EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103343/2022

Held in Glasgow via Cloud Video Platform (CVP) on 7 September 2022, 11 December 2023 and 15 January 2024

Employment Judge P Smith

Miss Cheryl Coutts	**Claimant** **In Person**
Silverburn Care Limited	**Respondent** **Represented by:** **Mr R Najafian - Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Claimant's claim of unfair dismissal is well-founded and succeeds.

2. The question of whether the Claimant should be reinstated or re-engaged by the Respondent shall be determined at a remedy hearing.

3. Any basic award of compensation for unfair dismissal shall be reduced by a factor of 100%, to nil, on account of the Claimant's culpable conduct prior to her dismissal.

4. Any compensatory award of compensation for unfair dismissal shall be reduced by a factor of 100%, to nil, on account of the Claimant's culpable contributory conduct.

5. Any compensatory award of compensation for unfair dismissal shall be reduced by a factor of 100% in respect of any losses the Claimant may have sustained as a consequence of her dismissal from 3 May 2022 onwards, applying the principle in *Polkey v A E Dayton Services Ltd.*

6. The Claimant's claim of wrongful dismissal is dismissed.

7. The Claimant's claims for a statutory redundancy payment, holiday pay, arrears of pay and other payments are dismissed upon their withdrawal by her, under **rule 52.**

8. The question of whether the Respondent should be ordered to pay a financial penalty to the Secretary of State (of no less than £100 but no more than £20,000) under **section 12A Employment Tribunals Act 1996** shall also be determined at the remedy hearing.

REASONS

Introduction

1. By a claim form dated 19 June 2022 the Claimant presented various claims to the Employment Tribunal. Following a discussion at the commencement of the hearing the Claimant decided to withdraw a number of those claims and I have dismissed them upon their withdrawal in the Judgment above. The claims of unfair dismissal and wrongful dismissal proceeded.

2. This case has had an unfortunate history which delayed its final determination. On the first day of the original hearing dates I decided to sist the case as it emerged during the Respondent's evidence that a criminal investigation was proceeding in relation to the Claimant and the incident that had precipitated these proceedings. That sist was ultimately lifted when the Tribunal was informed, in late 2023, that the prosecution of the Claimant was no longer being pursued by the Crown. It was re-listed for 11 December 2023 but on that occasion the Respondent's principal (and part-heard) witness had to travel to the south of England to deal with a family emergency. We were able to proceed across two further days, in January 2024. There was not, however, enough time to deliver an oral judgment and accordingly, the judgment was reserved.

3. In the preliminary discussion the following list of issues was agreed as being the definitive set of questions I would have to decide in determining the Claimant's claims.

Unfair dismissal

3.1. Has the Respondent proven a potentially fair reason for dismissing the Claimant? The Respondent's case is that the Claimant was dismissed for a reason relating to her conduct, namely assaulting and shouting at one of the Respondent's residents on 12 April 2022. That would, if proven, be a potentially fair reason for dismissing the Claimant under **section 98(2)(b) Employment Rights Act 1996**. The Claimant disagreed that this was the principal reason, stating instead that the principal reason was that the Respondent did not like her.

3.2. If the Respondent has proven a potentially fair reason, was the dismissal actually fair taking into account the test for fairness under **section 98(4) Employment Rights Act 1996**? In relation to conduct cases the following questions are pertinent:

3.2.1. Did the Respondent genuinely believe in the Claimant's guilt?

3.2.2. Was that belief based upon reasonable grounds?

3.2.3. Was as much investigation carried out as was reasonable?

3.2.4. At all times did the Respondent act as a reasonable employer, acting reasonably, could have acted?

3.3. The Claimant seeks reinstatement and re-engagement. If she was successful in her unfair dismissal claim, I decided that these issues would be best determined at a separate remedy hearing. However, in relation to compensation the issues I would have to decide would the following matters of principle:

3.3.1. Whether any reduction should be made to any basic award of compensation on account of any culpable or blameworthy conduct on the part of the Claimant prior to her dismissal.

3.3.2. Whether any reduction should be made to any compensatory award of compensation on account of any contributory conduct on the part of the Claimant.

3.3.3. Whether any reduction should be made to any compensatory award of compensation because there was a chance that, had the Respondent acted fairly, the Claimant would have been dismissed in any event (the principle derived from the case of *Polkey v A E Dayton Services Ltd*).

Wrongful dismissal

3.4. To what period of notice of the termination of employment was the Claimant contractually entitled to be given by the Respondent?

3.5. It is agreed that the Claimant was dismissed without notice.

3.6. The sole issue in this claim was therefore whether the Respondent was entitled to dismiss her without notice, i.e. did the Claimant engage in repudiatory conduct entitling the Respondent to dismiss her summarily?

3.7. If the Claimant was wrongfully dismissed, to what award of damages is she entitled?

4. I was presented with a productions file by the Respondent amounting to some 96 pages. The Claimant's documents (which had been sent to the Tribunal and the Respondent) had not been included within that file, so she was permitted to adduce any of those documents she wished to adduce during the course of her evidence. I was also shown CCTV footage of an incident that occurred in the workplace on 12 April 2022. This footage was reviewed on a number of occasions throughout the hearing in order that the witnesses could each comment upon it.

5. I heard evidence from Mr Rishi Sujeewon (Manager) and Mrs Marie Suzanne Lakin (HR Manager) on behalf of the Respondent. I also heard evidence from

the Claimant in her own cause, and also from Mr William Rollo and Mr Precious Olabode Bello (former colleagues) on her behalf.

Findings in fact

6. The following findings were made according to the applicable standard in the Employment Tribunals, namely the balance of probabilities.

7. The Respondent operates a residential care home, of the same name, in Pollok. It employs some 87 staff at the site in question.

8. As at the material time – April 2022 – the manager of the home was Mr Rishi Sujeewon. Mrs Marie Lakin was employed by the Respondent as its HR Manager. Mr William (known as Billy) Rollo was employed as Head Chef and Kitchen Manager. Mr Precious Olabode had been employed as a Senior Support Worker for a few weeks only.

9. The Claimant was employed by the Respondent as a Support Worker. Whilst her precise start date was not agreed, she had been employed by the Respondent since the summer of 2017. By April 2022 she had completed four full years of service. By clause 10 of her statement of employment particulars it was stated that she was entitled to two weeks' notice until four years' service had been completed plus – confusingly – an additional week for each complete year after the third year. The overall result of this formula is that the Claimant's contractual notice entitlement was three weeks. The formula adopted by the Respondent in its contractual documents provides for less than the statutory minimum notice required by **section 86(1)(b) Employment Rights Act 1996**, which provides for one week for each completed year of service. In these circumstances statute overrides the contractual position: the Claimant was entitled to four weeks' notice of termination by the Respondent.

10. It was apparent from certificates included within the productions file that the Claimant had completed training courses in adult support and protection (16 July 2021), dementia awareness (7 July 2021), health and safety (21 July 2021), and manual handling (26 July 2021). She was, as at April 2022,

working towards her SVQ in order to go on to become a Senior Support Worker.

11. Prior to 12 April 2022 the Claimant had not been subject to any disciplinary proceedings by the Respondent, nor issued with any warnings in relation to her conduct. I was told by Mr Sujeewon that there may have been some concerns about the Claimant's performance in her role, but this evidence was decidedly vague and the Respondent otherwise introduced no documentary evidence that might have indicated what such concerns were or if they had in fact been raised with her. In my judgment, it amounted to no more than a bare assertion on Mr Sujeewon's part. For these reasons, I rejected his evidence on this matter.

12. At its Pollok location the Respondent provides accommodation and care to residents, some of whom are elderly, frail, or otherwise have considerable care needs. One of those residents – who was later involved in the incident of 12 April 2022 – has bipolar disorder and dementia, and thus care needs specific to her situation. However, there was at the time no community restraint order in place that might permit the use of physical force in relation to her.

13. On 12 April 2022 the Claimant was at work. On this occasion she was working in the kitchen and not as a carer for residents. The following findings are based upon the CCTV footage which I was shown and reviewed several times.

14. At 15:12:50 that afternoon the Claimant was in the reception area of the home, facing the front of the home and with her back to the reception area. Also in the reception area at that time were Mr Olabode and Ms Elizabeth Michael, both stood by the reception desk in close proximity to the Claimant but not interacting with her.

15. At 15:12:51 the Claimant went to press a button to permit a visitor to leave the premises via the front door. The door opened and the visitor began to leave the building.

16. At the same time, the resident referred to in paragraph 12, above, began moving towards the doorway from the rear left of the reception area, at a relatively slow pace. She was dressed in a dressing gown and slippers, albeit with her back to the location of the camera. By 15:21:53, she was just behind the visitor, with one foot on the doormat, and heading in the same direction. She was at that stage behind the Claimant, to her left.

17. At 15:12:54 the Claimant raised her left arm to head height and placed her hand on the left of the doorframe, in between the visitor and the resident. At 15:12:55 the resident was at the threshold of the doorway, facing outwards.

18. At this point the Claimant turned to the resident and, using both arms, pushed the resident back into the reception area with the resident turning to face inwards by virtue of the Claimant's pushing. It was plain from the footage that the Claimant used considerable force, which included constant pushing for a period of ten seconds and with her leaning forwards at an angle, using her trailing foot for balance.

19. At 15:13:02 (seven seconds into the Claimant pushing the resident) Mr Olabode approached the resident, from behind. He is seen to have pulled her away from the Claimant, at 15:13:05.

20. Mr Sujeewon, giving evidence for the Respondent, stated that the actions of the Claimant in pushing the resident were not permitted, both as to pushing her in principle and in relation to the manner in which the Claimant was seen doing it. Mr Olabode, giving evidence for the Claimant, concurred and went further: he said that Support Workers were not permitted to physically restrain a resident "regardless of whatever", and that there should be no physical restraint "of any kind" used. Mr Olabode confirmed that he personally would never have done what the Claimant was seen doing, and in fact would only ever use physical force in relation to a resident in circumstances where an order was in place permitting it. At the start of this hearing (when discussing her inconsistent treatment point) the Claimant stated that Mr Olabode had done a similar thing to a resident and had not been dismissed, but in evidence he was not asked about it and in any event his evidence concerning whether

such conduct would ever be acceptable was to the complete opposite effect. The Claimant provided no examples to me of others who had engaged in this conduct, or indeed when it was said to have happened. For these reasons I rejected the Claimant's evidence that such conduct was carried out by others or otherwise commonplace at the home.

21. Mr Rollo's evidence on this matter was that he was an eyewitness to the incident, from outside the building. I accepted that from his vantage point in the approach to the doorway, he would have had a relatively good view of what happened. However, in my judgment the CCTV footage provided a better and unimpeded view of the incident. For his part, Mr Rollo personally did not see anything wrong with the methods the Claimant deployed to return the resident indoors. I accepted that this was his opinion but ultimately I was not assisted by it. I considered that of all the witnesses, Mr Rollo – as the Head Chef and not a carer himself – was the least well-equipped to provide evidence as to what methods were appropriate for a Support Worker to use when faced with this situation. Mr Sujeewon and Mr Olabode both came from a caring background and spoke with one voice about the circumstances in which physical restraint could be used, or not.

22. In my judgment, on this occasion the Claimant assaulted the resident. No physical force was permitted to be used in relation to this resident (nor indeed was it permitted to be used in relation to any other of the Respondent's residents at that time as no community restraint orders were in place). The Claimant, with her training, her more than four years' experience working in the home and her knowledge of this specific resident, knew that and yet still used physical force in relation to her. Going further, the duration and force deployed by the Claimant in the pushing itself was in my judgment excessive and indicative not of a desire to protect but of malign intent. It confirmed to me that what had happened was that the resident had been assaulted.

23. From 15:13:05 until 15:13:11 the resident and the Claimant remained in close proximity, speaking to each other. The CCTV footage recorded video only and did not record the audio of what was said between them. However, at 15:13:11 the resident moved away from the Claimant having raised her hand

to the Claimant and pulling her arm away from her. It was plain from the footage that the resident was cross about what had just happened.

24. At 15:13:12 the resident and the Claimant turned away from each other, but then in the next second returned to one another. It was equally plain to me, from the footage and of the pair's visible demeanour, that this was a continuation of a confrontation. That was consistent with the resident having been assaulted. The Claimant then swiftly lifted her right arm and pointed towards the area from which the resident had earlier emerged.

25. In evidence the Claimant said that at this point she told the resident "let's go in and get a cup of tea, get some proper footwear on, get some proper clothes on." That kind of protective statement did not, in my judgment, chime with the demeanour of the Claimant at the time. In my judgment, the Claimant's physical demeanour – as evident from the CCTV footage – appeared agitated and it looked like she was in fact issuing the resident with an order. Furthermore, written statements were taken from Mr Olabode and Ms Michael around the time of the incident. Those statements both recorded the Claimant having shouted at the resident, "don't ever talk to me like that, ever again" (Mr Olabode) or, "don't you dare speak to me like that ever again" (Ms Michael). Those contemporaneous accounts of what was said appeared to be consistent with what could be seen in the footage.

26. In his evidence to the Tribunal Mr Olabode resiled from his written statement to some degree. He said that he was very new at the time and that if he had been writing this statement now, he would have written it differently. He did not say, however, what he would have written differently save that he would not have used the word "forcefully". Ultimately, he said he could not be certain whether it was the Claimant or the resident who used the words he had cited in his written statement. Even making proper allowance for the fallibility of memory and the fact that he was giving evidence to the Tribunal some 21 months after the event, I was unconvinced by Mr Olabode's evidence. The CCTV footage showed him standing right next to the Claimant and the resident and facing them both at the time the Claimant raised her arm and addressed the resident. The written statement he gave and signed at the time

was unambiguous and materially corroborated by that of Ms Michael, also taken at the time. In my judgment, given his physical proximity to the Claimant and the resident during the exchange, and what he recorded contemporaneously in his written statement, I considered that his written statement provided the best evidence of what was said, by whom, and how it was said.

27. For these reasons I rejected the Claimant's evidence that she said, in a protective way, "let's go in and get a cup of tea, get some proper footwear on, get some proper clothes on." What actually happened was that, having assaulted the resident, the Claimant raised her arm, pointed towards the corridor and shouted at her words to the effect of, "don't ever talk to me like that, ever again".

28. Mr Sujeewon's evidence was that whilst he was not an eyewitness to the pushing segment of the incident (as he was in the office at the time), he was an eyewitness to the Claimant shouting at the resident as he had emerged from the office as a result of the commotion concerning the pushing. This evidence was not challenged and, given that Mr Olabode corroborated how close the office was to the reception area, I concluded that I should accept Mr Sujeewon's evidence on this point. He was not visible on the CCTV footage, however.

29. The CCTV footage then shows that having been shouted at by the Claimant, the resident left the reception area. The footage then ends.

30. Immediately after this the Claimant went to the kitchen and explained to two colleagues (Brian and Rosina) what had happened. She did not inform Mr Sujeewon, Mrs Lakin or anyone else that she had done so.

31. Mr Sujeewon personally witnessed the shouting segment and then reviewed the CCTV footage of the entire incident. At this point he formed the belief that the Claimant was guilty of gross misconduct and decided to dismiss her. He then telephoned Mrs Lakin to discuss the matter. He explained what had happened and that he had decided to dismiss the Claimant. Mrs Lakin's HR

advice to him was confirmatory of his decision and that the Claimant should be summarily dismissed.

32. The Respondent has a disciplinary policy and procedure. Mr Sujeewon was aware of it but could not recall whether he read it at the time. Given my findings about whether the policy was followed (as set out in the paragraphs that follow), I find that he did not in fact read it on 12 April 2022 or indeed have recourse to it at any point at which he came to deal with the Claimant in relation to the incident of that day. He had heard of the Acas Code of Practice on Disciplinary and Grievance Procedures but had received no training in relation to employment rights.

33. The Respondent's policy statement says that it is *"designed to ensure that all employees are dealt with consistently and fairly in disciplinary matters."* It then sets out a number of related principles, expectations and procedural steps. The first procedural step is that *"Before any disciplinary action is taken the relevant person will carry out a full investigation to establish the facts. The investigation will normally involve a meeting with you."*

34. At around 5pm on 12 April 2022 – less than two hours after the incident – Mr Sujeewon called the Claimant into the office. He also asked Pamela McCafferty, a nurse who was working that afternoon, to attend as a witness. There is a dispute about what was said at that meeting, and no notes were taken. Earlier in his evidence Mr Sujeewon suggested that in that meeting the Claimant had been suspended. He said that there was a letter to that effect, but no such letter was included within the productions file. He later conceded in his evidence that the Claimant had not in fact been suspended, but instead she had simply left the office. That changed account was concerning because it was at odds with not only his earlier evidence to the Tribunal but to official reports Mr Sujeewon made to the Care Inspectorate (on an Adult Protection Referral (AP1) form) the next day and to Disclosure Scotland on 21 April 2022. In both reports he expressly stated to the Care Inspectorate that she had been suspended. That was inaccurate.

35. Given this significant departure in evidence by Mr Sujeewon, in my judgment the Claimant's version is to be preferred in relation to what happened at this

meeting, consistent as it was with the concession. The meeting was brief. At the meeting Mr Sujeewon told the Claimant to leave the premises. He told her he might have to call the Police. The Claimant asked why and whether it was to do with the incident involving the resident. Mr Sujeewon confirmed that it was and that she must leave. The Claimant became defensive and raised her voice. In my judgment, she did so because she understood the gravity of what she had done earlier that afternoon and believed at that point that her employment was likely to be terminated imminently. Understandably in those circumstances, she was upset and defensive. She used foul language but was not, in my judgment, aggressive (physically or otherwise) towards Mr Sujeewon or Ms McCafferty as the Respondent contended. What the Claimant did not know, however, that Mr Sujeewon had already made the decision to dismiss her.

36. In my judgment, this meeting was not in any sense an investigatory meeting of the kind envisaged in the Respondent's disciplinary policy. No attempt was made to establish the facts: the facts, as Mr Sujeewon perceived them, had been confirmed in his mind in advance and simply conveyed to the Claimant. She was not shown the CCTV footage. She was not invited to comment or to provide any information by way of an admission or denial, or in relation to mitigation. She was not informed what would happen next.

37. After the meeting but prior to her leaving the building the Claimant returned, in an emotional state, to the kitchen. Her colleague Brian advised her to write down her version of events relating to the incident. She did so. She did not share that written statement with Mr Sujeewon at the time, nor was she invited or required to provide a written statement by her employer. The statement was undetailed and referred to the Claimant having *"used her body weight to guide"* the resident back into the premises. That version of events was contrary to my findings and was by any stretch disingenuous. The Claimant was being unduly generous to herself.

38. The Respondent's disciplinary policy and procedure envisages that a disciplinary meeting will be held before an employee is dismissed. The stated exceptions to that are situations where dismissal is not being considered or

where there is no purpose in having a meeting, such as where the conduct is admitted or the issue is relatively minor. None of those exceptions applied in the Claimant's case as her dismissal was a foregone conclusion, the subject-matter very serious, and she had made no admissions.

39. The disciplinary policy further states that, *"Before any disciplinary meeting, you will be: (1) Informed in writing of the allegation(s)/complaint(s) against you, and the basis for those allegations; (2) Given a reasonable opportunity to consider your response to that information; and (3) Offered the opportunity to be accompanied by a work colleague."* None of those things were ever done in relation to the Claimant.

40. The disciplinary policy re-states the right of an employee attending an investigatory or disciplinary meeting to be accompanied by a work colleague. Much in the same way as the contractual document provides for inadequate notice periods below the legal minimum, this restatement does not encapsulate the full extent of the legal right to be accompanied at a disciplinary meeting. Under **section 10 Employment Act 2002** a worker has the right to be accompanied at such a meeting by a fellow worker or indeed a Trade Union official.

41. Furthermore, on Mr Sujeewon's admission, no disciplinary meeting was ever convened. That was on the advice of the Respondent's HR Manager, Mrs Lakin, whose advice to Mr Sujeewon was that she agreed with his decision to dismiss the Claimant immediately. The importance of having such a meeting is set out in the policy: it permits an employee to put forward any defence or arguments they wish, and to comment on any disciplinary sanction that may be applied. It follows that the Claimant was not informed of her legal right to be accompanied at such a meeting by a work colleague or a Trade Union official.

42. Mr Sujeewon was an eyewitness to the shouting part of the incident and reviewed the CCTV footage of the totality before reaching his belief that the Claimant was guilty of gross misconduct in having physically assaulted the resident and then shouted at her. I accepted that he did genuinely believe in

her guilt and, given what he heard and later saw on the footage, there were reasonable grounds upon which he could form that belief.

43. On the evening of 12 April 2022 Mr Sujeewon spoke to Mr Olabode and Ms Michael and asked them each to provide a written statement in relation to what had occurred that afternoon. By this time he had already decided to dismiss the Claimant so such statements had no impact on that decision. On Mr Sujeewon's admission, the statements were procured not for the purpose of a disciplinary investigation as envisaged by the Respondent's own policy, but in order that the incident be reported to the Care Inspectorate.

44. I have referred to those statements already in these reasons. In both cases, the statements were generally damning of the Claimant's conduct in the incident. Nevertheless, they were not provided by the Respondent to the Claimant at any stage. Mr Sujeewon also spoke to the resident in question, along with the Police. Whilst no written statement was taken from her, the Claimant was not provided with any information regarding what the resident may have said to him (or the Police) about the incident.

45. A letter was written by Mr Sujeewon, based upon a template used by the Respondent, and sent to the Claimant via email on 14 April 2022. The letter stated that Mr Sujeewon had decided to summarily dismiss her, effective 12 April 2022. It also referred to a number of matters which were of concern to the Tribunal:

    45.1. The first was that it referred to the Claimant as stating she had *"used excessive force to restrain* [the] *resident".* She had said no such thing, but had she done so this would have amounted to an admission of misconduct. No admissions had been made at the time by the Claimant, and she did not make such an admission at any stage in evidence to the Employment Tribunal.

    45.2. The second was that it referred to the decision having been made *"following a full investigation"*. That comment was misleading in three respects:

45.2.1. Firstly, any such investigation as had taken place had not involved the Claimant; that could not properly be described as *"full"*.

45.2.2. Secondly, such investigation as there was had been done for a very different purpose, namely the report of an incident to the regulator, the Care Inspectorate, rather than for disciplinary purposes.

45.2.3. Thirdly, the use of the word *"following"* suggested that the decision had been made after carrying out an investigation. That was at odds with Mr Sujeewon's known position at the time, namely that his decision had in fact been made before speaking to the Claimant, the resident or indeed Mr Olabode and Ms Michael.

46. The letter referred to Mr Sujeewon having taken into account a statement from the resident and *"a Silverburn colleague"*. Neither statement was provided to the Claimant. The colleague was not identified. The letter was further misleading because two colleagues had in fact provided statements, not one.

47. The letter did make it plain to the Claimant that she could appeal Mr Sujeewon's decision. If she wished to appeal, she was informed that she had to write to Mrs Lakin within seven days, providing full reasons.

48. The Respondent's disciplinary policy states that upon lodging their appeal, an employee *"will be invited to an appeal hearing, and remind you of your right to be accompanied."* Materially, it goes on to state that, *"If there was no meeting before the disciplinary decision was first taken, then the appeal hearing will be a full hearing of the matters in question."*

49. On 19 April 2022, at 19:03, the Claimant emailed Mrs Lakin setting out five grounds of appeal. She contended that she had been unfairly dismissed. The next day Mrs Lakin telephoned her and asked if she would speak with her about the appeal over the telephone. The Claimant was not written to and was not informed by Mrs Lakin of her right to be accompanied at the appeal meeting, which was a right conferred upon her by law as well as by the Respondent's own policy.

50. Nevertheless, the Claimant agreed to speak to her and a telephone call took place at around 12:33 on 20 April 2022. It was, I find, relatively short. In that meeting the Claimant was asked whether there was anything she wished to add to her grounds of appeal. She did so, referring this time to the handwritten statement she had produced on the day (as referred to above). She referred to having had no training in how to deal with residents who abscond. She also referred to having been treated differently to other members of staff, this time to members of staff who had been caught asleep whilst at work. In her appeal email the Claimant had referred to inconsistent treatment between her and other colleagues who had used *"similar methods"* in respect of restraining absconding residents.

51. In her appeal report (dated 28 April 2022) Mrs Lakin referred to having looked at the investigation materials, which included statements from Mr Olabode and Ms McCafferty. She did not provide them to the Claimant or indeed check whether she had been previously provided with them. Mrs Lakin was shown a copy of Ms Michael's statement in evidence and said that she did think she had seen it. She made no reference to that in her report and did not know whether she had sent it to the Claimant. I found she did not, as she sent nothing else to the Claimant and to send this sole document but not the rest would be unlikely.

52. The materials before Mrs Lakin also included the CCTV footage, but she did not share that evidence with the Claimant either or check whether she had ever been shown it.

53. Mrs Lakin had heard of the **Acas Code of Practice on Disciplinary and Grievance Procedures** but did not refresh her memory in relation to it at any point at which she came to deal with the Claimant's appeal.

54. The Claimant's first ground of appeal was that Mr Sujeewon had failed to follow proper procedures. She complained that an investigation appeared to have been carried out but that she had not had the opportunity to defend herself. Mrs Lakin told the Tribunal in evidence that she had looked into this matter and concluded that the Claimant had been found guilty of gross misconduct and had therefore been dismissed in the meeting of 12 April 2022

by Mr Sujeewon. She did not say how she looked into it, such as through speaking to Mr Sujeewon after receiving the Claimant's grounds of appeal.

55. I found Mrs Lakin's evidence in relation to this matter to be highly unsatisfactory. In my judgment, she sought to mislead the Tribunal when she said she had looked into this first ground of appeal. I found that she took no steps to look into it at all. Had she done so, she would have been told by both Mr Sujeewon and the Claimant that had had not dismissed her on that occasion but instead sent her home; that, at least, was the agreed position between them. The dismissal decision was only communicated to the Claimant on 14 April 2022. Mrs Lakin's conclusion that the Claimant had been dismissed on that occasion was wholly unsupported by evidence and, therefore, perverse. It was an assumption, and one which was entirely misplaced.

56. When asked what steps she would have envisaged someone in Mr Sujeewon's position to take prior to dismissing someone in the Claimant's position, Mrs Lakin's evidence was – albeit expressed with a great deal of reluctance – that the footage would be reviewed and the individual *"spoken to"*. This evidence was, in my judgment, an unduly simplistic description of what procedural steps the Respondent's own policy provides for. As I have found, that policy provides for a clear procedure to be used in these circumstances.

57. I was confirmed in my judgment that Mrs Lakin's evidence was misleading because had she looked at the policy (which she said she did) and into the Claimant's first ground of appeal, she would have identified the significant, repeated and obvious flaws in the process adopted by the Respondent. No steps had been taken to provide the Claimant with the fruits of the investigation. Mrs Lakin herself knew from the time that the dismissal decision had been made prior to any meeting with the Claimant. The Claimant had not been written to with the allegations set out clearly, nor given an opportunity to properly prepare and defend herself. No disciplinary meeting had in fact been convened. Mr Sujeewon had not afforded the Claimant the right to be accompanied because, of course, there was no meeting.

58. Mrs Lakin's conclusion, in her appeal report, was that the Respondent's disciplinary procedure had been complied with and that *"there was no grounds or evidence of unfair dismissal".* Putting to one side the fact that the decision as to whether the Claimant's dismissal was fair or not is one for this Tribunal to decide, I found this conclusion to be completely unsustainable. Had Mrs Lakin approached this ground of appeal objectively and looked at what had actually occurred, the conclusion that the Claimant had not been given an opportunity to properly defend herself would have been inescapable. To conclude otherwise was, frankly, astonishing but particularly so for someone with an HR background as Mrs Lakin had.

59. The Claimant's second ground of appeal concerned her assertion that her training had been inadequate to deal with situations of the kind she faced on 12 April 2022. Mrs Lakin checked the Claimant's training records and reached the conclusion that her training had been adequate. In my judgment, that was a conclusion she was entitled to reach. It is, as referred to above, a conclusion with which I have agreed.

60. The Claimant's third ground of appeal concerned inconsistent treatment. Whilst it is true that during her telephone call with Mrs Lakin the Claimant also mentioned staff being caught asleep whilst on shift, her appeal email focused in unambiguous terms on other employees she stated had done the same thing as her and yet had not been dismissed. The Claimant never disavowed or otherwise dropped that principal assertion.

61. Mrs Lakin was asked in evidence what steps she took to look into this matter. She initially stated that she had looked into it, but upon further questioning it became quickly apparent that she had done no such thing and that her evidence was, once again, misleading. Ultimately, Mrs Lakin relied upon nothing more than her own personal knowledge of whether any other member of staff at the Respondent had been subjected to disciplinary action in relation to assaulting a resident; she could not think of anyone, and therefore concluded that there had been no inconsistent treatment. She admitted taking no steps whatsoever to speak to anyone – whether on the staff side or the management side – at the home about whether methods of restraint akin to those adopted by the Claimant on 12 April 2022 had been used by others, or

indeed whether anyone else had been formally or informally disciplined in relation to their use.

62. For a second time, I found that the reality was that Mrs Lakin intended to pay lip service to the Claimant's appeal and had no intention of actually approaching the matter objectively or thoroughly.

63. The Claimant's fourth ground of appeal concerned an allegation that Mr Sujeewon had failed to take into account her previously unblemished disciplinary record and her *"strong"* relationship with residents. Mrs Lakin did not in fact speak to Mr Sujeewon and check whether he had or had not taken such matters into account before he made his decision. It follows that Mrs Lakin took no steps to investigate this ground of appeal either.

64. The Claimant's fifth ground of appeal concerned the statement made in Mr Sujeewon's dismissal letter, that she had said she had used *"excessive force".* As I have found, she had made no such admission and Mr Sujeewon was wrong to record that she had. Mrs Lakin did not remember looking into this ground. I find she did not, given her inability to recall doing so and the fact she did almost nothing else in relation to the Claimant's appeal at all.

65. On 28 April 2022 Mrs Lakin wrote to the Claimant, informing her that her appeal had not been upheld on any ground and that the dismissal decision stood.

The law

Unfair dismissal

66. A claim of unfair dismissal is a statutory claim. **Section 94 Employment Rights Act 1996** confers the right upon an employee not to be unfairly dismissed by their employer, subject to the qualification (**under section 108(1)**) that they have two years' continuous service. There are categories of unfair dismissal claim for which two years' continuous service is not required, but the Claimant's case is not one of them.

67. One of the potentially fair reasons for dismissal is a reason relating to the conduct of the employee (**section 98(2)(b)**). The burden of proof is on the employer to show a potentially fair reason for dismissal (**section 98(1)**).

68. If the employer has satisfied the Tribunal that the sole or principal reason for dismissal is a potentially fair one, the question for the Tribunal is whether the dismissal was actually fair. The test to be applied is that set out in **section 98(4) Employment Rights Act 1996.** The burden of proof is neutral but the Tribunal must determine the fairness of the dismissal, having regard to the employer's reason, depending *"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 *"in accordance with equity and the substantial merits of the case".*

69. In conduct cases the there is a considerable bank of settled authority governing Employment Tribunals in how they should assess the fairness of a dismissal through the lens of **section 98(4)**. The leading case remains *British Home Stores Ltd v Burchell [1978] IRLR 3* (EAT), which sets out three principal points for the Tribunal to consider, namely:

69.1. Did the employer genuinely believe in the employee's guilt? That is a factual matter which looks at the mind of the dismissing officer.

69.2. If so, did the employer have reasonable grounds upon which to sustain that belief? That involves looking at the evidence that was available to the dismissing officer.

69.3. If so, did the employer nevertheless carry out as much investigation as was reasonably required, in all the circumstances of the case? The assessment of what amounted to a reasonable investigation will differ from case to case but it would generally involve looking at the steps the employer actually took in addition to those it could reasonably have taken but did not. Generally, what is reasonable will to a significant degree depend on whether the conduct is admitted or not *(ILEA v Gravett [1988] 25 IRLR 497*, EAT), and the question is to be determined from the outset of the employer's procedure through to its final conclusion (*Taylor v OCS Group Ltd [2006] IRLR 613*, England and Wales Court of Appeal).

70. At all stages in a misconduct case the actions of the employer are to be objectively assessed according to the established standard of the reasonable employer acting reasonably or, as it is sometimes put, whether the employer acted within a "band of reasonable responses" (*Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*, EAT). The Tribunal is therefore not concerned with whether the employee actually did do the things the employer found that it did; in line with the objective tests set out above, the task for the Tribunal is to determine whether the employer, acting reasonably, could have concluded that he had done (*Devis (W) & Sons Ltd v Atkins [1977] AC 931,* House of Lords).

71. Equally, the Tribunal cannot substitute its own view as to what sanction it would have imposed had it been in the dismissing officer's position (*Trust Houses Forte Leisure Ltd v Aquilar [1976] IRLR 251,* EAT); it is the sanction imposed by this employer which falls to be determined according to the band of reasonable responses test.

72. At all times I am required to have regard to the **Acas Code of Practice on Disciplinary and Grievance Procedures**, which is informative about the standards of procedural fairness to be expected of employers when dealing with disciplinary matters in the workplace.

73. If I find that the Claimant's dismissal is unfair I may nevertheless reduce any basic award under **section 122(2) Employment Rights Act 1996** if I find that the Claimant engaged in culpable or blameworthy conduct prior to her dismissal.

74. Equally I may also reduce any compensatory award under **section 123(6) Employment Rights Act 1996** if I find that the Claimant's culpable or blameworthy conduct caused or contributed to her dismissal. Any reduction on this basis should be in a proportion the Tribunal considers just and equitable.

75. Also, if I find that the Claimant's dismissal was unfair it is necessary for me to consider whether there was a chance that she would have been dismissed in any event (the principle expressed in *Polkey v A E Dayton Services Ltd [1987]*

3 All ER 974, House of Lords). The task for the Tribunal has been explained by the EAT (in *Hill v Governing Body of Great Tey Primary School [2013] IRLR 274*) in the following terms:

"First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have been dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."

76. Polkey deductions are not limited merely to procedural unfairness. They may be made in cases of substantive unfairness as well (*Gove v Propertycare Limited [2006] ICR 1073*, England and Wales Court of Appeal).

Wrongful dismissal

77. A claim of wrongful dismissal is a contractual claim. If an employee is summarily dismissed she will normally be entitled to damages representing payment for her period of notice if the circumstances did not justify summary dismissal. Whilst it is a long-established principle that there will be no wrongful dismissal if a lieu payment is paid even in circumstances where summary dismissal was justified (*Graham v Thomson (1822) 1 S 309*), whether such a dismissal was justified depends on whether in the circumstances the employee's conduct can be regarded as a repudiation of their contract (*Macari v Celtic Football and Athletic Co Ltd [1999] IRLR 787*, Court of Session).

78. Whilst each case is fact-sensitive, the Court of Session has provided guidance to Employment Tribunals on what repudiatory conduct means (*McCormack v*

Hamilton Academical Football Club [2012] IRLR 108). The essential principle (set out at paragraph 8) is that,

"… summary dismissal has to be regarded as an exceptional remedy calling for substantial justification. It will not readily be sustained for misconduct which only peripherally affects the performance of core duties under the relevant employment contract. To bring summary dismissal into play, repudiatory conduct must be so serious as to strike at the foundation of the employer/employee relationship, and for practical purposes to make its continuance impossible."

79. The Employment Tribunal has jurisdiction to determine wrongful dismissal claims by virtue of **article 3 Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994**, as a contractual claim arising on the termination of employment.

Analysis and conclusions

80. Applying the law as set out above, my conclusions in relation to each of the issues in these proceedings is as follows. Where necessary, I have referred to the parties' respective submissions but in this case the submissions were brief and involved both sides re-stating their cases. It has not been necessary for me to refer to their submissions in full, but I have naturally borne them in mind.

Unfair dismissal

(1) The reason for dismissal

81. As per my finding at paragraph 42, the reason Mr Sujeewon decided to dismiss the Claimant was because he believed she had physically assaulted a resident and then shouted at her. Given that positive finding, in my judgment the Respondent has satisfied the burden upon it to prove that the reason for dismissing the Claimant was one which related to her conduct. That was a

potentially fair reason by virtue of **section 98(2)(b) Employment Rights Act 1996**. I had no hesitation in rejecting the Claimant's contention that she was dismissed because the Respondent did not like her: the reason I have found was the only contender. The Claimant led no evidence as to who liked her and who did not, and it seemed to me inherently unlikely that disliking someone would outweigh the evidence relating to the incident of 12 April 2022.

(2) & (3) Fairness: genuine belief in guilt, on reasonable grounds

82. Consistent with my conclusion in relation to the reason for dismissal, and my finding at paragraph 42, my conclusion is that Mr Sujeewon not only genuinely believed in the Claimant's guilt in terms of having assaulted and shouted at the resident on 12 April 2022 but that there were reasonable grounds upon which he could have formed that belief. The first such ground was that he had been an eyewitness to the Claimant shouting at the resident, and the second was that he then went back and reviewed the CCTV footage which, unobstructed, showed the physical altercation between the Claimant and the resident.

(4) Fairness: as much investigation as was reasonable

83. It would not be correct to say that no initial investigation was carried out at all in this case. An investigation of a kind was carried out, but it was for a different (regulatory) purpose and did not include the Claimant whose alleged conduct was at the epicentre of the Respondent's concern. That investigation involved the taking of statements from Mr Olabode, Ms Michael and Ms McCafferty, and Mr Sujeewon reviewing the CCTV footage. As a matter of common sense (and specifically bearing in mind *ILEA v Gravett*) where allegations of very serious misconduct were not admitted by this Claimant, any such investigation – in order to be adequate – ought to have involved seeking an account from the Claimant, even if the **Acas Code of Practice** does not make an investigatory meeting compulsory in every case.

84. The investigative burden is something an employer continues to bear throughout its internal processes, as *Taylor v OCS* makes clear. No

disciplinary meeting was held so an opportunity for the Respondent to be furnished, by the Claimant, with information of relevance to the problem was missed.

85. In relation to the appeal, the *Taylor v OCS* obligation to investigate remains. As I have found (in particular, in paragraphs 54 to 64), Mrs Lakin took not even cursory steps to investigate four of the Claimant's five grounds of appeal and tried to mislead the Tribunal when she said that that she had done so. Of most significance to this Tribunal was the fact that the Claimant had squarely put into the equation the possibility that other employees of the Respondent had engaged in precisely the same, or very similar, conduct and had not been taken to task for it. A reasonable employer would have acted reasonably in at least investigating that matter to some extent, even in circumstances where the personal knowledge of the investigator might have led to scepticism on their part or in circumstances where the reasonable employer might, upon uncovering such conduct on a wider scale, then decide to take action in relation to the employee.

86. In my judgment, whilst this was not a case where no investigation was carried out, such investigation as was carried it was for the above reasons inadequate when considered objectively. For this reason, the Claimant's dismissal was unfair.

(4) Fairness: the band of reasonable responses

87. The Respondent is not a small or unsophisticated business. It employs 87 people who undoubtedly work in a challenging and highly regulated environment, and its administrative resources extend to its employment of a dedicated HR Manager, Mrs Lakin. In considering what the Respondent did during the internal processes, I have borne these factors in mind.

88. In my judgment, the Respondent's contention that this was a fair dismissal was fanciful, and inevitably doomed to failure, for the following reasons:

88.1. Whilst many managers form initial views about whether an employee is guilty or not guilty of misconduct when presented with an allegation and some evidence, the reasonable employer would not act

reasonably in simply deciding to dismiss the employee and following through on that decision shortly thereafter, as Mr Sujeewon did in this case. The **Acas Code of Practice** (to which I have had regard) and the Respondent's own policy both require that an employee who is accused of serious misconduct should at least be informed of the problem (the **Code**, paragraph 9) enabling them to put forward a defence or mitigation. That important safeguard was not afforded to the Claimant, despite the fact that the allegations against her were incredibly serious and might yet still prove to have effects on her prospects for future employment. This Respondent's actions fell plainly outside the band of reasonable responses in not informing the Claimant of the problem to the extent that she might be in a position to formulate a defence.

88.2. The **Code** and the policy speak also speak with one voice about holding a disciplinary meeting (the **Code**, paragraph 10), and why that is so important: it is crucial to the employee being permitted to defend the case against them. Denying them such a meeting is an affront to natural justice. In all but the most exceptional cases would a reasonable employer act reasonably in not holding such a meeting, and this case is not in my judgment exceptional. Mr Najafian submitted that if the Respondent had not instantly dismissed the Claimant as it did, it would have failed to comply with its legal regulatory requirements. No statutory or other legal provision was cited to me to support that proposition; I therefore rejected it. That Mrs Lakin, with her experience in HR, should have endorsed Mr Sujeewon's knee-jerk reaction to dismiss without holding a disciplinary meeting was not merely negligent but outright wrong. In my judgment, no reasonable employer with the resources this Respondent had would be taken as having acted reasonably in not affording an employee in the position of the Claimant the opportunity to be heard at a disciplinary meeting, given the seriousness of the allegations against her and the potential consequences for any employee in her position. This Respondent's actions were outside the band of reasonable responses.

88.3. At no stage was the Claimant informed of her right to be accompanied at any meeting that did occur. That right is an important legal right and the Respondent's policy (partially) cites it. Paragraphs 10 and 13 of the **Code** mention it as well. A reasonable employer of the size and resources available to this Respondent would not act reasonably in not informing – effectively denying – the Claimant her legal right, especially when its own policy dictates that accompaniment in some form should be allowed. This Respondent's action in this regard was outside the band.

88.4. The misconduct Mr Sujeewon genuinely believed the Claimant was guilty of is certainly something which, given its inherent seriousness, a reasonable employer could legitimately take the view that dismissal was an appropriate response to. However, this employer went about it in a panicked way and one which denied even the basic elements of fairness and natural justice to the employee. It adopted tunnel vision, where the outcome was a foregone conclusion. Considering the Respondent's actions up to and including the dismissal stage as a whole, they were by any standard grossly inadequate and in my judgment, well outside the band of reasonable responses.

88.5. I turn finally to the appeal. In my judgment, the actions of the Respondent in its handling of the appeal could only be described as disgraceful. To act reasonably, the reasonable employer with the resources available to this Respondent would have taken at least some steps to verify, or disprove, the assertions made by an employee in the position of the Claimant. It would also have taken at least some steps to look at whether the process that had led to the appeal had been in compliance with its own policy, particularly where the first ground of appeal alleged procedural errors. Instead, in relation to all but the most straightforward of the grounds (ground 2) no such steps were taken at all. The conclusion I reached was that Mrs Lakin had no intention of ever seriously entertaining the Claimant's contentions in relation to the appeal. Indeed, the whole appeal began and ended

within less than 24 hours. This Respondent wholly failed to act reasonably, according to the objective standard.

Conclusion on unfair dismissal

89. It follows from the above paragraphs that the Claimant was unfairly dismissed. Her claim is well-founded.

Reduction to the basic award in relation to conduct

90. Whilst the questions of whether the Tribunal should make an order for reinstatement or re-engagement remain live and will be dealt with at a subsequent remedy hearing, it remains necessary for me to determine whether, in principle, any basic award of compensation should be reduced on account of any culpable or blameworthy conduct on the part of the Claimant prior to her dismissal. The Respondent contends that I should make such a reduction, of 100%.

91. My findings in relation to what happened on 12 April 2022 are clear. At paragraphs 22 and 27 in particular, I found that the Claimant both assaulted the resident and then shouted at her. The resident was a particularly vulnerable individual, suffering as she did from bipolar disorder and dementia. The Claimant's conduct was certainly culpable, to a high degree.

92. Ultimately I must determine whether it is just and equitable to make a reduction to the basic award. That is a matter of discretion. I have reached the conclusion that it would be just and equitable to exercise that discretion and make a reduction. The Claimant's conduct was extremely serious; awarding even a relatively modest basic award of compensation could be perceived as the Tribunal condoning that conduct or, worse, rewarding it. This Tribunal neither condones, nor will it reward or be perceived as rewarding, that conduct. It was conduct which has never been admitted to by the Claimant, despite the CCTV footage showing the incident for what it was. She continues to maintain that she did nothing wrong and was trying to help the resident. She has expressed no remorse for what occurred. She has stuck to her position in the teeth of overwhelming evidence.

93. These factors have led me to conclude that it would be just and equitable to exercise my discretion and reduce any basic award by a full factor of 100%, to nil.

(1) Reduction to the compensatory award: contributory conduct

94. In determining whether I should, in principle, reduce for conduct reasons any compensatory award that might otherwise be due to the Claimant I must apply a different test. Whilst I must of course find there to have been culpable or blameworthy conduct on her part in order to make such a reduction, any such conduct must have contributed to the dismissal. The focus is on the conduct of the employee, which must be contributory, and not on what the employer did (or might have done differently) that made the dismissal unfair.

95. I remind myself that I must reach consistent conclusions. As per paragraphs 22 and 27, I have made express findings about the Claimant's conduct and assessed the Claimant's culpability in relation to them in paragraph 91. In my judgment, it was solely the conduct of the Claimant in having assaulted and shouted at the resident that made Mr Sujeewon dismiss her. He decided to do so within less than two hours of the incident having taken place. As I remarked at paragraph 81, there was no other contender. In my judgment, the Claimant was entirely the author of her own downfall. She contributed to her dismissal by a factor of 100%.

96. I must then consider whether it is just and equitable to make a reduction to any compensatory award on this basis. That too is a discretionary exercise. However, I again remind myself that I must reach consistent conclusions and consider that I should exercise that discretion for precisely the same reasons as those expressed in paragraph 92, above.

97. Accordingly, for these reasons any compensatory award should be reduced by a full factor of 100%, to nil.

(2) Reduction to the compensatory award: the Polkey principle

98. In determining whether any reduction in the compensatory award should be made according to the *Polkey* principle I have reminded myself of the

explanation of that principle in the *Hill* case. I must start by considering whether the Respondent could have dismissed the Claimant fairly. I have concluded that it could. The allegations upon which Mr Sujeewon based his decision were very serious and any employer could reasonably take the view that such seriousness required the most severe disciplinary sanction.

99. I must then consider what the chances were of the Claimant being dismissed, not on the basis of what a hypothetical employer might have done but on the basis of what this employer might have done, working on the assumption that it would have acted fairly.

100. In my judgment, the allegations against the Claimant were so serious, and the CCTV evidence in particular so damning, that Mr Sujeewon would certainly have dismissed the Claimant. Indeed, it would be surprising if any other, lesser sanction would have entered into the equation given the gravity of what he saw and heard the Claimant having done to the resident.

101. The real question is how long it would have taken this Respondent, acting fairly, to reach that inevitable destination. Doing the best I can, I consider it would have taken three weeks. The Respondent, acting fairly, would have suspended the Claimant on full pay on 12 April 2022 and set in motion its own policy. That would necessarily have involved investigating the matter and providing relevant statements and the CCTV footage to the Claimant (or at least giving her an opportunity to come into work and view it). It would have involved having at least one meeting with the Claimant (at the very least, a disciplinary meeting), but with enough notice and information being provided to her in advance. It would also have involved the Respondent working with the Claimant to enable her to bring along a colleague of her choice, as per her legal right to be accompanied. Had the Respondent taken these steps it would still, at the disciplinary meeting, have been faced with an employee in a state of denial who expressed no remorse for her actions or put forward any mitigation. In my judgment, the Claimant would certainly have been dismissed by 3 May 2022.

102. Accordingly, for these reasons I would reduce any compensatory award for unfair dismissal by a factor of 100%, to nil, but from 3 May 2022 onwards. Up to that point, the Claimant would have remained suspended on full pay.

Wrongful dismissal

(1) The Claimant's notice entitlement

103. As I found at paragraph 9, the Claimant's statutory entitlement to notice was greater than that provided for in her contract of employment. In principle, she was entitled to be given four weeks' notice of the termination of her employment by the Respondent.

(2) & (3) Dismissal without notice; entitlement of the Respondent to dismiss without notice

104. It was agreed that the Claimant was dismissed without notice.

105. In my judgment, the Claimant's conduct in assaulting and shouting at a vulnerable care home resident on 12 April 2022 was of such seriousness that it was, as per *McCormack*, something which struck at the heart of the employment relationship and made it impossible to continue the employment. It was, to use contractual language, repudiatory conduct. It is difficult to envisage the circumstances in which the employment of a care home Support Worker could continue where such a person had assaulted and shouted at one of the people whom they were responsible for caring for.

106. Accordingly, in my judgment the Respondent was contractually entitled to dismiss the Claimant without notice owing to her repudiation of the contract. It follows that her wrongful dismissal claim must fail and it is dismissed. It is not necessary for me to assess damages.

Remedy

107. I noted from the claim form that the Claimant wishes to be reinstated into her old job or re-engaged by the Respondent. The Claimant confirmed those wishes at the start of the hearing. Reinstatement and re-engagement are the primary remedies for unfair dismissal and I have upheld that claim,

irrespective of the fact that no compensation will be payable to the Claimant in the event that compensation is the only appropriate remedy.

108. The Tribunal heard no evidence on whether reinstatement or re-engagement would be viable and no argument on either side as to whether I should, or should not, make either form of order. Taking into account the fact that both parties represented themselves, it appeared to me to be in the interests of justice to give them both an opportunity to address the questions of reinstatement and re-engagement at a separate remedy hearing. A date shall be sent out by the Tribunal in this regard, together with case management orders.

Financial penalties

109. It should be apparent from my judgment that not only did the Respondent breach the Claimant's right not to be unfairly dismissed (under **section 94 Employment Rights Act 1996**) and her right to be accompanied at a disciplinary meeting (under **section 10 Employment Act 2002**), but there are features in the case that may well be deemed to be *"aggravating features"* of those breaches.

110. I consider that this may be an appropriate case in which the Respondent should be ordered to pay a financial penalty (of no less than £100 but no more than £20,000) to the Secretary of State, pursuant to the Tribunal's power to impose such a penalty under **section 12A Employment Tribunals Act 1996**.

111. At the remedy hearing I shall give both parties the opportunity to address me on whether I should impose a financial penalty on the Respondent, and the Respondent will have an opportunity to provide information relating to its ability to pay if it wishes for me to take that into account when deciding whether to impose such a penalty and in relation to the amount of any penalty I may decide to impose.

P Smith

_____

Employment Judge

25 January 2024

Date

Date sent to parties 26 January 2024