resident and Melissia Chadwick gave fulsome evidence about the events of the Christmas gathering.

189. On the balance of probabilities on the evidence before us we do not find it sufficiently established that the Claimant failed to give suitable care to the resident with the suspected moisture lesion. To be clear that does not mean in the unfair dismissal claim that the Respondent's conclusions in that regard were outside the reasonable range. But our analysis is that if the Claimant was in charge, then she was entitled to delegate some aspects of residents' care to other qualified carers. Melissia Chadwick had examined the resident and the Claimant had spoken to Melissia. We accept that notwithstanding issues as to who went and got it or who put it in the resident's room, a cushion was obtained and that the Claimant (who was about to go on holiday) asked the night staff to keep an eye on it and make an appropriate referral if needed.

190. We do consider Claimant's conduct in her lack of care for the needs of the residents who suffered sunburn and Resident X, all of whom were vulnerable service users and for whom the Claimant's role was to render care, did amount to gross misconduct. It was conduct that undermined trust and confidence in the Claimant's abilities to look after the wellbeing of vulnerable residents within the Respondent's care and entitled the Respondent to dismiss without giving notice. The wrongful dismissal complaint is not well founded and is dismissed.

"Direct age discrimination

Did the Respondent to the following things:
(a) Start disciplinary proceedings.
(b) Dismiss the Claimant

Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant the tribunal will decide whether she was treated worse than someone else would have been treated.

The Claimant says she was treated worse than Melissia Chadwick.

If so, was it because of age?

Did the Respondent's treatment amount to a detriment?"

191. The Claimant's age group is 41 and she compares herself with people in the age group around 21 (Melissia Chadwick's age). The Claimant says that her age was a factor in the action that the Respondent took against her in singling her out for investigation and dismissal. She says that she was the eldest member of staff on duty that day. She says Mrs Reeve referred to Melissia Chadwick as a young girl, that Ms Lewis called the other carers young girls, and that Ms Hartley had

referenced her own young age in her evidence. The Claimant says such evidence is reflective of a culture in the workplace to consider her responsible because she was the eldest member of staff on duty that day.

192. It was accepted during cross examination that the age discrimination complaints did not extend to Mr Reeve's handling of the appeal.

193. On our notes record Mrs Reeve had referred to Ms Chadwick as doing a lot for her age and not that she had referred to her as a young girl. When challenged Mrs Reeve said that was really a reference to experience rather than age. It was said in the context of Mrs Reeve saying she could not definitively comment on all the different types of work that Melissia Chadwick may and may not have done. Ms Hartley did refer to herself as only being a cadet carer and age 17 in evidence in terms of explaining why it was difficult to stand up to the Claimant on the day. Ms Lewis said in evidence that the Claimant treated the youngsters who worked there as having to do what the Claimant said and that she also remembered her and the Claimant having at one point a spat over the young girls but could not remember what it was for. She said with the Claimant in charge the girls did not have much say in anything. We would add that all witnesses used the word "girls" to talk about the other carers including the Claimant so the word "girls" simply by itself when used in evidence was not any indicator of or reference to age.

194. We do not find that the Claimant's age was a material influence on the decision to start disciplinary proceedings or the decision to dismiss the Claimant.

195. The disciplinary proceedings were started in part because of the sunburn suffered by the residents which Mrs Reeve considered was likely to be the Claimant's overall responsibility. Mrs Reeve considered it likely to be the Claimant's responsibility not because of the Claimant's age but because of her knowledge of the Claimant's status in the home as being in charge when on shift and because of the statements she received about events that day which also suggested the responsibility lay with the Claimant. That was not because of/materially influenced by the Claimant's age. The Claimant's status in the home was borne of various factors such as the length of time and experience she had working in the home; that when the managers left she had for a time been the only senior carer; that Mrs Reeve had relied on the Claimant to assist her at that time and undertake additional work; the Claimant's level of qualification; the way the Claimant would in general take charge. None of these factors equate to age. Hypothetically someone much younger to the Claimant but otherwise in the same situation as the Claimant, including the Claimant's own attributes and style of working when on a shift, would have been considered to be in charge in the same way.

196. We do not find that Melissia Chadwick was in the same material position as the Claimant. She was not considered by Mrs Reeve to be in overall responsibility/ in charge that day for the residents. This was not because Melissia Chadwick was younger than the Claimant. It was because Melissia Chadwick had less experience, was working alongside people such as the Claimant to gain more experience, and did not have the same background or history in the workplace that the Claimant did.

197. In our decision making we did take account of the references made in evidence to age. We accept that when Mrs Reeve referred to Melissia Chadwick doing a lot for her age it was a poor choice of words for what was a reference to experience and a sentiment that Melissia Chadwick was progressing well with her career. We did not consider that it equated to an attitude on Mrs Reeve's part of holding the Claimant to account and Melissia Chadwick not to account because of their respective ages.

198. We consider the point that Ms Lewis was making (and indeed Ms Hartley) was that she thought there was a power and status imbalance at play. She was saying that it was difficult for the other carers to stand up to the Claimant and insist the residents go inside because of the force of the Claimant's personality and the way the Claimant ran shifts. We consider that Mrs Reeve had a similar view alongside and that it was difficult for other carers to stand up to the Claimant because the Claimant was generally in charge. We ourselves considered that the Claimant was likely to have a forthright and directional style in work, and had expected others (other than perhaps Ms Lewis) to follow her directions.

199. We do not consider that this sense of power and status imbalance amounted to age being a material influence in how Mrs Reeves dealt with the Claimant in contrast to Ms Chadwick. As we have said a considerably younger person but otherwise in the same situation as the Claimant would have been treated the same as the Claimant by Mrs Reeve. Likewise, it would be possible for someone to be considerably older than Ms Chadwick but otherwise in the same circumstances as Ms Chadwick (for example the same kind of experience and qualifications). If so, we consider that notional individual would have been treated in the same way as Ms Chadwick was treated as compared to how the Claimant was treated.

200. If therefore there was sufficient to shift the burden on to the Respondent, we find that the burden of proof would be discharged in showing that the conduct was not because of/materially influenced by age.

201. Disciplinary proceedings relating to medicine dosages, use of Cetraben, the treatment of Resident X and the treatment of the resident with the suspected moisture lesion started because they were concerns directly about the alleged conduct of the Claimant raised by the other carers with Mrs Reeve. Again, a hypothetical comparator in the same situation but of a younger age would have received the same treatment.

202. The Claimant was dismissed because Mrs Reeve believed the Claimant was in charge and responsible for the residents who suffered sunburn. Our analysis about Mrs Reeve's conclusion that the Claimant was in charge and that such a conclusion was not because of/materially influenced by age and the use of Melissia Chadwick as a comparator is the same as above. The Claimant was also dismissed because Mrs Reeve believed the Claimant had refused care to Resident X and the resident with the suspected moisture lesion and had inappropriately directed the use of Cetraben. Again, this was not because of age/materially influenced by age.

203. The complaints of age discrimination are therefore not well founded and are dismissed.

Employment Judge R Harfield

Date 15 January 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON 19 January 2024

FOR THE TRIBUNAL OFFICE Mr N Roche

Notes

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/