



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102749/2023

**Held in Edinburgh on 7, 8, 9, 10 and 29 May 2024
Members' Meeting 31 May 2024**

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**Employment Judge M Sutherland
Tribunal Member E Farrell
Tribunal Member M McAllister**

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J Difolco

**Claimant
Represented by
S Monan, Solicitor**

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Care UK Community Partnerships Ltd

**Respondent
Represented by
S Ismail of Counsel
Instructed by
DAC Beachcroft LLP**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

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1. The complaints of failure to make reasonable adjustments and harassment do not succeed and are accordingly dismissed.
2. The complaint of unfair dismissal succeeds and the claimant is entitled to a basic award of One Thousand, Eight Hundred and Sixty-Two Pounds and Ninety-Seven Pence (£1,862.97).

E.T. Z4 (WR)

REASONS

Introduction

- 5 1. The claimant made complaints of unfair dismissal, failure to make reasonable adjustments and harassment which were denied by the respondent.
2. Both parties had the benefit of professional representation.
- 10 3. The final hearing was held in person with the exception of the last day which was held by CVP and restricted to submissions. The members' meeting was also held by CVP.
4. The hearing had been listed to determine liability only but by agreement of the
15 parties was extended to include remedy.
5. The claimant gave evidence on her own behalf and called the following witnesses: Natasha Difulco (Daughter); Dougie Brownlee (RCN Union Representative). The respondent called the following witnesses: Samantha
20 Rogan (Regional Director); Suzanne Welsh (Assistant Manager); Michael Dolan (Regional Director).
6. Parties lodged a joint bundle to which supplementary documents were added during the hearing.
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7. The names of the alleged perpetrator and alleged victims were redacted by
30 prior order under Rule 50.
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8. The following initials are used in this judgment by way of abbreviation –

Initials	Name (relevance)	Job Title
DB	Douglas Brownlie (claimant's union rep)	RCN representative
GG	Gillian Goodall	Home Manager
AB	Alleged perpetrator of sexual harassment	Care Assistant
MD	Michael Doolin (appeal chair)	Regional Director
ND	Natasha Difulco	Claimant's daughter
SD	Sonny Dunbebin	Nurse in Charge
SR	Samantha Rogan (disciplinary chair)	Regional Director
SW	Suzanne Welch	Assistant Manager

List of Issues

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9. The list of issues agreed by the parties was as follows –

Jurisdiction – time limit

- 10 1. *Were some of the claimant's claims presented out of time? Specifically, was the claimant's claim for sexual harassment as per s.26 EqA presented within the time limit prescribed in s.123 EqA, as extended by ACAS conciliation? R avers that any conduct that occurred prior to 14 December 2022 is out of time. In considering the above point, were the claimant's claims under the EqA part*
- 15 *of a continuing act under s.123(3)(a) EA?*
2. *If the claimant's claims under the EqA were presented out of time, is it just and equitable to extend time such that those claims were presented in time?*
- 20 3. *If not, does the Employment Tribunal have the jurisdiction to hear those claims?*

Unfair Dismissal - s.98 ERA

4. *It is accepted that the claimant's termination amounts to a dismissal within the meaning of section 95(1)(a) of the ERA.*

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5. *What was the reason for the claimant's dismissal? The respondent avers that it was for 'some other substantial reason' (their reliance upon conduct in the alternative was withdrawn during the hearing).*

10 6. *Did the respondent dismiss the claimant for a potentially fair reason within the meaning of section 98 of the ERA? In this case for "some other substantial reason", as per s.98(2)(b).*

15 7. *If so, did the respondent act reasonably in treating this reason as sufficient for dismissing the claimant, as per s. 98(4) ERA?*

a) Did the respondent carry out a fair and reasonable investigation before dismissing the claimant? The claimant is alleging that the dismissal was unfair for the following reasons:

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b) that Samantha Rogan failed properly to investigate the criminal proceedings and to consider alternatives to dismissal including continuing suspension with or without pay, or transferring her to alternative employment, pending the outcome of the criminal trial;

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c) that Michael Doolin refused her appeal giving reasons that were predetermined and inconsistent and

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d) the respondent did not produce any evidence to indicate that damage to reputation was a real risk.

8. *Was the respondent's decision to dismiss the claimant within the range of reasonable responses available to a reasonable employer?*

Polkey

9. *If, the tribunal finds that the dismissal was procedurally unfair, should compensation payable to the claimant be reduced to reflect that the claimant would have been dismissed in any event and, if so, by how much?*

Failure to make reasonable adjustments – ss.20 & 21 EqA

Disability status

10. *At all relevant times to the claim, did the claimant have a physical or mental impairment, as per s.6 EqA? The claimant is relying on the condition of osteoarthritis in her hands. The respondent accepts that the claimant had the condition of osteoarthritis in her hands as of April 2022. It is not accepted that this was for all of the period relevant to the claim.*

11. *If so, at all relevant times to the claim, did the impairment have a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities? This is not accepted by the respondent.*

Alleged failure to make reasonable adjustments

12. *Did the respondent apply a provision, criterion or practice ("PCP") by requiring care assistants to use hoist machinery and to manually support residents to stand? (The respondent accepts that it applied that PCP.)*

13. *If so, would the PCP place those with osteoarthritis in their hands at a substantial disadvantage in comparison with persons who are not disabled? The claimant alleges that the PCP [namely pushing the equipment into place ready for use] would cause strain and pain in the hands of those with osteoarthritis. If so, did the claimant suffer this disadvantage? This is not accepted by the respondent.*

14. *If so, did the respondent know, or ought the respondent reasonably to have known at all times relevant to the claim that:*
- a) *the clamant was disabled; and*
 - b) *that the clamant was likely to be placed at a substantial disadvantage compared with persons who were not disabled?*
15. *If so, did the respondent fail to take such steps to avoid that disadvantage suffered by the claimant? In particular, the claimant alleges that the respondent should have:*
- a) *removed the requirement to use hoist machinery from the claimant's role; and*
 - b) *not required her manually to support residents to stand?*
16. *If not, was it reasonable for the respondent to have to take such steps to avoid the disadvantage?*

Sexual Harassment – s.26 EqA

17. *Did the respondent engage in the following conduct:*
- a) *[from October 2019 to June 2019 AB inappropriately touched other members of staff] (withdrawn during submissions);*
 - b) *in late Summer 2021 AB grabbed the claimant's chest; and*
 - c) *[from late 2019 onwards Ms Gillian Goodall and Ms Suzanne Welch continually failed to deal with the claimant's reports of sexual harassment made to them] (withdrawn during submissions).*
18. *Was the conduct unwanted and of a sexual nature?*
19. *Did it have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for the claimant?*

20. *Was it reasonable for the conduct to have that effect, taking into consideration the claimant's perception and the other circumstances of the case?*

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Remedy Issues

21. *If the claimant is successful in any of her claims, the Tribunal will need to consider issues of compensation.*

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22. *Should the claimant be awarded an uplift due to respondent's failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.*

15 **Findings in fact**

10. The Tribunal makes the following findings in fact:

11. The respondent is a provider of residential nursing care for older people. The respondent employees over 10,000 employees working in care homes across the UK. The respondent has a dedicated HR department.

12. The claimant was employed by the respondent from 2 October 2019 until her dismissal with effect from 15 November 2022. She worked as a Care Assistant in the Cairdean Nursing home providing personal care to vulnerable residents. Maintaining her registration with Scottish Social Services Council (SSSC) was a condition of her role. The claimant was a Member of the Royal College of Nurses Union.

13. Cairdean Nursing Home has 3 floors. On each floor there around 30 residents housed within 3 units. The claimant was moved at her request from the ground

to the top floor. Unlike the residents on the ground floor, the residents on the top floor require personal care. Care Assistants are required use of machinery (hoists and stand aids) to provide that care. Two people are required to operate the machinery. Prior to its use, the Care Assistant must push a wheeled hoist or stand aid a short distance over short pile carpet.

2019

14. Shortly after the claimant commenced employment she became aware that AB also worked at the Home as a Care Assistant. The claimant knew of AB because her daughter, ND, had previously worked with AB in another care home operated by another provider. Her daughter had told the claimant that he had made her uncomfortable because of inappropriate behaviour of a sexual nature. When the claimant was rostered to work on the same floor as AB, the claimant told SD, nurse in charge, that she would not work on the same floor as him and the claimant was moved to a different unit.

2020

15. In September and October 2020 the claimant consulted her GP regarding pain in her joints including her hands which the GP considered likely to be Osteoarthritis.

2021

16. On 30 March 2021 the claimant submitted a written complaint about AB namely: "Before leaving work...I started to give AB the handover...I went with AB to introduce him to [the new resident] On entering NR's room, AB put his arms round the top of my body grouping my breasts I was so taken back that I pulled away from him as soon as I introduced him to the resident, could not get out of there quickly enough when he grabbed me he said and what can I do for you, I then hurried to unit door. I just wanted to get out, but he was right behind me, when we approached the unit door Nicole was standing, holding the door open, waiting on me he grabbed nicole's trouser leg and would not let go eventually she told him to let go and she managed to pull away from

him, we both couldn't get away quick enough, I was totally shocked and felt degraded, he should not be allowed to do this."

- 5 17. On 31 March 2021 AB was suspended by GG, Home Manager pending investigation into an allegation of sexual harassment. He was instructed not to contact any employee or resident without her permission. SW, Deputy Manager was appointed as investigator.
- 10 18. On 6 April 2021 SW held an investigation meeting with AB who stated that the handover with the claimant occurred at the desk and he introduced himself to the new resident later and he had no interaction with the claimant other than at the desk.
- 15 19. On 7 April 2021 SW held an investigation meeting with NH who stated that: the claimant took AB to the new resident's room, the claimant looked uncomfortable, AB was running that fast he overtook the claimant, AB stopped the claimant from going further.
- 20 20. On 7 April 2021 SW held an investigation meeting with FP, Care Assistant who stated that: the claimant and NH did the handover with AB at the desk and said he, FP, could go early.
- 25 21. On 7 April 2021 SW held an investigation meeting with the claimant who stated that: she introduced him to the new resident, he grabbed her from behind on her chest and asked what can I do for you, she left just after that; Nicole was at door to leave; she didn't tell Franscico to leave; when she worked elsewhere AB wanted to take pictures of her young daughter with no clothes on; she told Sonny that she was uncomfortable to work with him; was a bit uncomfortable on handover; grabbed just inside the room and then
30 stayed in the room with him and explained the man's needs; AB went through the door in front of her and she couldn't get out.

22. SW considered that there were inconsistencies in the evidence: in her letter the claimant had said she couldn't leave quickly enough but in their meeting she said she had stayed to do the handover; it was unclear why she would do the handover in the new resident's room on her own when she was
5 uncomfortable working with AB and because handover is normally done at the computer; there was conflicting evidence as to who left the room first; FP said claimant did handover at desk and said he could go home early. On 7 April 2021 SW advised management that it should not proceed to disciplinary because of inconsistencies in the evidence and that AB should be allowed to
10 return to work.

23. In early April SW advised the claimant that AB was returning to work and offered to move her floors to make her feel more comfortable. The claimant advised she was fine so long as she never worked alongside him.

15 24. On 15 April 2021 the claimant contacted her union for advice about his return to work.

25. On 31 May 2021 and 1 June 2021 two care assistants lodged complaints
20 alleging inappropriate behaviour by AB. On 2 June SW called AB and advised him that another investigation was due to commence. That day AB resigned with immediate effect.

26. In October 2021 the claimant consulted her GP about pain in her hands noting
25 that her fingers are hot and tender at end of the working day.

2022

27. The claimant was formally diagnosed with Osteoarthritis in April 2022. The
30 claimant had been suffering with increasing pain in her fingers over several years. In March 2022 her GP noted "agony with wrists and joints affecting job pushing machinery". The claimant struggled to open bottles and tins at home. Although the claimant regularly used pain medication, the pain affected her

sleep. The claimant advised her colleagues and asked them to push the machinery into position which they did.

- 5 28. Around April 2022 the claimant was informed by SW that her SSSC certification had expired and she was unable to work as a care assist. The claimant was transferred to a laundry role in June 2022 pending renewal. The laundry role involved pushing trolleys carrying laundry. The head house keeper role was advertised. The claimant's application for that role was unsuccessful and she returned her care assistant role around end May 2022.
- 10 29. On 18 October 2022 the claimant was arrested and charged with murder along with two other defendants following a police investigation. She was held in police custody for 30 hours. On 18 October 2022 the claimant's daughter reported that the claimant would be absent from work due to Covid.
- 15 30. On 19 October 2022 the claimant appeared in Court where the charge and arrest were recorded and the claimant and co-defendants were bailed. This was reported in the Daily Record newspaper. The claimant's name, age and home town was reported. There was no reference to the respondent or her work as a Care Assistant.
- 20 31. On 20 October 2022 the claimant's daughter went to Cairdean and informed the Home Manager that the claimant had been arrested and charged with murder.
- 25 32. The respondent's disciplinary policy provides that where an employee is the subject of a criminal charge the Company will, where possible, investigate the facts before deciding whether to take formal disciplinary action and the Company will not usually wait for the outcome of any prosecution before
- 30 deciding what action, if any, to take, and where it relates to conduct outside of work it may be treated as a disciplinary matter if it is considered relevant to their employment.

33. On 20 October 2022 the claimant was suspended on full pay pending an investigation into “a breakdown in trust in confidence and potentially bringing the company into disrepute following your arrest and appearance in court for facing murder charges.”

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34. On 27 October 2022 MS held a fact finding meeting with the claimant. The claimant explained that she was first arrested for murder in January 2022 but was not charged until October 2022. She explained she did not have Covid but had instead been arrested on 18 October and held in police cells for 30 hours. She advised that there was to be a preliminary hearing on 29 November 2022 and she was awaiting a trial date. She stated she was innocent and having to wait till this nightmare ends. She stated at no time did she tell the management team and then her daughter came to see GG after court hearing as the story was in the newspaper and someone would see it.

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35. On 31 October 2022 MS took a statement from GG who advised that prior to October 2022 the claimant had told her the police had taken her phone as evidence but did not state why – she did not previously mention that she had been charged with murder.

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36. MS prepared an investigation report which noted that “at no time were management informed by Jacqueline of her arrest or the charges against her”. The investigation report concluded as follows: “The evidence supports the allegation of breakdown of confidence and potentially bringing the company into disrepute as at no time were the management informed by Jacqueline of her arrest or the charges against her”. Following the conclusion of the investigation, the respondent concluded that there was a disciplinary case to answer.

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37. On 11 November 2022 the claimant was invited to a disciplinary hearing to discuss an allegation of “serious act causing a breakdown in trust and confidence and potentially bringing the company into disrepute including failure to report circumstances concerning arrest and court appearance for serious charges including murder.” Copies of the investigation report and

related documents were enclosed. The respondent informed the claimant that one possible option was the termination of her employment.

- 5 38. A disciplinary hearing was held on 14 November 2022. SR acted as Chair and the claimant was accompanied by her union Rep DB. The claimant stated that she had informed GG in January that she had been arrested.
- 10 39. After the meeting SR held a meeting with GG who said that the claimant had not advised her in January that she had been arrested. There was no discussion at the disciplinary hearing about the risk of reputational damage.
- 15 40. SR, Chair decided to terminate the claimant's employment with a payment in lieu of notice. "I...find that due to you being named in the Daily Record newspapers article on 19 October stating that you were facing murder charges. This is regarded as a serious act which could potentially bring the company into disrepute". She found that there had been a breakdown in trust and confidence because she had not advised GG of her arrest in January and because her daughter advised of her charge in October.
- 20 41. On 18 November 2022 the claimant consulted her GP who noted that she was struggling with anxiety; has an ongoing criminal case; and she had just been sacked due to criminal charges.
- 25 42. The claimant appealed against the decision. The appeal hearing took place on 8 December 2022. It was chaired by MD, Regional Director. At the hearing the claimant advised that the preliminary hearing had been put back to end January 2023. She stated that she told GG in February about the arrest. There was no discussion about the risk of reputational damage aside from a brief denial in the claimant's statement of case. After the hearing, MD took a statement from GG who stated that she did not give prior information about
30 the arrest.

43. MD decided that the allegation of breach of trust and confidence should be discounted because the claimant and GG gave conflicting versions of events. Whilst he accepted that she was innocent until proven guilty he considered that this did not mitigate the risk of reputational damage. In the outcome letter he stated: "Whilst the charges against you remain pending, I cannot be certain that the allegation of murder did not occur and therefore I do not believe it is appropriate for you to remain in a position of trust with vulnerable adults"; "You have however potentially put Care UK at risk of potential reputational damage following the newspaper article issued in October whereby you were named"; "In conclusion therefore as you have been dismissed with notice and not for gross misconduct, I consider that being charged with murder is a substantial reason to dismiss".
44. As at the date of termination of her employment the claimant was age 55, was paid £394.28 gross a week (paid monthly in arrears) and was entitled to an employer pension contribution of 5%.

2023/2024

45. The claimant consulted with her GP on various dates in 2023 and 2024. The GP notes focus on her difficulty coping with the murder charge and the pending criminal trial which she was finding extremely stressful. (There were no entries which focused on her treatment at work.) She was experiencing significant difficulties with her mental health for which she was prescribed medication. She was referred to wellbeing services in July 2023.
46. She was unable to advise of a date for her trial until February 2023.
47. On 21 March 2024 the claimant was acquitted after a trial diet. The claimant remains unfit for work for the foreseeable future.

48. The claimant participated in ACAS Early Conciliation from 21 January to 14 March 2023. Her claim was lodged with the Employment Tribunal on 14 April 2023.

Observations on the evidence

5 49. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

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Osteoarthritis

15 50. The claimant stated in evidence that she was diagnosed in late 2020 and that she had informed her manager GG of her diagnosis in October 2021. It was apparent from her medical records that she was diagnosed in April 2022. There was no formal record of the claimant having advised her manager GG or any other manager of her osteoarthritis. SW recalled an incident at work involving a resident which affected the claimant's finger but no mention had been made of Osteoarthritis. GG regularly referred staff for occupational health appointments and it was reasonable to infer that GG would have referred the claimant had she been advised of her osteoarthritis. It was considered more likely than not that the claimant did not advise GG or any other manager of her Osteoarthritis.

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25 Reasonable adjustment

51. It was considered more likely than not that the claimant experienced some difficulty in pushing the machinery which is why she got the younger staff to do it for her (as stated to her GP in March 2022).

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52. It was considered unlikely that the claimant told her managers about her osteoarthritis and its effect at work because: her evidence on the dates was wholly inconsistent (she initially said she told her manager of her osteoarthritis and the difficulties she experienced at work in March 2021, she then stated she first told her manager after her diagnosis which was in April 2022); there was no record of her having told her manager; her manager GG was known for regularly seeking OH reports but did not seek one for the claimant; when the claimant reported an incident affecting her finger, she did not mention her osteoarthritis; the claimant initially stated that GG had moved her to the laundry in June 2022 in response to her reporting the osteoarthritis but she then accepted that she was moved because she was unable to work as a care assistant following expiry of her SSSC registration; and after April 2022 the claimant did not discuss her OA and any impact on her work.

15 Alleged sexual assault

53. It was difficult to make a positive finding on the allegation of sexual assault particularly given the passage of time. AB was not employed by the respondent and was not called to give evidence. The claimant's daughter's evidence appeared rehearsed rather than a genuine recollection of events, and she gave evidence on matters which she had not witnessed. We also considered that there was a reasonable basis to GG's conclusion, following her contemporaneous investigation, that the evidence regarding the alleged sexual assault was affected by inconsistencies given that handovers were ordinarily conducted at the computer, the claimant had previously made it clear that she was unwilling work with AB, and an independent witness had stated that the handover to AB had been conducted at the computer.

54. The claimant stated that during the investigation meeting SW asked the claimant "are you sure it was not just banter". SW stated in evidence that she had not asked that and it was the claimant who said after she had referred to the trouser pulling incident. The contemporaneous notes of the meeting

reflected SW's account. The claimant did not raise this issue or any issue with the accuracy of the minutes at the time. SW considered that this was a serious allegation. It is considered more likely than not that SW did not ask the claimant "are you sure it was not just banter".

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55. The claimant stated in evidence that GG had not told her AB was returning to work after his suspension. SW stated in evidence that she advised the claimant that AB was returning to work and offered to move her floors to make her feel more comfortable. It is considered more likely than not that she did because this action was described in the contemporaneous report made by SW to SSSC on 9 June 2021.

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Unfair dismissal

- 15 56. Both SR and MD described in evidence the same mechanism for the reputational damage namely that the newspaper might be read by residents with capacity, relatives of residents and staff. This was considered noteworthy because there were other mechanisms (e.g. prospective customers), because this mechanism was not referred to in the investigation report, meeting notes or outcome letters, and because SR had made the decision to dismiss because of the failure to report. This therefore suggested a degree of retrospective consideration and discussion.

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- 25 57. MD stated in evidence that he had considered whether there was an alternative to dismissal at the relevant time. In evidence he explained in detail why it was inappropriate to transfer her to another role or to suspend her with or without pay. This was not discussed at the appeal hearing and was not referred to in the outcome letter. It is considered more likely than not that although he considered whether there was an alternative to dismissal as a general proposition he did not give any proper consideration to whether she could be transferred or suspended with or without pay at the time, because

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had he done so he would have said as much in the appeal hearing or the outcome letter. However, we accepted his evidence as reliable that transfer to another role did not mitigate the reputational risk because of resident contact and an indefinite suspension with or without pay would give rise to significant agency costs.

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The law

Equality Act 2010

Disability status

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58. Section 6 of the Equality Act provides that: (1) A person has a disability if: (a) that person has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

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59. In determining disability status the Tribunal must take into account any aspect of the Guidance on the definition of Disability (2011) and the EHRC Code of Practice on Employment (2015) which appears to be relevant.

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60. The burden of proof is upon the claimant.

Normal day to day activities

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61. Day to day activities are things people do on a regular or daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing food, walking, travelling and social activities. This includes work related activities such as interacting with colleagues, using a computer, driving, keeping to a timetable etc (Guidance D2– D3).

Substantial adverse effect

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62. The impairment must cause an adverse effect on normal day to day activities but it need not be a direct causal link.

- 5 63. The adverse effect must be substantial. Section 212(1) of the Equality Act provides that “substantial” means more than minor or trivial. The EHRC Code notes that a disability is “a limitation going beyond the normal difference in ability which might exist among people”.
- 10 64. It is important to consider the things that a person cannot do, or can only do with difficulty (Guidance B9). This is not offset by things that the person can do.
- 15 65. The time taken by a person with an impairment to carry out an activity should be considered when assessing whether an effect is substantial (Guidance B2).
- 20 66. Schedule 1 paragraph (5) of the Equality Act provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if measures are being taken to correct it and but for that, it would be likely to have that effect. The tribunal should deduce the effect on activities if medication or treatment were to cease unless it has resulted in a permanent improvement.
- 25 67. The Guidance provides at para B7 “Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of
- 30 normal day-to-day activities.”

Long term effect

68. Schedule 1 paragraph 2(1) of the Equality Act provides that the effect of an impairment is long term if it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.

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69. Schedule 1 paragraph 2(2) provides that if an impairment ceases to have a substantial adverse effect, it is to be treated as continuing to have that effect if that effect is likely to recur. In **SCA Packaging Ltd v Boyle** 2009 UKHL 37, the House of Lords ruled that “likely to” in this context means “could well happen” rather than “more likely than not”.

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70. Whether a person has an ongoing underlying condition and the likelihood of recurrence of its effects must be judged at the relevant time and not with the benefit of hindsight. An employment tribunal should disregard events taking place after the alleged discriminatory act but prior to the tribunal hearing.

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Failure to make reasonable adjustments

71. Under Section 20 of the Equality Act an employer has a duty, “where a provision, criterion or practice of A's, puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage”. The duty also arises where the disadvantage is caused by a physical feature or the lack of an auxiliary aid.

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72. Section 15 makes allowances for disability whilst Section 20 requires affirmative action (**Carranza v General Dynamics Information Technology Ltd** [2015] IRLR 43, EAT).

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73. The tribunal must identify the provision, criterion or practice (‘PCP’) applied, the non-disabled comparators, the nature and extent of the disadvantage, and the reasonableness of the proposed adjustment. The

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burden of proof is upon the claimant to establish the application of the PCP, the substantial disadvantage, and an adjustment which on the face of it could be reasonable in the circumstances. The burden of proof is then on the respondent to show that the adjustment was not reasonable.

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74. A substantial disadvantage is one that is more than minor or trivial. The purpose of the comparison with people who are not disabled is to establish whether the PCP or absence of an auxiliary aid puts the disabled person to a substantial disadvantage and not whether the disability causes it (***Sheikholeslami v University of Edinburgh*** 2018 IRLR 1090, EAT). There is accordingly no requirement for a comparator group whose circumstances are the same.

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75. What is a reasonable step is to be considered objectively having regard to all the circumstances of the case. Paragraph 4.5 of the EHRC Employment Code (2011) provides that “The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of any disruption caused; the extent of the employer’s financial or other resources; the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and the type and size of the employer.” There is no onus on the claimant to suggest adjustments.

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Respondent knowledge

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76. Under Schedule 8 Part 3 of the Equality Act the respondent is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know that an interested disabled person has a

disability and is likely to be placed at the substantial disadvantage by the PCP, a physical feature or the absence of an auxiliary aid. The tribunal must determine whether the respondent knew, or ought reasonably to have known, that the claimant was disabled. If so, the tribunal must determine whether the respondent knew, or ought reasonably to have known, that the claimant was likely to be placed at a substantial disadvantage (*Wilcox v Birmingham CAB Services Ltd* [2011] All ER (D) 73 (Aug), Employment Appeal Tribunal) If the respondent did not know, the tribunal must consider whether the respondent ought reasonably to have known in the circumstances. The respondent may be on sufficient notice as to the impairment, and its adverse effect, to merit further enquiries.

Harassment

77. Section 26 of the Equality act provides that “A person (A) harasses another (B) if - (a) A engages in unwanted conduct related to a relevant protected characteristic [or of a sexual nature], and (b) the conduct has the purpose or effect of - (i) violating B’s dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B”. A person also engages in harassment if they treat B less favourably than they would have if they had not rejected or submitted to conduct of a sexual nature amounting to harassment.

78. The tribunal must determine whether the person engaged in the conduct; whether the conducted related to the protected characteristic; whether the conduct was unwanted; and whether that conduct had the purpose, or the effect, of violating the claimant’s dignity, or creating the offensive, etc environment.

79. Conduct is related to a protected characteristic if it is connected with it without being because of it.

5 80. In deciding whether the conduct has that purpose the tribunal must consider the person's intentions. The burden of proof provisions apply as for direct discrimination. Where the conduct has a prohibited purpose it does not also require to have the prohibited effect.

10 81. In deciding whether the conduct has that effect the tribunal must take into account "the perception of B; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect" (Section 26(4) EA 2010). This entails both a subjective question (what did B perceive?) and an objective question (was it reasonable, etc?) (***Pemberton v Inwood*** [2018] EWCA Civ 564, CA) Where the conduct has the prohibited effect the person does not have to have intended it. However, it is relevant to consider whether it was reasonably apparent that the conduct was not intended to have that effect (***Richmond Pharmacology v Dhaliwal*** 2009 ICR 724, EAT). An offensive environment means a state of affairs such that a one-off incident
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20 may amount to harassment if sufficiently serious to have a continuing effect.

Time Limit

82. Under Section 123 a complaint of discrimination may not be made after the end of the period of three months starting with the date of the act to which the complaint relates or such period as the tribunal thinks just and equitable. The
25 three-month time limit may be subject to an extension of time to facilitate ACAS Early Conciliation.

- 5 83. The failure to make a reasonable adjustment is an omission rather than a continuing act. Under Section 124 the time limit runs from the date on which the person decided upon it. If they do no inconsistent act, that date arises on the expiry of the period in which they might reasonably have done it (Section 124).
- 10 84. The tribunal has a very broad discretion as to whether to extend time but it is the exception rather than the rule and the onus is upon the claimant. The tribunal should have regard to all relevant circumstances of the case including the length and reasons for the delay, the effect upon the evidence, the steps taken once the claimant knew of the relevant facts and the balance of prejudice to the parties.
- 15 85. Where skilled advisors are a fault, the approach taken to time limits for the not reasonably practicable extension (that the remedy lies against the adviser) is not necessarily determinative of the just and equitable extension (***Virdi v Comr of Police of the Metropolis*** [2007] IRLR 24, EAT).

Unfair dismissal

- 20 86. Section 94 of Employment Rights Act 1996 ('ERA 1996') provides the claimant with the right not be unfairly dismissed by the respondent.
87. It is for the respondent to prove the reason for the claimant's dismissal and that the reason is a potentially fair reason in terms of Section 98 ERA 1996.
- 25 88. A dismissal is potentially fair if it is for 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held' (Section 98(1)(b)). It must be substantial and not frivolous, trivial or inadmissible (***Willow Oak Developments Ltd v Silverwood*** 2006 ICR 1552, CA).
- 30

- 5 89. If the reason is in dispute, the Tribunal must either make findings in fact on balance of probabilities as to what conduct caused the employer to dismiss or find that the employer has failed to discharge the burden of proving the reason. At this first stage of enquiry the respondent does not have to prove that the reason did justify the dismissal merely that it was capable of doing so.
- 10 90. A reason for dismissal is a set of facts known to the employer, or beliefs held by him, which cause him to dismiss the employee (***Abernethy v Mott, Hay and Anderson*** 1974 ICR 323, CA). The issue of the fairness of that decision encompasses consideration of the whole process including any internal appeal and thus may take into account evidence relevant to that reason which emerges in the course of an internal appeal (***West Midlands Co-operative Society Ltd v Tipton*** [1986] ICR 192, HofL).
- 15 91. Where there are multiple reasons for dismissal the employer must establish the principal reason. The principal reason may encompass one reason or multiple reasons which are said to justify the dismissal cumulatively or individually.
- 20 92. If the reason for the dismissal is potentially fair, the Tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair under Section 98(4) ERA 1996. This depends whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the respondent acted reasonably or
- 25 unreasonably in treating it as a sufficient reason for dismissing the claimant. At this second stage of enquiry the onus of proof is neutral.
- 30 93. In determining whether the respondent acted reasonably or unreasonably the Tribunal must not "substitute itself for the employer or to act as if it were conducting a rehearing of, or an appeal against, the merits of the employer's decision to dismiss. The employer, not the tribunal, is the proper person to conduct the investigation... The function of the tribunal is to decide whether

that investigation is reasonable in the circumstances and whether the decision to dismiss, in the light of the results of that investigation, is a reasonable response” (*Foley v Post Office; Midland Bank plc v Madden* [2000] IRLR 827). The Tribunal must not substitute its own view as to what it would have done in the circumstances. Instead, the Tribunal must consider the range of reasonable responses open to an employer acting reasonably in those circumstances.

5
10 94. The tribunal is not conducting a rehearing or an appeal but determining whether the decision to dismiss was procedurally and substantively fair. The range of reasonable responses test applies both to the procedure adopted by the respondent and the fairness of their decision to dismiss (*Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 (EAT)).

15 95. In determining whether the respondent adopted a reasonable procedure the Tribunal should consider whether there was any unreasonable failure to comply with their own disciplinary procedure and if applicable the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Tribunal then should consider whether any procedural irregularities identified affected the overall fairness of the whole process in the circumstances having regard to the reason for dismissal (*Taylor v OCS Group Ltd* [2006] IRLR 613). It is irrelevant that the procedural steps would have made no difference to the outcome except where they would have been utterly useless or futile (*Polkey v AE Dayton Services Ltd* 1988 ICR 142, HL).

25
30 96. Any provision of a relevant ACAS Code of Practice which appears to the Tribunal may be relevant to any question arising in the proceedings shall be taken into account in determining that question (Section 207, Trade Union and Labour Relations (Consolidation) Act 1992). The ACAS Code of Practice on Disciplinary and Grievance Procedures expressly applies to misconduct and poor performance dismissals and expressly does not apply to redundancy and non-renewal of a fixed term contract dismissals. It does not apply to dismissals for some other substantial reason unless it is disciplinary in nature (*Phoenix House Ltd v Stockman* 2017 ICR 84, EAT).

97. The ACAS Code of Practice on Disciplinary and Grievance Procedures provides in summary that: employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions; employers and employees should act consistently; employers should carry out any necessary investigations, to establish the facts of the case; employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made; employers should allow employees to be accompanied at any formal disciplinary or grievance meeting; employers should allow an employee to appeal against any formal decision made.
98. The risk to reputational damage can provide a sufficient justification notwithstanding that criminal charges are not proven such that an innocent person may be fairly dismissed (***Leach v OFCOM*** [2012] IRLR 839, CA). Whether or not that risk does in fact justify a dismissal in a particular case will depend on the facts.
99. The respondent must adequately explore the risk to reputation and must consider and act reasonably in relation to alternatives to dismissal including suspension with or without pay (***Allan Lafferty v Nuffield Health*** UAEATS/0006/19/SS):
- “It would not be open to an employer to dismiss an employee for reputational reasons just because an employee faces a criminal charge. There would need to be some relationship between the matters alleged and the potential for damage to reputation... The risk to reputation, in particular arising out of the suggestion that the employer continued to place vulnerable persons at risk, is more obvious. However, even if those circumstances, there cannot be an assumption of risk without some consideration of the matter”.*
100. Compensation is made up of a basic award and a compensatory award. A basic award, based on age, length of service and gross weekly wage, can be reduced in certain circumstances.

101. Section 123 (1) of ERA provides that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the Claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer.
- 5
102. Where, in terms of Section 123(6) of ERA, the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, then the Tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.
- 10
103. Where a procedural irregularity renders a dismissal unreasonable it is not relevant to the question of fairness that a proper procedure would have made no difference unless, in exceptional circumstances, it was utterly futile or useless (*Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL)*). However, such considerations are relevant to whether it would be just and equitable to award compensation. Tribunal requires to engage in degree of speculation in assessing the percentage chance and timing of the claimant being fairly dismissed had a proper procedure been followed.
- 15
104. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”) provides that if, in the case of proceedings to which the section applies, it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice applies, and the employer or the employee has unreasonably failed to comply with the Code in relation to that matter, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase or decrease the compensatory award it makes to the employee by no more than 25%. The ACAS Code of Practice on Disciplinary & Grievance Procedures is a relevant Code of Practice.
- 20
- 25

Claimant's Submissions

105. The claimant's submissions were in summary as follows -

30 Time limits

- a. The tribunal has a wide discretion to extend time (***Robertson v Bexley Community Centre (t/a Leisure Link)*** (2003) EWCA Civ 576, CA).
- b. The claimant was ignorant as to how to enforce her rights. An advisor's mistake should not be visited upon her (***Bahous v Pizza Express Restaurant Ltd*** UKEAT/0029/11).
- 5 c. The merits of the claim are relevant to the balance of prejudice (***Kumari v Greater Manchester Mental Health NHS Foundation Trust*** [2022] EAT 132).
- d. The respondent ought to have carried out the reasonable adjustment by
10 end May 2022 and there was a continuing failure to act.

Disability status

- e. The claimant has had a physical impairment of her hands since early 2020 (formally diagnosed as osteoarthritis in 2022) and which materially affected her work and sleep.
- 15 f. General work related activities are a normal day to day activities.

Failure to make reasonable adjustments

- g. The PCP caused pain in her hands on account of her osteoarthritis.
- h. The respondent knew because the claimant told her manager GG in April 2022. The claimant's evidence should be accepted because it was
20 unchallenged.
- i. It would have been reasonable to have removed the duty to use the hoist and stand aids.

Sexual harassment

- j. The evidence of the claimant should be accepted because it was
25 uncontested.
- k. Whilst SW genuinely believed that the evidence was inconclusive but that belief did not have a reasonable foundation.

Unfair dismissal

I. The decision to dismiss fell out with the band of reasonable responses because:

i) The respondent did not investigate in discussion with her the timing of the criminal trial or whether there was damage to reputation.

5 ii) Each case turns on its own facts and **Lafferty** could be distinguished because of the undertaking that the claimant would be reinstated if he was acquitted and because of the risk of reputational damage to a charity.

10 iii) The respondent did not properly consider alternatives to dismissal including alternative roles or suspension with or without pay. A large employer should not be financially troubled by suspension on pay (**Lafferty**).

iv) It can thereby be inferred that the appeal was predetermined.

Remedy

15 a. The claimant seeks past and future losses and uplift for failure to comply with the ACAS Code

b. The loss of the SSSC certification did not impact on her ability to perform other roles or any suspension.

Respondent's Submissions

106. The respondent's submissions were in summary as follows -

20 Time limits

a. The exercise of discretion is the exception and the burden is upon the claimant (**Robertson**).

25 b. Ignorance as to how to enforce a right must be reasonable. The claimant knew that sexual assault was unlawful, she had the benefit of consulting a trade union officer, he admitted he was at fault for not advising her, her remedy lies with the trade union.

c. Prejudice caused by pursuing historic allegations must be considered (**Concentrix CVG Intelligent Contact Ltd v Obi** [2022] EAT 149).

Relevant witnesses were no longer employed by the respondent. The quality of evidence was affected by the passage of time.

Unfair dismissal

- 5 d. A reason for dismissal is substantial if it is not whimsical or capricious and could justify the decision.
- e. Dismissal may be fair where there is some relationship between a criminal charge and a significant risk of reputational damage (**Leach**). Dismissal for reputational risk was fair where a hospital employee who worked with vulnerable patients was charged with assault (**Lafferty**).
- 10 f. The claimant cared for vulnerable individuals, she was charged with murder, and her name was reported in the press and on social media. Residents, family members and staff may become aware and remove residents.
- 15 g. The dismissing officer considered alternatives to dismissal. She considered that this was not appropriate.
- 20 h. The appeal officer considered that: suspension with pay was not reasonable because he could not predict how long it would take for the criminal trial to conclude; suspension without pay was not reasonable because he would have to cover the cost of agency staff at three times the rate; and it was not reasonable to remove her to a different role because all roles would have some resident contact. His decision was not predetermined because he overturned the dismissal for gross misconduct. There was no requirement to prove actual reputational damage.
- 25 i. There should be a **Polkey** reduction to compensation because the claimant would have been fairly dismissed following the loss of her SSSC registration in January 2023 and by reason of incapacity on account of her unfitness to work because of the criminal trial which did not take place until March 2024.
- 30 j. The compensatory award should be reduced because claimant was unfit to mitigate her losses because of the criminal proceedings.
- k. The ACAS Code does not apply to SOSR dismissals.

Disability status

l. The claimant was diagnosed with osteoarthritis in 2022. Her physical impairment did not have a substantial adverse effect but her joints were well preserved and there were only minor changes.

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Reasonable adjustments

m. The tribunal must confine itself to the pleaded adjustments (***Newcastle City Council v Spires*** UKEAT/0034/10).

n. The claimant did not tell GG about her osteoarthritis.

10 o. The PCP did not place the claimant at a substantial disadvantage because the machinery is not difficult to move and after her diagnosis she arranged for other members of staff to push the machinery.

p. The claimant accepted she could not be a care assistant without using the machinery and that all other roles would have affected her hands.

15

Discussion and decision

Was the complaint of sexual harassment brought in time?

20 107. The claimant made a complaint of sexual harassment namely that she was subjected to a sexual assault by AB in March 2021. The claimant submitted a written complaint to her employer at the time which was investigated. The matter did not proceed to a disciplinary hearing because of inconsistencies in the evidence. The claimant was aware that sexual assault was unlawful but
25 she did not seek any advice about how to enforce her rights. In April 2021 the claimant sought advice from her union about AB's return to work after suspension. Her tribunal complaint was lodged over 2 years later and only after she had been dismissed. The claimant asserts that she did not lodge a complaint at the time because she was ignorant as to how to enforce her
30 rights but she did not seek advice on this despite being a member of a union. If an extension of time is refused the claimant will be unable to proceed with

her complaint of sexual harassment. If it is granted the respondent will defend a complaint where the available evidence has been affected by the passage of time. It is not considered just and equitable to grant an extension of time in these circumstances. The tribunal does not therefore have jurisdiction to hear the complaint of sexual harassment and the complaint is accordingly dismissed.

Did the claimant have disability status at the relevant time?

108. In 2020 the claimant's GP considered she was likely to have Osteoarthritis. Following tests the claimant was formally diagnosed with OA in April 2022. The claimant has had a physical impairment from at least 2020.

109. The claimant suffered from increasing pain in her hands from 2020 onwards such that she regularly required to take medication. She struggled to open bottles and tins and her sleep was affected. Her physical impairment had a more than minor or trivial effect on her normal day to day activities. By April 2022 that effect had lasted for at least 12 months, or was likely to last at least 12 months, and was accordingly long term.

110. The claimant therefore had disability status by April 2022 because her osteoarthritis had a substantial and long term adverse effect on her ability to carry out normal day to day activities.

Was there a failure to make a reasonable adjustment?

111. The respondent applied to the claimant a provision, criterion or practice ('PCP') by requiring care assistants to use hoist machinery and stand aids. Pushing that equipment in place caused pain in the claimant's hands. Application of the PCP put the claimant to a substantial disadvantage in comparison with persons who are not disabled.

112. The respondent did not know and could not reasonably be expected to know that the claimant had that disability or was likely to be put to that disadvantage. The claimant had not told her managers about her osteoarthritis or its effect at work.

113. In any event the claimant herself arranged for other members of staff to push the equipment into place. It would accordingly not have been reasonable to
5 remove the use of hoist machinery from her role because the disadvantage had otherwise been addressed.

114. There was accordingly no failure to make a reasonable adjustment and the complaint is dismissed.

10 *What was the reason for the dismissal? Was it potentially fair?*

115. The focus of the disciplinary investigation was the claimant's failure to report her arrest and charge. The investigation report concluded as follows: "The
15 evidence supports the allegation of breakdown of confidence and potentially bringing the company into disrepute as at no time were the management informed by Jacqueline of her arrest or the charges against her". Whilst the report referred to the newspaper article, no assessment was made of any risk of reputational damage arising from it.

116. The claimant was called to a disciplinary hearing "to discuss an allegation of
20 serious act causing a breakdown in trust and confidence and potentially bringing the company into disrepute including failure to report circumstances concerns arrest and court appearance for serious charges including murder".

117. The failure to report was discussed at the disciplinary hearing. Any risk of
25 reputational damage was not discussed.

118. The Claimant was dismissed with payment in lieu of notice by stated reason of an irretrievable breakdown in trust and confidence namely the failure to report. The focus of the outcome letter was the failure to report. The
30 newspaper article was referred to only briefly: "you being named in

the...newspaper article...stating that you were facing murder charges. This is a serious act which could potentially bring the company into disrepute”.

5 119. At the time of the disciplinary hearing the disciplinary manager made the decision to dismiss because of misconduct namely the failure to report.

120. The claimant appealed the decision to dismiss. The failure to report was discussed at the appeal hearing. The risk of reputational damage was not discussed (aside from a brief denial in the claimant’s statement of case).

10 121. On appeal the decision to dismiss by reason of conduct was overturned and the claimant was dismissed by reason of the risk of reputational damage.

15 122. The reason for dismissal was not frivolous, trivial or inadmissible and was therefore substantial. There was some relationship between the arrest and charge of a care assistant and the potential for damage to reputation of a care home provider (**Leach**). The dismissal was therefore of a kind as to justify the dismissal of an employee holding the position which the claimant held and was accordingly potentially fair.

20 *What the dismissal fair in the circumstances?*

123. The investigation and report made no assessment of any risk of reputational damage. Risk of reputational damage was not discussed at the disciplinary hearing. The reason for her dismissal was her failure to report (which was overturned on appeal). Risk of reputational damage was not discussed at the appeal hearing (which considered only the alleged failure to report). Alternatives to dismissal were not considered in discussion with the claimant.

30 124. Whilst the ACAS Code does apply not (because the reason was not disciplinary in nature (**Phoenix House**)) the underlying principles of natural justice may do so. Although on the face of it there was a procedure (being an investigation, hearing and appeal) that procedure in reality applied only to the failure to report.

125. We do not consider in the circumstances that any large employer with a dedicated HR function acting reasonably in the circumstances would have taken the decision to dismiss by reason of the risk of reputational damage without having first discussed the matter with the claimant. As it was put in **Lafferty**, even where the risk is reasonably obvious there requires to be adequate exploration of the matter including the alternatives to dismissal. The failure to discuss the risk of reputational damage with the claimant meant that there was no adequate exploration. We do not consider in the circumstances that any such discussion would have been utterly useless or futile because it would have enabled proper consideration in discussion with the claimant of the nature of the reputational risk and the alternatives to dismissal.

126. Dismissing the claimant because of the risk of reputational damage without prior discussion with her fell out with the range of reasonable responses and was accordingly unfair.

To what compensation is the claimant entitled?

127. The claimant is entitled to a basic award of £1,862.97 (£394.28 gross weekly pay + 5% pension contribution x 3 years' service x 1.5 for years over age 41).

128. Having regard to the evidence led at this hearing, we considered that had the risk of reputational damage and the alternatives to dismissal been discussed with the claimant she would have been dismissed in any event, and that dismissal would have been fair, given the nature of the reputational risk (working with vulnerable residents whilst on trial for murder) which could not be mitigated by transferring her to another role (which entailed resident contact), and given the uncertainty and significant cost implications of her indefinite suspension (pending the outcome of the criminal trial). Accordingly, we concluded that it would be just and equitable to reduce to the compensatory element to nil.

Conclusion

129. In conclusion the complaint of unfair dismissal succeeds and the complaints of discrimination do not and are accordingly dismissed.

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Employment Judge: M Sutherland
Date of Judgment: 2 July 2024
Entered in register: 2 July 2024
and copied to parties 02/07/2024

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