



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4104287/2023

Held In Person at Edinburgh Employment Tribunal on 11-12 January 2024

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Employment Judge Murphy

Ms T Murray

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**Claimant
In Person**

20 **Fairfield Care Scotland Ltd**

**Respondent
Represented by
Mr M Ramsbottom,
Litigation Consultant**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's claim of unfair dismissal does not succeed and is dismissed.

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REASONS

Introduction

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1. This final hearing took place as an in-person hearing at the Edinburgh Employment Tribunal.
2. The claimant was dismissed by the respondent by the provision of notice which expired on 15 May 2023 and complains of unfair dismissal. The

respondent admits dismissing the claimant but denies that the dismissal was unfair.

3. The respondent led evidence from Ms N Latif, Director and co-owner of the respondent company, who took the decision to dismiss the claimant. The claimant gave evidence on her own behalf and also led evidence from three witnesses, namely: Ms S Wallace and Ms T Patrick (former Care Assistants employed by the respondent) and Ms N Aitken (a Care Team Leader employed by the respondent).
4. Evidence was taken orally from the witnesses. A joint set of productions was lodged running to 151 pages. During the hearing, the claimant produced an additional 5 pages of documents, though in the event, only one of these was ultimately referred to in evidence.

Issues to be determined

5. Prior to hearing evidence, I agreed with the claimant and Mr Ramsbottom that the issues to be determined in this case, as follows:

- (1) The respondent admits dismissing the claimant. What was the reason or the principal for the dismissal? The respondent says its reasons were:
- i. Staff members raising concerns about the manner in which the claimant interacted with them;
 - ii. Staff members citing the claimant as a reason they had resigned from the respondent or considered resigning from the respondent;
 - iii. The claimant confirming she could not work with all her colleagues;
 - iv. The claimant confirming she would not be prepared to accept an alternative role;

v. The claimant confirming she would not move to an alternative site.

(2) Was this genuinely the reason for the dismissal?

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(3) Was this a “substantial” reason of a kind such as to justify the dismissal for the purposes of section 98(1)(b) of the Employment Rights Act 1996 (“ERA”)?

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(4) Did the respondent act reasonably in all the circumstances in treating this as a sufficient reason to dismiss the claimant, applying the test in section 98(4) of ERA?

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(5) If the claimant was unfairly dismissed, is she entitled to compensation, and if so, what compensation should be awarded?

Findings in Fact

6. Having carefully considered the evidence, the following facts, and any others which appear in the ‘Discussion and Decision’ section, were found to be proved on the balance of probabilities.

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Background

7. The respondent is a limited company which operates two care homes. These are Auchtermairnie Care Home in Kennoway and Links View Care Home in Burntisland. The respondent company employs approximately 70 staff across the two care homes. The current owners and directors of the respondent company are Ms N Latif and her husband Mr R Latif. They have owned and operated the company since 2021. The Latifs also own two further care homes which are not operated under the auspices of the respondent company. They have operated these since 2019. Mr and Mrs Latif are involved in the management of all 4 care homes.

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8. Auchtermairnie has 35 members of staff and 22 residents. It provides long-term and respite care for elderly residents, all of whom have dementia and other complex care needs. The claimant was employed at Auchtermairnie as a Care Assistant from 1 November 2017 (before the Latifs' involvement with the homes) until her dismissal took effect on 15 May 2023.
9. As well as caring experience, the claimant had experience of working in a kitchen some years previously and was competent and qualified to undertake this type of work. The claimant had health conditions which meant she was unsuited to undertaking kitchen work on a long-term basis. From time to time, however, when the cook didn't attend work for whatever reason, the claimant worked shifts for the respondent in the kitchen at Auchtermairnie. As well as being competent in food preparation and hygiene, she had a good understanding of the residents' dietary needs and she agreed to do this work on occasion to save the respondent getting an agency member of staff in, who would not be familiar with the kitchen and the residents' dietary requirements.
10. Ms Latif oversaw various aspects of management of the care homes she and her husband operated. Her role included dealing with HR and recruitment as well as training and development. In addition, she oversaw the management of each of the homes. At Auchtermairnie, the respondent employed a dedicated manager called Fiona King who was a trained nurse. Beneath Ms King, two care teams were deployed to work on day shift and two teams to work on night shift. There were two Team Leaders on each team as well as Senior Care Assistants and Care Assistants. There was always a Team Leader and a Senior Carer on shift every day. The respondent also employed other members of staff who worked on housekeeping, kitchen and maintenance duties. Other than Ms Latif, the respondent had no dedicated HR function but subscribed to the services of Peninsula for HR advice and support.
11. The claimant worked day shifts which were 11.5-hour shifts (over a 12-hour period with a thirty-minute unpaid break). She originally worked 7 shifts per

fortnight but in January 2023, she reduced her hours because of health issues to 6 shifts per fortnight. At the time her employment ended, her average gross weekly pay was £362.25 per week. Her average gross monthly pay was around £1,569.63 per month and her average monthly net pay was approximately £1,369.

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12. The duties of a care assistant were set out in an HR Handbook, as follows:

a) Assist residents in a reassuring and professional manner at all times, showing courtesy and respect.

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b) Attend to the comfort and personal appearance and hygiene of residents at all times including but not exclusive to; dressing, toileting, bathing, combing hair, assisting with dentures and hearing aids.

c) Record and chart observations of residents including weight, food and liquid intake / output and report any observed changes.

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d) Help prepare food trays and eating areas, prepare residents for meals and provide assistance to residents with eating if required.

e) Escort residents to hospitals, dentists and other approved excursions.

f) Assist with social care needs, be aware of and comply with relevant company policies including health and safety, correct moving and handling and infection prevention.

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13. Auchtermairnie Care Home is in a rural location and staff recruitment and retention in this area has proved a challenge for the Latifs throughout the period that they have operated the home. The residents develop bonds, particularly with the care staff, and when a member of the care team leaves, the residents can be upset by the change, so that the Latifs aspire to promote long service in their workforce where possible.

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14. The claimant's team consisted of Fiona King, Manager, (FK), Lynsey Potter, Team Leader, (LP), Toni Patrick, Care assistant (TP), Susan Wallace, Care Assistant, (SW), Jenna Armstrong, Cook, (JA) and Nichola Adams, Domestic Assistant.

15. The claimant was a valued member of staff. She was recognised by Ms Latif to have an excellent manner with the residents of Auctermairnie and good relationships with them. Before the events of February 2023, the claimant had no formal disciplinary record or history of informal warnings.

5 *Events in 2022: relationship between the claimant and LP*

16. A situation developed in or around early 2022 which fractured the relationship between the claimant and LP and another member of staff. The respondent arranged mediation for the claimant and LP (who was working at that time as a member of agency staff) and the other employee. One outcome of the mediation which was discussed was that shifts would be arranged so that the claimant and LP would not be placed on shift together again and so that LP and the other staff member would not be on shift together either. The three agreed to continue working at the home under the new arrangements, despite the ill feeling which had developed.

17. Although, for a short period, the arrangement was maintained and the claimant was not put on shift with LP, this was short lived. LP stopped providing services via the agency and was appointed directly by the respondent as a Senior Care Assistant. The claimant was required to work alongside her on shifts. The claimant did not raise any complaint about this to the respondent.

18. Over time, the relationship between the claimant and LP became more and more strained again. An incident took place in 2022 whereby the claimant was giving a resident end of life care. A requirement to put a thickener in his fluids was not communicated to her. The claimant felt very upset with LP who, she felt, had not given her a proper handover with the necessary instruction in relation to the resident. The claimant complained about LP to FK with respect to the incident, and the relationship between the claimant and LP deteriorated further.

Events on 25 and 26 February 2023

19. In the day or two before Saturday 25 February 2023, there was some disagreement between LP and FK (the manager). On the morning of 25 February 2023, soon after the day shift began at just after 7 am, the claimant and LP, who were starting their day shift, were in the office to get a handover from the departing nightshift. The claimant started an altercation with LP. She was unhappy with LP over her behaviour towards FK but also felt a buildup of personal ill feeling towards her. The claimant confronted LP angrily in the office in front of around 5 other members of staff and told her that she shouldn't be disrespecting FK. The claimant was shouting and swearing at LP. She was angry. LP telephoned NL while the claimant was there, shouting at her, at around 7.15 am. LP said to NL words along the lines, "I can't do this anymore. I want to leave." She told NL that the claimant (who could be heard in the background) was shouting and swearing at her and that she felt intimidated and cornered.
20. NL asked LP to ask the claimant to go outside as she was concerned that the residents may hear the shouting. LP passed on the request but the claimant refused. The claimant thought she was being instructed to go home for the day. The claimant replied "*I'm not f***ing leaving my job*". NL then asked to speak to the claimant and the claimant came to the phone. She told NL she was very angry and upset with LP and kept saying "LP can't do that to the Manager". NL asked the claimant to take a breath and to go outside to calm down. The call was on a landline phone. The claimant passed the handset back to LP in an aggressive manner and LP said to NL, "*she's gone and just thrown the handset back at me*".
21. NL telephoned FK, who was not on shift at the time, and asked her to attend the home and NL also drove to Auchtermairnie. FK arrived and asked the claimant to work on a different floor to LP. When NL arrived, a meeting was convened between the claimant, FK and NL.
22. The claimant admitted she was angry that morning. She admitted she was "shouting and swearing [her] ... head off". She accepted her behaviour was

unacceptable. She was asked by NL whether she would behave like that to a resident and she said, "No, I wouldn't!" and left the meeting in an angry manner. FK brought the claimant back in, and NL told the claimant, "I have no choice but to issue you with a disciplinary – I will confirm what level it is, though, in writing". The claimant replied: "That's fine, I accept it". She agreed she deserved the disciplinary and agreed to be professional at work. NL showed the claimant the handwritten notes at the end of the meeting and the claimant signed them.

23. The claimant was on shift the next day (26 February 2023). She was in the kitchen in the morning and noticed two bowls of mince which she had also spotted sitting out on the worktop the previous day. One contained pork mince. The claimant was aware from her kitchen experience that it would be unsafe to re-heat the pork mince. At that point it didn't cross her mind that the cook, JA, had any intention of doing so. She thought the bowls had been left there as an oversight because the kitchen was hectic. She left the kitchen to attend to a resident. Later at lunchtime, the claimant was in the kitchen when she saw JA take the bowl of pork out of the microwave. She said to JA: "You can't serve that!" JA replied "I'm the cook!" The exchange escalated and voices became raised. The claimant insisted that the food could not be served and pointed out that it could make the resident ill and cost JA her job. JA took the bowl and threw it away.

24. The claimant reported the issue to LP and Angela Bell, Senior Carer. JA reported the incident to FK and to LP. FK told NL about the incident. NL asked FK to instruct JA to send her a statement, setting out what had happened. On 28 February 2023, JA sent NL an email, as follows:

On Sunday 26th February at around 12 noon, Tracy Murray ... approached me in an aggressive manner accusing me of attempting to poison a resident because I was about to use mince which according to her had been left out of the fridge.

I told her that there was no way I would leave mince lying out of the fridge - I didn't serve the mince anyway and threw it away.

Tracy was swearing and shouting at me in front of other members of staff including the residents. I walked away.

When I came back in she attempted to start shouting and swearing at me again.

5 *I was very upset and scared - she was very intimidating.*

I approached my care team leader Lynsey Porter who confirmed that she did a kitchen check in the morning before I started and did not find any mince lying outside the fridge or anything issues.

She also heard the shouting and swearing.

10 *She attempted to calm the situation and I heard Tracy say to Lynsey that she was a 'f'ing useless team leader' and stormed off.*

Investigation and Disciplinary

25. The claimant went off sick with work related stress on 27 February 2023.

15 26. NL decided to conduct an investigation into the events of 25 and 26 February 2023. She asked the manager, FK, to ask any member of staff on shift on the dates in question to provide their accounts of what happened.

20 27. With regard to the incident on 25 February, NL received two statements. One was from LP (received by email by NL on 28 February) and the other from Manisha Gunarathna, Senior Care Assistant, (received by email on 1 March 2023). Both were sent direct to NL's email which was an address which began 'admin@...' and was the only address NL had for the respondent company.

25 28. In her email, LP described the claimant as having shouted and sworn in her face on 25 February. She described how she spoke to the director while the claimant continued to shout. She said the claimant continued to shout and swear at the director down the phone. She went on to say:

"Tracy Murray then threw the phone back at me in an aggressive manner before leaving the office.

All witnesses were present throughout this incident.

The office door was open, I'm sure some residents heard what happened"

29. Ms Gunarathna's email of 1 March also stated that she witnessed the claimant shouting and swearing at LP. She said that the claimant was aggressive. She also said:

"I also saw her swearing on the phone to you and throwing the handset back at Lynsey in a forceful way. ...I went to comfort a resident who heard everything and was very frightened."

30. With respect to the incident on 26 February, in addition to the email from JA herself, reproduced above at paragraph 24, NL received two emails from LP on 28 February and an email from TP, Care Assistant. In her emails, LP stated she had done a kitchen check in the morning of 26 February and that no food was left out. She also asserted that at around 12.45 on 26 February, she heard the claimant shouting and swearing at JA in the kitchen area.

31. The email from T Patrick to NL was sent NL's 'admin' address. In common with other incoming emails received by NL to that address, it didn't display Ms Patrick's email address in full but, because her account had 'remembered' Ms Patrick as a contact, it showed on screen and in the printed version produced to the Tribunal as being from **toni patrick** . It read:

Hi Nadia

I would like my statement to remain anonymous please as I work in Tracy's team and she can be quite intimidating if you get on the wrong side of her.

- On Sunday 26th February just before lunch service, I witnessed Tracy shouting and swearing at Jenna the cook.

There were frightened residents in the lounge, I was too afraid to get involved.

I'm sorry for that.

Thank you

...

5 32. On 2 March 2023, NL conducted an investigatory meeting with the claimant via telephone. The purpose of the call was to discuss, specifically, the alleged incident on 26 February (NL having previously met with the claimant to discuss the incident on 25 February). NL took handwritten notes immediately after the call which she then typed up. The claimant explained she had seen the mince left out the night before and that when she entered the kitchen before lunchtime, she approached JA to warn her not to use it. She told NL there had been problems before with JA making food that was not up to standard which she had reported to FK.

15 33. NL explained she had two statements which claimed the claimant was shouting and swearing and that one of them claimed that a resident was frightened from the shouting and swearing. NL told her that the individuals wished to remain anonymous in case it affected their working relationship with the claimant. The claimant denied shouting and swearing. She said she just told JA not to serve the food, then went to report it to LP and Angela Bell. NL told her she would need to investigate to make sure the correct procedures are carried out in the kitchen and to make sure staff are conducting themselves in a professional manner.

25 34. NL said, "*Tracy you really need to keep your cool – you just cannot behave in this way.*" The claimant replied, "*I know, I've been feeling really awful about what happened on Saturday – why would I shout again the following day?*" NL said, "*I don't know, but I have two statements claiming that you did.*" She gave her the chance to add anything else she wished to add. She concluded the call by saying she would be in touch about next steps.

35. On Friday 3 March, NL sent the claimant by email in the following terms:

Dear Tracy

You are required to attend a disciplinary hearing on Monday 6th March at 11:00 AM at Auchtermairnie Care Home to discuss the following matter(s) of concern:

- 5 • *Alleged serious breach of company rules and procedures in respect of the health and safety of fellow workers, namely: Lynsey Potter and Jenna Armstrong*
- 10 • *it is alleged that on 25th February you behaved in a threatening manner towards your supervisor, Lynsey Potter, causing her to feel intimidated and distressed about your conduct and to fear the application of physical violence for you, as you were shouting, swearing and threw a handset at her in a forceful way. This incident has also happened in earshot of vulnerable residents, causing them to feel scared and distressed, and they needed comforting afterwards.*
- 15 • *It is further alleged that on 26th February you behaved in a threatening manner towards your colleague, Jenna Armstrong, in that you were shouting and swearing at her, causing her to feel intimidated and threatened. This incident also happened in front of staff and residents, causing them undue stress.*

20 *If these allegations are substantiated, we will regard them as serious misconduct.*

I enclose for your information, copies of the documents that will be used at the hearing, (itemised below) together with a copy of our disciplinary rules and procedures.

- 25 1. *Statement 1 from Care Team Leader claiming your threatening manner towards her.*
- 2. *Statement 2 from staff member witnessing the incident on Saturday 25th February*
- 30 3. *Statement 3 from Director regarding incident on Saturday 25th February*

4. *Statement 4 from Cook stating your threatening manner on Sunday 26th February*
5. *Statement 5 from Supervisor claiming Kitchen was in order on morning of Sunday 26th February*
- 5 6. *Statement 6 from Care Assistant witnessing shouting and swearing from kitchen on Sunday 26th February*
7. *Statement 7 from supervisor witnessing shouting and swearing from kitchen on Sunday 26th*

10 *The hearing will be conducted by Razwan Latif, Director. I will also be in attendance as note taker.*

If you're unable to provide a satisfactory explanation for the matters of concern set out above, you may be given a warning, or a final written warning if deemed appropriate, in accordance with our disciplinary procedure.

15 *You are entitled, if you wish if you so wish, to be accompanied by a fellow employee.*

If you do not attend a disciplinary hearing without giving advance notification or good reason, we will treat your non-attendance as a separate issue of misconduct.

20 *If you have any queries regarding the contents of this letter please contact me.*

...

25 36. Attached to the email were the disciplinary procedure and the statements. However, the statements had been anonymized so that, in each case, the claimant could not see the sender of the email / signatory of the statement. The claimant could and did readily infer that Statement 1 was from LP about the incident on 25 February. Statement 2 was the email from M Gunaratha regarding the 25 February allegation but the claimant could not identify that MG was the author. The claimant was aware that Statement 3 was from NL

(about 25th) and that Statement 4 was from JA (about the 26th). The claimant was unsure who the author of Statements 5 and 7 was (relating to 26 February). These were also by LP. She was similarly unaware that the author of statement 6 (relating to 26 February) was Toni Patrick.

5 37. The claimant, who was off sick, asked for the disciplinary hearing to be postponed and the respondent agreed to delay the hearing until 11 March 2023. In the period prior to the hearing, the claimant got in touch with the colleagues who were on shift on the relevant dates to ask them to provide statements.

10 38. She asked T Patrick, with whom she was friendly. Ms Patrick provided a typewritten statement to the claimant before the hearing regarding Sunday 26 February. In it, Ms Patrick said she'd seen two bowls of food sitting out when she had been in the kitchen at around 7.20 am on 26 February. She referred to the exchange between the claimant and JA and said that "*the two staff*
15 *members' voices were getting raised*". She went on to say:

To my knowledge while I was on the floor in the lounge all residents were fine, eating their lunch waiting on pudding.

19 39. This differed from the statement Ms Patrick had sent to NL on 28 February in which she had requested anonymity. In that statement she said there was
20 shouting and swearing on 26 February and also stated, "*There were frightened residents in the lounge*".

25 40. On 4 March, the claimant requested a statement from S Wallace, Care Assistant, using the respondent's the Planday app. This is an internet-based tool used by the respondent which, among other functions, allows staff to view their shifts on the rota and to clock into and out of work. It also allowed staff to contact each other. Ms Wallace responded via Planday at some point between 8 and 11 March 2023. She confirmed in her statement that she also recalled seeing the bowl of mince on the kitchen counter the previous day. She recalled that on 26th, the claimant came into the kitchen and brought up

the topic of the mince. Ms Wallace said: *“Both Tracy and Jenna started to raise their voices so I removed myself from the situation”*.

5 41. The claimant also asked Nicola Adams, who worked as a domestic if she would write a statement. Ms Adams wrote a handwritten statement for the claimant on 6 March 2023. She confirmed she was on duty on 26 February 2023 and, at lunchtime was working in the upstairs small lounge and in the hallway of bedrooms 7-9. She said at no point during this time did she hear raised voices or shouting.

10 42. On 10 March 2023, NL received word that Care Team Leader, Henia Hutchison was resigning. She was keen to retain Ms Hutchison, who was highly skilled. She telephoned her and asked her why she wanted to resign. Ms Hutchison said it was because of ongoing issues she was having with the claimant. NL asked her to confirm this in an email and HH sent an email the same day, as follows:

15 *Hello Nadia*

20 *I would like to take this opportunity to thank you for giving me the chance to work at Auchtermairnie but sadly this has not worked out as I had hoped, the main reason for my resignation is that Tracy Murray has made my job very difficult, she has lashed out at me in a very aggressive manner in front of the manager, undermined me as her senior, intimidated me and behaved unprofessionally since I started here. The manager did speak to her and give her a warning to which she did apologise but I just can't work with her and it would be easier if I just left.*

25 43. On 11 March 2023, the claimant's disciplinary hearing took place. She was accompanied by her colleague, Nicola Aitken, Care Team Leader. Mr R Latif chaired the meeting and NL took handwritten notes which were signed off at the end of the meeting by all attendees.

30 44. Mr Latif read out the allegations as they appeared in the invite letter. He then read out the 7 statements which had been attached with the disciplinary invite.

The claimant was given the opportunity after hearing each one to respond to its content.

- 5 45. With respect to Statements 1 - 3 (regarding the 25th February), the claimant broadly agreed with everything. However, she disputed that she threw the handset at LP and she disputed that any residents heard or needed comforting. She also disputed saying *"I'm not f***ing leaving my job!"* However, she agreed generally that she was shouting and swearing at LP in the office and accepted her behaviour was unacceptable.
- 10 46. With respect to Statements 4 - 7 (regarding 26 February), the claimant did not agree with the contents of the statements. She told Mr Latif that she completely disagreed with Statement 4 (from JA). She accepted that there were raised voices but not that she was shouting and swearing. She disagreed with LP's statements and T Patrick's statement about what happened that day.
- 15 47. The claimant told Mr Latif she had gathered statements from everyone on shift on the 26th via Planday. Mr Latif questioned why the staff hadn't come forward and given statements to NL. He said *"So you have got other staff involved that didn't know anything before? ... Do you realize this will most likely cause a bad atmosphere at work now?"* The claimant apologised for doing so.
- 20 48. At the conclusion of the meeting, the claimant gave Mr Latif the statements she had collected. She said: *"What I did on Saturday, I admit to it. Not on Sunday – my statements don't confer with the ones you have."* She was asked if she would like to add anything and said: *"Sorry, I have been way out of order"*.
- 25 49. On 14 March 2023, Mr Latif sent the claimant a first and final written warning. He confirmed that he found the allegations as set out in the disciplinary invite to be substantiated. He explained that the warning would be placed on her personnel file but would be disregarded for disciplinary purposes after 12 months provided her conduct improved to a satisfactory level. With regard to
30 his reasoning for imposing this sanction, he said:

5 *At the hearing your explanation was that you hold your hands up for your actions but that you do not agree with all accounts provided via witness statements. You also stated during the investigation that you were angry, “shouting and swearing my head off”, and that you got involved because you can.*

10 *I consider your explanation to be unsatisfactory because your behaviour does not represent the level of professionalism expected in your role and does not align with our Company values. All members of staff are required and expected to remain professional, respectful, and polite to colleagues and residents at all times.*

Having carefully reviewed the circumstances, including the severity of the offence, I have decided that a first and final written warning is the appropriate sanction.

15 50. The letter explained the claimant had the right of appeal and how she could go about appealing. The claimant did not appeal the warning.

Events during March / April 2023

20 51. On 16 March T Patrick gave notice of her resignation by handing FK a typewritten letter. In her letter, she did not identify her reasons for leaving. FK met with TP on 17 March to discuss her resignation. During that meeting, TP told FK that she had enjoyed her time with the respondent until recently. She said that she now felt uncomfortable on shift due to issues within her team. FK suggested the possibility of a transfer to another team, but TP said she felt it was the correct thing for her to resign though she would like to remain as bank staff. She was exploring other job opportunities.

25 52. NL was keen to retain TP if possible. She met with TP on 20 March. She took handwritten notes during their meeting. She asked TP why she had decided to leave. TP said words along the lines:

“There are far too many big personalities on this team – in particular Tracy Murray – she is always clashing with Jenna and Lynsey, she

can make rude comments behind their backs to others, Lynsey and Tracy don't get on because of it. Lynsey is the Care Team Leader and Tracy can resist taking instructions from her."

53. NL asked if anyone else made her feel intimidated and TP answered that JA
5 made her feel intimidated. She was asked whether LP or the claimant made her feel intimidated, and she said no, but in the claimant's case, she said:

10 *"No but she creates a horrible atmosphere in our team. Even before what happened on Saturday, if she's not happy about something, everyone will know about it. She has told me she hasn't got on with Lynsey since that incident last year and now she doesn't like Jenna because she doesn't think Jenna knows what she's doing in the kitchen..."*

54. NL asked TP if she would consider swapping teams, but TP said she would
15 not. She said she was leaving because of the bad atmosphere created by certain staff members. When asked to elaborate who they were, she said *"The whole team, in particular, Tracy...I feel like I have no friends left on this team. Because of what happened over the weekend with Jenna and Lynsey, I feel like the team has now broken down – the team feel scared."* She said she couldn't work with the claimant or JA. NL asked her if she would be willing
20 to attend a mediation meeting and TP declined. TP asked NL if this would be confidential, and NL replied that it would be. TP was given the chance to read and sign the minutes, which she did.

55. On the same date, NL conducted a meeting with JA. She asked JA whether
25 she had been intimidated by anyone in the team and JA said she had, by the claimant. She referred to the incident on 26 February. She said that the claimant was also disrespectful towards others like the Care Team Leader [LP]. She told NL she was dreading the claimant coming back from sick leave and said: *"I can't work with her. It is really affecting my mental wellbeing – I have considered leaving this job on the back of this"*.

56. Also on 20 March 23, NL met LP and asked her if she felt intimidated by anyone on her team. LP also said she felt intimidated by the claimant. She said the claimant didn't listen to her instructions, put her down and tried to undermine her. She referred, among other matters, to the incident on 25 February when she said the claimant "*threw a handset at me forcefully*".

57. On 24 March 2023, NL wrote to the claimant, who remained signed off sick, inviting her to attend a welfare meeting on 28 March 2023. She advised the meeting would be informal though she offered the claimant a right to be accompanied. With respect to the purpose of the meeting, she wrote:

The purpose ... is to establish the nature and extent of your illness, how long it's likely to be before you're well enough to return to work and what arrangements we might need to make to ensure your safety.

...

In addition we do want to discuss with you the interaction between you and the other staff members and their feelings about that.

I would like to discuss this with you so that you are fully aware of the situation and the impact that it is having on these staff members I hope that between us we can find a way to resolve this situation.

In the event that this proves impossible and we cannot find a way forward then I need to warn you that your employment may be terminated after a formal hearing is conducted. Any termination would not be for your conduct or capability but would be for 'some other substantial reason' because of the breakdown in your relationship. I very much hope that we can avoid this.

58. The meeting was postponed until 4 April 2023, at the claimant's request. She remained off with stress and didn't feel prepared for it.

59. On 2 April, NL obtained a statement from FK, who said that over the years she had found the claimant to be outspoken at times. She referred to an incident she recalled in 2021 involving H Hutchison, who had been upset by

the claimant's manner towards her. She said the claimant did apologise to Ms Hutchison at the time and that she, FK, had spoken to her and reminded her to act in a professional manner at all times. FK noted that moving the claimant to a different team would be difficult because she would still end up working with LP in week 1 of her fortnightly rota and with JA in week 2.

Meeting on 4 April 2023

60. The claimant attended the welfare meeting on 4 April, accompanied again by N Aitken. NL conducted the meeting and took handwritten notes during the discussion. She began by asking the claimant about the nature of her sickness absence. The claimant said:

"Work related stress, I feel sick, nervous and stressed about coming back to work. I think it would cause issues coming back for me and the other staff.

...

15 *I can't see myself working with some members of my team, especially after what's happened with Jenna and Lynsey".*

61. NL asked the claimant how she thought her interaction would be with LP. The claimant said, *"it's been a build up with her. I don't have to like her but I would have to work with her because of my shift pattern."* NL then asked about JA. The claimant said she didn't like her and couldn't work with her. NL asked about the claimant's relationships with FK and with NL herself. In relation to both managers, the claimant said she thought interactions would be ok. She said she felt the relationship only with LP and JA had broken down.

62. NL said she needed to make the claimant aware that two members of staff had handed in their resignation and that two would resign if the claimant returned. She said they would have to replace the entire team and asked the claimant how she felt they could move forward from this. The claimant answered: *"I don't know – probably by letting me go but I'm not walking away from this, even if it means I end up getting dismissed."*

63. The claimant agreed that her return might cause FK issues and stress. NL asked if the claimant would consider changing roles, and suggested working in the kitchen. She replied she wouldn't want to because of her hip problems. NL asked if the claimant would consider working in the respondent's other
5 other care home in Burntisland. The claimant said she would not travel there. (She doesn't drive and it would be a lengthy journey by bus at either end of a 12 hour-shift). NL asked if the claimant would be happy with a settlement and the claimant replied: "No, I don't need your money". NL asked her what she would like to do then and the claimant said she would call on Friday and let her know.
10 NL gave the claimant and Ms Aitken the chance to read the notes she had taken of the meeting and to sign them. Both did so.

Period from 4 to 13 April 23

64. At some point between 4 and 11 April, the claimant called NL about returning to work as her sick line was expiring. NL advised the claimant to get the sick
15 line extended.

65. On 11 April, NL wrote to the claimant to invite her to a formal meeting on 13 April. She offered her the right to be accompanied. With respect to the purpose of the meeting, the letter said:

20 *The purpose ... is to discuss matters of concern in regarding [sic] your work as a Care Assistant.*

When you started working for Fairfield Care Scotland and at the time you passed your probationary period, it was mutually accepted that you had a good, appropriate, working relationship with the team.

25 *Recently, however the interaction between you and the team has changed and they no longer feel comfortable working with you and have stated that they will tender their resignations should you return.*

At our previous welfare meeting we discussed the following:

1. *Your relationship with Jenna and any mediation and her decision to resign if you returned*

2. *Your relationship with Lindsay and any mediation who has stated that she will resign if you return*
3. *Your relationship with your manager, Fiona., [sic]*
4. *Your colleague Tony resigned due to your conduct.*
5. *Your welfare meeting stating that you will have issues coming back to work and that as an employer we should dismiss you from post., [sic]*
6. *Accepting a position in a different area (Kitchen),*
7. *Accepting a position in a different care home,*
8. *Accepting a settlement*

We now require to discuss the fact that another member of the team has also stated that should you return then they will also resign from post. This effectively removes the entire team.

I would like to discuss this with you so that you are fully aware of the situation and the impact that it is having on Jenna, Lindsay [sic], Fiona and I hope that between us we can find a way to resolve this situation.

In the event that this proves impossible and we feel unable to continue, then I need to warn you that your employment may be terminated. Any termination would not be for your conduct or capability but would be for 'some other substantial reason' because of the breakdown in your relationship. I very much hope that we can avoid this. However, in view of the personal nature of your working relationship with Jenna, Lindsay and Fiona it is obviously of paramount importance that they feel comfortable working with you.

66. On the same date, NL received an email from S Wallace, Care Assistant. The email from S Wallace to NL was sent NL's 'admin' address. In common with other incoming emails received by NL to that address, it didn't display Ms Wallace's email address in full but, because her account had 'remembered' Ms Wallace's email address as a contact, it showed on screen and in the

printed version produced to the Tribunal as being from Susan Wallace . The email read:

Hi Nadia,

5 *As I have mentioned before, I am considering handing in my resignation as I joined this team to have a fresh start and not get involved in any drama. Since joining I have constantly found myself either avoiding situations between members of staff such as Jenna and Tracy or being asked to provide statements from Tracy whilst she has been off sick when I didn't want to get involved but she kept*
10 *harassing me to give her a statement about the incident which happened in the kitchen with her and Jenna. I told her I had already given you a statement but she insisted I give her one too.*

15 *I thought I was coming to a place which was highly rated and staff maintained being professional but I cannot see myself working with Tracy.*

In the short time I have been here I have seen her act unprofessionally.

I am grateful that you have said I can stay here until I find another position, I may reconsider staying if Tracy doesn't come back or switching teams which I know isn't possible at the moment, the work
20 *environment has been much better since Tracy hasn't been here.*

I'm sorry for letting you down but I feel uncomfortable knowing Tracy could be back any day soon.

Many thanks

Susan

25 *Meeting on 13 April 2023*

67. The claimant attended the meeting on 13 April. It was conducted by NL. The claimant chose again to be accompanied by Ms N Aitken. NL took handwritten

notes during the meeting. NL began by restating the purpose of the meeting as set out in the invite letter. She repeated in her introductory remarks that, if a mutually agreeable solution could not be found, then the contract of employment may be terminated.

5 68. NL read out to the claimant the statement she had taken from LP on 20 March 2023. The claimant dismissed LP's statement as lies. The claimant noted that, if she moved teams, she would still have to work a day a week with LP and said she didn't think it would work. NL asked if she would be interested in mediation with LP and the claimant replied, "no."

10 69. NL then read out to the claimant the statement she had taken from JA on 20 March 2023. The claimant said JA was lying and that she had done nothing but help her in the kitchen. She said JA shouldn't be in the kitchen and that she would never work with JA on any team.

15 70. NL read out TP's concerns from the meeting she had conducted with TP on 20 March 2023. NL asked what the claimant's perspective was on TP's resignation. The claimant replied, "*As a team, the team has broken down. She's right and I agree.*"

20 71. NL read out the statement she took from FK on 2 April 2024. She asked for the claimant's perspective and where they could place her if she came back. The claimant acknowledged that she got what FK said about the issue with her moving teams. NL said that FK was concerned that this had happened in the past with Henia Hutchison and that she feared it happening again. The claimant replied that she could be blunt and outspoken but if something wasn't right, she had to stand up to it. The claimant said she felt sad about FK's
25 concerns. NL asked how the concerns could be worked out and what the claimant could do to improve this. The claimant said she didn't have an answer for that.

72. NL then read out the email she had received from S Wallace on 11 April 2023. The claimant said she didn't really know S Wallace and didn't have any issues

with her. She said she didn't have a problem working with S Wallace and could do mediation with her to help her not feel intimidated.

73. NL asked the claimant again about how she saw things moving forward. The claimant said the only way she could see things moving forward was by moving teams but she didn't know how that would work. NL asked if she would consider mediation with the team. The claimant said, "*no, I can't see that working now.*" NL asked what she proposed they do and the claimant said, "*I don't know. Probably letting me go.*" NL reminded her she had tried to explore with her changing roles, working in her other care home, and that she'd asked about settlement and resignation and the claimant had said no to all of these. She asked if this was still the case and the claimant confirmed it was.

74. NL gave the claimant the opportunity to ask any further questions, but the claimant had none. At the conclusion of the meeting, she asked the claimant and Ms Aitken to read the minutes and sign them which they both did.

75. On 17 April 2023, NL sent a letter to the claimant by email and post in the following terms:

Dear Tracy

I am writing to confirm the decision following the recent meeting on Thursday 13th April where we discussed the difficulties in your working relationship with the entire staff team at Fairfield Care Scotland Ltd.

During our meeting we discussed all the statements put forward by current employee's [sic] of Fairfield Care and your thoughts on them. We further discussed past and current resignations based on the relationship between yourself and the staff team.

You explained that you felt the relationship had broken down between all staff and you did not know of any way that it could be repaired other than switching teams. You further stated when discussing how to repair the relationships that you would not engage in any mediation or conversations with the staff effected [sic].

We also looked at whether any changes in working practice would resolve the situation or whether there was any other employment available. Unfortunately, this is not the case.

5 *Under the circumstances our inability to find acceptable alternatives, I must regretfully inform you that your employment is being terminated for some other substantial reason, namely that the relationship between you and the entire team at Fairfield Care Scotland Ltd has irretrievably broken down.*

10 *As an employee with 5 whole years of service, you are entitled to 4 weeks' notice of termination which will take effect from the date of receipt of this letter which means your effective date of termination of your employment will be 15th May 2023.*

...

15 *You have the right to appeal against my decision and should you wish to do so you should write to Razwan Latif, Director, within 5 days giving the full reasons as to the grounds of appeal.*

...

76. NL sent the letter both by email and by recorded delivery on 17 April 2023.

20 77. On 18 April 2023, the claimant emailed the admin email address. She asked for the statements read at the meeting and asked for a copy of the minutes of the meeting. She also said, "*I will appeal this*". Mr R Latif replied by email the same day. He asked the claimant to give her full reasons as to the grounds of her appeal in writing so that he could arrange a meeting. The claimant did not reply at that time.

25 78. On 21 April 2023, S Wallace tendered her notice of resignation. She handed a letter she had typed to FK. She stated her last working day would be 26 May 2023. She thanks Ms King for the opportunity to work at the home but said she felt her strengths lay more with support work.

79. On 11 May 2023, the claimant sent a further email to Mr R Latif, using the 'admin' address. She said:

Raz I acknowledge the letter and still wish to appeal.

80. On the same date, Mr Latif emailed the claimant a letter which he also sent by post. The letter noted the claimant had not supplied the reasoning for her appeal as had been requested. He told her the respondent was unable to hear her appeal as she had not complied with the instructions in the letter of 17 April which stated that an appeal must be submitted within 5 days.

10 *The claimant's post-termination losses*

81. At the time of the termination of her employment, the claimant had 5 complete years of service and was 52 years' old. Her net monthly pay with the respondent had been around £1,369. Following the termination of her employment, the claimant claimed Universal Credit from May to September 2023. The claimant secured new employment with Forth and Oban Ltd with effect from 22 May 2023. With her new employer, her net average monthly wage was around £1,054.

20 82. The claimant pursues no pension losses.

Observations on the Evidence

83. My assessment of the claimant was that she sought to be honest and did not intend to give misleading evidence. However, there were lapses in her recollection and at times it seemed she became confused. She was candid with the Tribunal that, during the material period, she was off with work-related stress, was on anti-depressant medication and described that, at times, she 'couldn't get her head around the events'. On some occasions, owing to lapses in memory and / or confusion, the evidence she gave was not accurate.

84. One example is that she had a tendency to dismiss documents as wholly inaccurate when first asked about them. However, when she was taken to the detail of the document bit by bit, she revised her response and acknowledged either that the document was, in fact accurate, or that she agreed with most of it. This happened on two or three occasions. To her credit, the claimant corrected herself when she took time to reflect on the productions. Another example is that there were times when the claimant's evidence contained inconsistencies, particularly about the sequence of events and communications with the respondent during her sickness absence. It was not my impression that these arose from any intention to mislead the Tribunal, but I was not convinced that the claimant's grasp of the chronology in this period was reliable.

85. That said, there was relatively little material conflict between the evidence of the claimant and that of Ms N Latif. One difference was that the claimant's evidence was that, during the meeting on 13 April 2023, she had said yes to the NL's suggestion of mediation with LP. Ms N Aitken also gave evidence to that this was her recollection. I preferred NL's account of the matter (that the claimant had said no). NL's contemporaneous note of the meeting recorded that the claimant had said no. Both the claimant and Ms Aitken had been given the opportunity to read NL's note and both had signed it. I found NL to be a straightforward witness with a sound grasp of the chronology and detail. She was an experienced notetaker and it seems to me improbable she would make such a fundamental error or that, if she did, the error wouldn't be picked up by the claimant or NA..

86. I also noted that, according to the notes of the two meetings, the claimant's stance with respect to LP might be interpreted as having hardened on 13 April (by which point she had been read LP's statement), compared with the meeting on 4 April. On 4 April, NL asked the claimant - not about mediation specifically - but about how she felt her interaction with LP would be moving forward. At that time, the claimant said that she didn't have to like her but that she would have to work with her because of her shift pattern. N Aitken was present at both meetings. It may be that the claimant and Ms Aitken are

confusing this (relatively encouraging) previous response by the claimant about LP with her position at the later meeting on 13th April.

- 5 87. During the evidence taken from the claimant's two other witnesses, some sharp conflicts of fact emerged. The specific nature of these factual disputes was not fully foreshadowed by the pleadings. The claimant had asserted in her ET1 form that 'false statements have been produced from members of staff that did not write this' but had not elaborated. Her own knowledge of these matters came entirely from Ms S Wallace and Ms T Patrick.
- 10 88. In brief, Ms Wallace denied that she sent the email to NL dated 11 April 2023, or indeed that she had ever seen that email before the hearing. Ms T Patrick denied having ever sent to NL the email dated 28 February 2023 regarding the incident on 26 February. She likewise gave evidence that she had never seen that email before. T Patrick further alleged that the notes of the meeting on 20 March 2023 between her and NL were inaccurate; that she had not previously seen the first page of the two page note which she said did not correctly reflect what she said about the claimant; and that there were also inaccuracies on the second page of the note.
- 15 89. Because the full details of these asserted discrepancies had not been put to Ms Latif during her cross examination, I permitted her to be re-called by the respondent so that she may have an opportunity to give her evidence on these matters. Ms Latif said that she received the emails from Ms Wallace and Ms Patrick in the usual way to her company 'admin' address and that she accurately recorded her discussion with Ms Patrick on 20 March in the notes of the meeting that were produced to the Tribunal.
- 20 90. I preferred the evidence of Ms Latif to T Patrick. Ms Patrick had signed the note of the meeting which she claimed was incorrect. Even the second page, which she accepted bore her signature, she now said contained inaccuracies. I considered it inherently improbable that Ms Patrick was asked to, or indeed that she would be willing to agree to, sign only the second half of a note of a meeting. Likewise, it seemed to me unlikely that she would sign the second
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page right after the meeting, despite it containing important inaccuracies. I accept on balance that she saw the whole of the note before she signed it off.

5 91. I further accept, on balance, that it accurately recorded the conversation which took place between Ms Latif and Ms Patrick. It may be that Ms Patrick felt embarrassed that the contents of the note, which she believed would be confidential, were shared with the claimant, who was and is a friend of Ms Patrick's. It may be that she wished to retreat from her words for fear of causing her friend upset or anger. On the balance of probabilities, that seemed to me more likely than the alternative hypothesis that Ms Latif
10 fabricated an invented dialogue between herself and Ms Patrick and substituted it as the front page of the signed note in order to misrepresent Ms Patrick's position at her meeting with the claimant.

15 92. I likewise find on the balance of probabilities that Ms Patrick sent the email to NL on 28 February stating she had witnessed the claimant shouting and swearing at JA on 26 February. The only alternative scenarios would appear to be that either Ms Latif fabricated the email to herself or that a third party impersonated Ms Patrick by sending an email to Ms Latif from Ms Patrick's own account or from another account that was created and named to give the appearance of belonging to Ms Patrick. These alternatives seemed to me
20 improbable. The claimant had already admitted to the conduct the previous day on 25th. She had accepted and agreed in a meeting with Ms Latif that she deserved a disciplinary for that incident. If Ms Latif had had an agenda to ensure the claimant received a disciplinary warning, she had no need to fabricate evidence about 26 February, given the conduct which was already
25 admitted. The email itself appeared in the productions in an unremarkable format which compared similarly with other (unchallenged) emails received from different senders who sent messages to the admin email account. On the balance of probabilities, it is more likely that Ms Patrick sent the email to NL than that she did not.

30 93. I also preferred Ms Latif's evidence in relation to Ms Wallace's email of 11 April. Once again, if Ms Wallace did not send the email, then the only

alternative scenarios appear to be that Ms Latif fabricated the email to herself or that a third party impersonated Ms Wallace by sending the email from Ms Wallace's own account or from another 'fake' account appearing to belong to Ms Wallace. These alternatives again appeared to me to be inherently
5 improbable. Again, the email of 11 April was unremarkable in its format. Ms Wallace confirmed her personal email account was secured albeit she couldn't recall if it was by password or fingerprint.

94. Fabricating the email would be a high-risk strategy for Ms Latif. She well knew that the claimant was capable of contacting witnesses separately herself for
10 their accounts, based on events at the earlier disciplinary hearing. At the time, Ms Latif already held significant evidence from others about concerns relating to the claimant and the team issues surrounding her, including from LP, JA, H Hutchison and TP. I found it unlikely she would go to dishonest lengths to justify a dismissal by inventing 'extra' evidence from Ms Wallace.

15 95. I accepted Ms Wallace's evidence that she handed her resignation into Ms King on 21 April. The email dated 11 April didn't purport to give notice of resignation but said only that she was considering it. It would be an unusual and curious coincidence if Ms Latif fabricated an email mentioning that Ms
20 Wallace was considering handing in her resignation on 11 April, with no knowledge that this was the case, only for it to transpire that it was actually so, as demonstrated by her resignation 10 days later. On the balance of probabilities, I found that Ms Wallace sent, and Ms Latif received the email dated 11 April.

25 **Relevant Law**

Unfair Dismissal

96. Section 94 of ERA provides that an employee has the right not to be unfairly dismissed. It is for the employer to show the reason or the principal reason (if
30 more than one) for the dismissal (s98(1)(a) ERA). The employer may either show that it is one of the prescribed reasons falling within subsection (2) of

section 98 or that it is 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position with the employee held' (referred to as an 'SOSR reason') (s.98(1)(b)).

- 5 97. At this stage, the burden on the respondent is not a heavy one. A "reason for dismissal" has been described as a "*set of facts known to the employer or it may be of beliefs held by him which cause him to dismiss the employee.*" (**Abernethy v Mott Hay and Anderson** [1974] ICR 323). In cases involving SOSR, CA, Griffiths LJ has stated the issue thus in **Kent County Council v Gilham** [1985] IRLR 18, CA: "*The hurdle over which the employer has to jump at this stage of an enquiry is designed to deter employers from dismissing employees from some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the enquiry moves on to [ERA section 98(4)] and the question of reasonableness.*"
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- 15
98. The Tribunal must be satisfied that in all the circumstances the employer acted fairly in dismissing for the asserted SOSR (Section 98(4) of ERA). There is no burden of proof on either party when it comes to the application of section 98(4). A Tribunal must not substitute its own decision for that of the employer in this respect. Rather, it must decide whether the respondent's response fell within the range of reasonable responses open to a reasonable employer in the circumstances of the case (**Iceland Frozen Foods Limited v Jones** [1982] IRLR 439). The test of reasonableness is an objective one.
- 20
99. Personality differences, or rather the manifestations of these, have been held in some cases to amount to SOSR justifying a decision to dismiss (**Treganowan v Robert Knee & Co Ltd** [1975] IRLR 247, **Perkin v St George's Healthcare NHS Trust** [2005] EWCA Civ 1174). In **Perkin**, the Court of Appeal opined that 'personality' could not of itself provide a fair misconduct reason for dismissing an employee, but it could manifest itself so as to do so where a personality clash had led to a breakdown in the
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functioning operation. The employer must prove the facts necessary to show this was so.

- 5 100. It has been held by the EAT that, in the case of a dismissal because of an alleged breakdown of a working relationship, with no disciplinary situation, the ACAS code of Practice on Disciplinary and Grievance Procedures does not apply (**Pheonix House v Stockman and Lambis** [2016] IRLR 848). What is required is that an employer should fairly consider whether or not the relationship has deteriorated to such an extent that the employee cannot be reincorporated into the workforce without unacceptable disruption, which is likely to involve a careful exploration of the employee's state of mind and future intentions. It would, as a general rule of ordinary common sense, be unfair to take into account matters which were not fully vented between the employee and the employer at the time the decision is taken.
- 10 101. Whether a dismissal is fair or unfair is to be judged at the time of the dismissal being notified in light of the situation when the dismissal occurs (**St John of God (Care services) v Brooks** [1992] IRLR 546).
- 15 102. In the context of misconduct dismissals, it is not uncommon for employers to rely on previous written warnings when seeking to justify a conduct dismissal for the purposes of section 98(4). The courts have considered the correct approach to reliance by an employer on final warnings in that context in a number of authorities. It has been ruled that in a conduct dismissal, it is legitimate for an employer to rely on a final warning, provided it was issued in good faith; there were at least *prima facie grounds* for imposing it; and it was not 'manifestly inappropriate' to issue it (**Davies v Sandwell Metropolitan Borough Council** [2013] EWCA Civ 135 Mummery LJ). If the warning is issued in bad faith, a Tribunal should not take it into account in deciding whether there was sufficient reason for dismissing the employee (**Way v Spectrum Property Care Ltd** [2015] EWCA Civ 381, LJ Clarke). However, subject to satisfying itself that on these important caveats, in cases involving misconduct dismissals, the EAT has held a Tribunal should otherwise treat
- 20 25 30

the earlier warning as valid (**Wincanton Group PLC v Stone** [2013] IRLR 178 Langstaff J).

Submissions

- 5 103. Due to a shortage of time at the hearing, parties were invited to send written submissions. Mr Ramsbottom sent a written submission on 18 January 2024. The claimant elected not to make any written submission, but she sent a brief written reply to Mr Ramsbottom's submission.
- 10 104. For brevity, Mr Ramsbottom's written submission is incorporated by reference, and the following is a short summary only. He invited me to make certain findings in fact. Broadly, he invited me to prefer Ms Latif's evidence over that of the claimant witnesses. He set out a brief synopsis of the law and characterised this case as an SOSR case where, he said, the claimant's dismissal was both procedurally and substantively fair.
- 15 105. Mr Ramsbottom referred to the claimant's final warning which, he said, was issued following a fair hearing by Mr Latif. He referred also to the meetings held by Ms Latif on 4 and 13 April 2023. He pointed out notice was given of the purpose of the meetings and the claimant was warned in her invite letter of 11 April of the possibility of dismissal in advance of the meeting on the 13th.
- 20 Mr Ramsbottom observed that alternatives to dismissal were discussed at these meetings, including changing role or site as well as mediation. Ultimately, submitted Mr Ramsbottom, the respondent's concern that the claimant returning to work would have the effect of undermining their business and the working relationships within the team were well founded.
- 25 106. The claimant disputed the accounts in a number of statements received by the respondent in relation to the incident on 26 February. She said she accepted the warning in respect of the incident on 25th February but not in respect of the allegation regarding the 26th of that month. She contended that the other job role offered by the respondent would not work as she would still
- 30 need to work with LP for 10 hours on the same shift. She reiterated that it was

not practicable for her to commute to Burntisland. She further advised in her reply that she did not accept there was a team breakdown and said that at no point did she harass, bully or intimidate any of the [team]. She further asserted that no one in her team left as a result of her actions.

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Discussion and Decision

107. Returning to the list of issues, the first question to be determined whether the respondent genuinely dismissed for the reasons it has asserted, namely:

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- i. Staff members raising concerns about the manner in which the claimant interacted with them;
 - ii. Staff members citing the claimant as a reason they had resigned from the respondent or considered resigning from the respondent;
 - 15 iii. The claimant confirming she could not work with all her colleagues;
 - iv. The claimant confirming she would not be prepared to accept an alternative role;
 - v. The claimant confirming she would not move to an alternative
 - 20 site.

108. I accept that Ms Latif dismissed the claimant because these reasons. The respondent has proved on the balance of probabilities that this set of circumstances indeed existed at the time the decision to dismiss was taken. There was no dispute that this was Ms Latif's reason for dismissal and no other reason was put forward by the claimant. Further, I am satisfied that this reason or these reasons were not trivial or unworthy such that they could potentially justify dismissal. The enquiry, therefore, moves on to ERA section 98(4) and the question of whether the respondent acted reasonably in all the circumstances of the case.

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109. I remind myself that the question is to be determined at the time of the dismissal. It is important to bear in mind that this is not a case where the claimant's conduct was the reason for the dismissal. It is not a case where the respondent relied upon a previous final written warning in order to dismiss for a subsequent act of misconduct. Here, dismissal is asserted to be for another substantial reason. That reason might be characterised more briefly as a breakdown in the interpersonal relationships between the claimant and LP and JA with repercussions more widely in the team, together with an impasse as to how to move forward from this breakdown.
- 5
110. The circumstances which led to the final written warning on 14th March are important background facts in this particular case. The conduct to which the warning relates is conduct which might be described as the manifestation of the key personality clashes within the team between the claimant and LP and between the claimant and JA. Indeed, after those events on 25 and 26 February 2023, there were no later instances of problematic interactions between the claimant and others because she would shortly go off sick and remain so until her dismissal.
- 15
111. To properly consider the circumstances of the dismissal, I consider it would be an error to ignore or disregard the circumstances of the final warning on the facts of this particular case. I appreciate that the respondent did not rely on the final written warning to justify the dismissal so that the principles in **Davies, Way** and **Wincanton Group** are not of direct and unqualified application. Nevertheless, the allegations which were the subject of the warning and the process that followed form a significant part of the overall circumstances. I do not conflate this with a misconduct dismissal case but I do consider it to be relevant, on the facts of this particular SOSR case, to consider whether that Mr Latif's final warning was given in bad faith or was otherwise manifestly inappropriate. If it was, that would provide important context against which to assess the subsequent procedure and whether dismissal fell within the band of reasonable responses.
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112. The claimant admitted the conduct on 25 February 23 albeit that she said she passed the phone aggressively and disputed whether the altercation caused a disturbance to residents. The respondent held accounts from other witnesses based on which they might reasonably form a different view about those disputed points. Similarly on 26 February, the claimant denied shouting and swearing but admitted a dispute over the use of pork mince which resulted in raised voices. Again, the respondent had obtained alternative accounts which might reasonably be believed by them to sustain that allegation.
113. I do not find that the warning was either issued in bad faith or that it was manifestly inappropriate. The claimant, to her credit, accepted it with respect to the 25th and did not appeal it in relation to either allegation. Far from indicating bad faith, the impression was that Ms Latif felt no option but to progress the matter on a formal disciplinary footing but that she took no pleasure or satisfaction from doing so. She valued the claimant's caring skills and her bonds with the residents, and she was acutely aware of problems with staff recruitment and retention to the rural home. The incident, particularly on 25th February, as candidly described by the claimant herself, was plainly a serious one.
114. In the aftermath of the February events and the ensuing disciplinary process, the respondent received communications from a number of individuals which gave it cause for concern that the claimant's return in due course to the workplace could have a destabilising effect. They received resignation notices from HH and TP on 10 and 16 March. Both cited issues concerning the claimant. They received communications from LP and JA, both expressing that they didn't feel they could work with the claimant. On 4 April, NL discussed the situation with the claimant herself, who said that she couldn't see herself working with some members of her team, as much as she missed the residents. Although a number of options were explored on that date, for one reason or another, none of them was workable from the claimant's perspective.

115. It was in these circumstances that the respondent decided to invite the claimant to the meeting to discuss the situation on 13 April 2023, following which Ms Latif ultimately decided to dismiss. I remind myself that the burden of proof is neutral at this stage of the analysis and that I require to avoid substituting my own view of the matter for that of the respondent. The question is whether the response of dismissing the claimant fell within the range of reasonable responses open to an employer of the respondent's size and type. It is not relevant whether I would have taken the same decision.
116. The ACAS Code did not apply but the respondent in any event provided the claimant with notice of the circumstances that would be discussed at the meeting and with notice that the claimant's employment may be terminated for some other substantial reason because of the breakdown of the relationships if it was not possible to find a way to resolve the situation. The claimant was offered, and took up, the opportunity to be accompanied. At the meeting itself, she was given the opportunity to respond to all points in full and to add anything she wished to add at the end. She was given a chance to review NL's handwritten minutes and she did so. She was afforded an opportunity to appeal though she declined to take this up within the time scale specified.
117. At the hearing, there was no progress in identifying a way forward that might resolve or mitigate the concerns the respondent had about the potential impact of the claimant's return. Mediation was discussed and rejected and the claimant also repeated her position that switching teams would not work as she would still need to work alongside JA at times. She reiterated that (for perfectly valid reasons) she felt a move to a role in the kitchen, or to work in Burntisland, were not viable for her. When asked what she proposed they did, the claimant's response was "*I don't know, probably letting me go*".
118. At the time of the decision, Ms Latif had carefully explored the claimant's state of mind and future intentions with respect to the issues. She had fully vented with the claimant what the concerns were and had read out the various communications and statements by her colleagues. The respondent was

given no realistic cause for optimism that the claimant could be successfully re-incorporated into the workforce following her sickness absence without the risk of unacceptable disruption. As well as the events in February 2023, the respondent knew that mediation had been attempted between the claimant and LP the previous year in another connection but that notwithstanding this, there had been significant deterioration in relations over time, culminating in the eruption of tensions on 25 February.

119. This is an unfortunate case in many ways. My impression from the claimant's evidence was that she was someone who was passionate about her caring role and who was a determined advocate for the residents she served. My impression from the respondent's evidence is that a different outcome would have been preferred had it been achievable and sustainable. Nevertheless, I am satisfied that Ms Latif's reason for dismissing was a substantial one of a kind such as to justify the dismissal and that, taking into account all of the circumstances, the respondent acting reasonably in treating it as a sufficient reason to dismiss. Whether or not the Tribunal would have reached the same decision is nothing to the point. With no meaningful suggestions or alternatives on the table, dismissal fell within the range of reasonable responses open to the respondent.

Conclusion

120. The complaint of unfair dismissal is not well founded and is dismissed.

Employment Judge

L Murphy

26 January 2024

Date of Judgment

26/01/2024

Date sent to parties