



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4105122/2022

Held at Aberdeen on 30 & 31 May 2023

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Employment Judge N M Hosie

Mrs T Bello

**Claimant
In Person**

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Deeside Care LLP

**Respondent
Represented by
Ms A Stobbart,
Counsel
Instructed by,
Mr Z Mo,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

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1. the claimant was unfairly dismissed by the respondent; and
2. a Remedy Hearing should be fixed.

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REASONS

E.T. Z4 (WR)

1. Mrs Taiwo Bello claimed that she was unfairly dismissed by the respondent, Deeside Care. The respondent admitted the dismissal but claimed that the reason was conduct and, in particular, the physical and verbal abuse of a resident in its Care Home and that it was fair.

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The evidence

2. On behalf of the respondent, I heard evidence from:-

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- Susan McDonald, Regional Support Manager, who took the decision to dismiss
- John Park, Regional Director, who heard the claimant's appeal against her dismissal.

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3. I then heard evidence from the claimant who was unrepresented, and on her behalf from Edith Wolowolo who, like the claimant, was employed by the respondent as a Care Assistant. Ms Wolowolo was summarily dismissed at the same time as the claimant following a complaint by a female resident, "R", at the Care Home where they worked. Each spoke to written statements (P. 59-63 and P. 69).

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4. "Character statements " were also submitted by the claimant (P. 64-68 and P.70). These were of limited evidential value as I did not hear evidence from any of the individuals concerned and they were not, therefore, cross-examined. However, the claimant had been employed by the respondent for over 11 years, had been promoted and had an unblemished record.

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5. A Joint Bundle of documentary productions was also lodged ("P").

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The facts

6. Having heard the evidence and considered the documentary productions, I was able to make the following findings in fact. Mrs Bello commenced her employment as a Care Assistant with Southern Cross Health Care Ltd on 1 March 2011. Her contract of employment was one of the documentary productions (P.72-77). Her employment transferred to the respondent, Deeside Care, on 17 October 2013 following a business transfer (P.82). The respondent is part of a group of Companies which operates care homes throughout Great Britain. They have 7 in Scotland, which include 2 in Aberdeen, namely Deeside Care Home (“the Home”) , where the claimant worked, and Rubislaw Park.
7. The claimant’s employment was terminated, summarily, on the ground of gross misconduct, on 27 May 2022. By that time, the claimant had been promoted to the position of Senior Care Assistant. She had an unblemished record.

Allegations by resident “R” which resulted in the claimant’s dismissal

8. R was a resident in the Home. She was 74 years of age; she had had a stroke which had affected her mobility down one side, but otherwise she had “full capacity”. She had moved to the Home from another Care Home in Aberdeen on 15 February 2022 following a lengthy stay in hospital.
9. I did not hear evidence at the Hearing from either Gayle Bain, the Manager of the Home or from R’s daughter or son. However, it would appear that Ms Bain became aware that R had complained about her care and she asked R’s daughter to be present in the Home on 14 April when she took a statement from R.

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R’s statement

10. Ms Bain duly met with R and her daughter on 14 April and prepared a statement which was produced. It was in the following terms (P120):-

“Resident Statement

5 14/04/2022

 2pm

10 *Discussion with resident and daughter*

15 *R gave overview of night time issues and recounted event of a resident/unidentified person entering room with a pillow and placing in (sic) on her head. Unsure as to who this person was but described someone with bended knees.*

20 *R described an incident where she had buzzed for a bedpan and was left on this for a considerable period of time she describes as hours passing. Eventually two carers attended her and were angry as she had pulled the bedpan out herself due to discomfort and the sheet had got wet as a result with ? urine.*

25 *R recalls thereafter a remote control being used to mimic R as she told them she was going to call the Police due to staff’s attitude and what she considered to be angry (sic). R then recalled the tv remote being thrown at her and striking her on the chest. This was done by the night carer wearing a headscarf. She recalled the use of swearing also during this episode.*

30 *R also recalled previous events of being whipped with towel, struck with a water bottle and unpleasant interactions with the night staff in general. She is afraid to ask for help and will wait for a long period of time if buzzing for attention.*

35 *Has escalated concerns to family and staff however she feels that the staff deflect the situation when reported today (sic) nurses.*

R reported not feeling like she can ask for help overnight and door will be slammed closed after any interactions.

40 *She also recalls residents coming into her room and swearing at her, difficult to deal with when she is immobile and scared to ask for help.*

R identified two members of staff from ID file and was scared if they were to return regarding potential repercussions.”

- 45 11. Ms Bain also asked R’s daughter to provide a “written account”. Her undated letter/e-mail , was produced (P.113-115). The following are excerpts:-

5 *"As requested, I am providing a written account of what we've discussed in the last few days. My mum, R, moved into Deeside Care Home on 15 February, having previously been a resident at Northcote Lodge for almost two years and following a lengthy stay in hospital. Very soon after she moved in, it was clear to me that she wasn't happy. I spoke to HS about this a few times and Mum's medication was changed in the hope she would feel less down. I visited her most days and every time I spoke to her, she said she wasn't happy and often uttered phrases like, 'you've got to get me out of here'.*

10 *Within the first few days of her being there (certainly before the 24 February, but I think probably the 17 or 18) she told me about an incident with a carer on night duty.....*

15 *I was obviously shocked, but knew that Mum was depressed and at that time I felt that she was fed up about her lack of mobility and how it impacted on her quality of life and couldn't separate that from the move, blaming it on Deeside.....*

20 *I didn't hear about any other individual incidents for a while but out of the blue, both myself and my brother received missed face time calls from her at approximately 1.30am on 31/03 which concerned me a little. Then when I visited on 08/04 Mum told me about an incident that had recently happened (either the night before or the night before that) that caused me great concern. She said that she had woken up needing the toilet and buzzed for someone to come. She waited a long, long time before someone came (she says this is very normal during the night) and they helped put her on the bed pan and left. Mum opened her bowels in the bed pan and then buzzed for someone to come and remove it. No-one came for a very long time. Mum is very sure that she waited for well over an hour. She got more and more worked up and shouted "help me" repeatedly as well as buzzing but still no-one came. Thinking no-one was ever coming, Mum decided she would have to remove the bed pan herself. With her mobility issues and only having one working arm, this was obviously a struggle for her and she may have made a mess. She put the full bed pan on her tray table that was alongside her bed.*

25 *Eventually the carer that she has had issues with all along opened the door and looked in, made a face to show that she wasn't happy then walked out without saying anything. She then returned with another carer. By this stage, Mum was very distressed, upset and worked up. She said to the first carer "I should report you to the Police" to which the carer replied aggressively "go ahead and phone the fucking Police then" and picked up the TV remote control from the table and threw it at Mum. I asked her what the other carer was doing at this point, thinking she would be trying to calm the situation, but Mum said "Oh, she's just as bad. They're horrible!" (Mum told me the exact same wording about phoning the Police several times, but later said she didn't recall if she swore or not but is in absolutely no doubt that she angrily told her to go ahead and phone, and then threw the remote at her.*

30 *In the morning, Mum was still thinking about the incident and told JS (a Carer) what had happened. She became upset and cried which is incredibly unusual for Mum. When I asked what exactly was making her so upset she said "I just couldn't take anymore. It was just too much". So I questioned her more*

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about what it was normally like at night time. She said it was awful, that the carers were always horrible, cruel, nasty etc. I spoke to JS about it in passing and I knew that it had been reported to management so assumed it was being dealt with.

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When I visited on 12/04, Mum told me that someone had visited during the night and asked her some questions. She was a bit confused about what they were wanting to know and told some stories of when residents have come into her room and caused her some distress. When I suggested that maybe they might have been wanting to know about the incident with the bedpan, she felt a bit foolish and realised that that was what was being asked about.

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Around this time, I realised that I should have been more on the ball and should have noticed that while Mum was full of stories about the daytime carers and that they told her about their families etc, she had never once told me anything like that about any of the night carers. I spoke to my brother and we both agreed that we were now extremely concerned and wanted to know more about what was going on so he e-mailed to ask.

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GB (the Home Manager) phoned me on 13/04 to ask what I knew about what had happened and asked if I would come in the following day to be there when she spoke to Mum again. So on 14/04 I visited Mum while GB came to speak to her. She told GB the story of the bedpan/remote control incident and while she couldn't specifically remember the details of the incidents she told us right at the beginning of her stay, she said that they are always awful/horrible and often hit her. When GB said she was looking to suspend the carers involved pending an investigation Mum looked visibly concerned/worried/scared and asked several times what would happen and wouldn't it be worse when they came back? She kept saying "they'll be so angry, they'll give you a mouthful" etc. and GB explained that she had no option and couldn't have people working when she had such serious concerns about their conduct and reminded Mum that some of the residents wouldn't be able to voice their concerns so she had to take moves to protect them as well as Mum.

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GB asked Mum if she could tell her who the people involved were. Mum said she wished she knew their names but they had never introduced themselves or told her their names. She tried to describe them, and said that the first one wore a "headscarf" and then told GB she would be able to point them out in photos. GB went to look for photos and while she was away Mum continued to press me on what would happen and if these carers would come back. When GB returned with photocopies of some passport/permit/license photos, Mum immediately identified one as the first carer, she also identified another as someone who was "quite nice". She took longer looking at the other two but seemed quite convinced eventually that she could identify the 2nd carer too. Over the next couple of days Mum continued to be concerned about what would happen and it was obvious to me that she was genuinely very apprehensive, if not actively scared of these carers."

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12. R's daughter went on in her letter to say that she had been advised that the Police had arrived at the Home and taken a statement from her mother in the course of which she had made a further allegation. She expressed her serious concern on her behalf and that of her brother and advised that they were discussing the possibility of moving their mother elsewhere. She went on to say this in her letter (P115):-

"We are both relieved and reassured that Mum has been believed, that these allegations are being taken seriously and are happy that now, this is being dealt with as it should be. GB has reassured Mum and made sure that staff she trusts have been on duty overnight. Mum has seemed a bit happier the last few days."

13. The undated letter/e-mail which R's son sent to Ms Bain was also produced (P.116/117). The following are excerpts:-

"I spoke to my sister and she said you had asked us both to provide an account of the abuse my mother has been faced with during her time at Deeside.

I live in Brussels so unlike my sister I haven't had the chance to visit my mother since Christmas, but I have had frequent contact with her via FaceTime and also with my sister. I will travel to Aberdeen on Monday to spend time with my mother and hope I can meet you at some point that week to discuss everything that has happened and what the next steps should be.

It goes without saying, but I would like to make it clear that these events have been extremely distressing for the whole family, including my two teenage children, who are very close to their Grandma. It is hard to imagine anything worse than a vulnerable (and in fact almost helpless) woman in the later stages of life suffering such abuse. My mother has had an extremely difficult life and certainly does not deserve this (and nor does anyone else). I mention this not for "dramatic effect" but because it is relevant to a point I will make below.

Nevertheless I am grateful to you for the steps you have taken so far to deal with the situation in a professional manner and will try to prevent an account of events in a neutral manner.

With regard to providing that account of events, I have read the e-mail that my sister has sent to you. To avoid repetition I can confirm that I agree with everything she has written she has regarding the abuse that my mother has suffered. While I was obviously not present during the conversations between

5 *my sister and mother, during Face Time call with my mother, she did provide me with the same version of events. These calls would usually be either the same day as my sister was told what had happened or possibly the day before or the day after. Sometimes my mother would reach out to me first, and sometimes it would be to my sister. I don't doubt for a second that what (his sister) or my mother have explained is true."*

- 10 14. He went on in his e-mail to refer to other allegations which his sister told him had been reported by his mother to the Police and then said this:-

15 *"With hindsight, I feel very guilty about having not intervened as soon as she had complained about the first instance of abuse. The reason I did not was because I was hoping it was a one-off incident that would not re-occur. In addition, I understood that the person responsible had been disciplined. My mother had only just moved into the home and if I had "made a fuss" at the time I thought it would give her an extremely negative impression of the home, which would stay with her for the remainder of her time at Deeside.*

20 *I should also have picked up on the signs of her not sleeping at night and generally being unhappy. I put this down to her simply preferring Northcote and having a bad reaction to a change of home. However, she has never had sleep problems in the past and has always been a sociable person so I should have realised that this was indicative of something more serious."*

25 **Claimant's suspension on 14 April 2022**

- 30 15. After taking the statement from R, Ms Bain advised the claimant, the same day, that she was suspended from duty with immediate effect.

- 35 16. I am satisfied, on the evidence, that R identified from the photographs she was shown that it was claimant and her colleague Edith Wololwolo who had been involved in the alleged incident involving the bedpan and remote control ("the incident").

17. The incident was also reported to the Police. Both the claimant and Ms Wolowolo were apprehended by the Police taken to the Police station and questioned but neither was charged.

Investigation

- 5 18. On 14 April 2022, Anna Hoffmann, Deputy Manager, wrote to the claimant to invite her to attend an “Investigatory meeting” on 19 April (P.123/124).
19. I did not hear evidence from Ms Hoffmann but a handwritten record of the meeting and Minutes were produced (P.125).
- 10 20. The investigation was conducted on the false premise that the incident had occurred on 12 April 2022 (P.130). It was later established that the incident had occurred on 5 April 2022.
- 15 21. The allegations were: “verbal/shouting/mimicking/inappropriate manual handling techniques” (P.131).
22. The claimant confirmed that in the evening in question she was working with Edith Wololwolo.
- 20 23. Ms Hoffmann asked the claimant to “describe what happened that night” and the Minutes record the following exchanges (P130-133):-
- “TB - I came in at 19.30, entered the unit and went to the kitchen to start the tea/coffees.*
- AH – Did you assist or answer F2 buzzer during the night?*
- 25 *TB – Yes.*
- AH – Can you describe your interaction with R?*
- TB – When I was doing the tea, R buzzed. Edith went to F2 and the resident asked for a bedpan.*
- AH – So you were not in the room when the bedpan was given?*
- 30 *TB – No.*
- TB – When I finished the tea, we had handover and started the rounds.*
- AH – How long was the resident on her bedpan?*

TB – 10-15 minutes.

AH – Did she buzz?

TB – No she was shouting, when I went into her room, the lady had removed her bedpan.

5 AH – Was R becoming distressed?

TB – When I went to take the bedrail down, the resident said we should not.

AH – Did you notice that the resident was distressed?

TB – No she wasn't.

10 AH – Are you aware of any other intervention methods to prevent distressed behaviour?

TB – If I see a resident is distressed, I try to calm them down and not use a raised voice.....

15 AH – So if you understand Adult Support Protection, did you ever raise your voice?

TB – I never.

AH – At any time when you were assisting R did you become physical?

TB – No, if any resident needs two people we always go in twos. I never physical towards my resident.....

20 AH – To summarise:-

AH – You never used inappropriate manual handling techniques?

TB – No.

AH – Your communication was appropriate?

25 TB – Yes.

AH – Did you use a remote control to pretend you were calling the Police?

TB – No.

AH – Do you think there are changes you can make?

30 TB – I attend to residents the way they should be treated. I treat people the way I would like to be treated.”

24. A confidential Investigation Report signed by “K Chisholm, Deputy Manager”, was prepared. I did not hear evidence from “K Chisholm” at the Hearing. I do

not know why she signed, as opposed to the investigating officer, Ms Hoffman. The report records “the Investigation Findings” as follows (P.140):-

5 *“Statement from R taken by GB – Home Manager on 14/04/2022 – this formed a focal point for the allegation that was raised, R identified the care staff involved from photos held on their files. This included Tiawo Bello. R went into more detail about what had happened during this incident, and she expressed that she feels she can’t ask for help at night, as is unsure how staff interactions will be.*

10 *Investigation meeting held with Tiawo Bello on 19/04/2022 – Tiawo was very vague in her answers. Very short and simple. Did not elaborate on any of the questions asked. Denied any wrongdoing. Brought up things from R’s statement that was not mentioned in questions. Tiawo’s knowledge into adult support and protection is poor – unable to say if she completed her ASP e-learning/system checked ASP last done in July 2021. Unable to say what the SSSC codes of conduct are – stated she must have forgotten them.*

Facts established:

20 *Taiwo confirmed she was working on the first floor and which carer she was working with (EW).
Taiwo’s lack of understanding about adult support and protection and the SSSC codes of conduct.*

25 *Facts that could not be established:*

Taiwo denied any wrongdoing and denied all allegations.”

25. The recommendation in the report was “to appoint a Disciplinary Manager”
30 and the following “Further details on recommendation” were provided (P.141):-

35 *“The resident has full capacity and can say what happened. R was able to pick out the staff in the photos shown from the staff files.
Taiwo’s lack of knowledge about what constitutes an ASP referral.
Taiwo Bello - to be referred to the SSSC for investigation for breaching the SSSC codes of conduct.”*

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Disciplinary

26. On 25 April 2022, Susan McDonald, Regional Support Manager, wrote to the claimant to invite her to attend a Disciplinary Meeting on 3 May (P.151-152)

Disciplinary meeting on 3 May 2022

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27. Minutes of the disciplinary meeting were produced (P.155-163). I was satisfied that they were reasonably accurate. Robert Allan of Unison attended the meeting as the claimant's representative.

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28. At the start of the meeting, the claimant advised that R's allegations related to the events of the evening of 5 April and not 12 April as Ms Hoffman had thought.

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29. Ms McDonald advised the claimant that, "*the allegation is regarding continence care and a bedpan. And following that the behaviours which are alleged to have happened*". The claimant explained that it had been her colleague Edith Wololwolo, alone who had taken the bedpan to R following her request.

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30. The following are excerpts from the Minutes (P.155-163):-

"What did you see when you walked into the bedroom? Please use "I" so I know it's your account.
I saw the room was dirty.

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With what?
Poo and urine.

So you left the room to get equipment to clean it up?
Yes.

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Where was the bedpan?
My colleague took it to the toilet.

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Did you see her?
Yes.

Where did she get the bedpan from?
It was on the bed.

5 What did your colleague do with the bedpan?
She took it to the toilet to empty it.

10 And at this time you left the room?
Yes, to get bedsheets and wipes.

What happened as you were leaving?
She is a nice lady to be honest with you, she was asking me "what is your name, what is that on your head?" [TB motioned to her head scarf]

15 What did you see when you came back in?
Nothing. My colleague had already prepared the wipes. She has the two bedrails on the side. Before we attended to her, we had to put the sides down. But my colleague said we don't need to. I said ok, we should keep one up because she is weaker on her right side.

20 So both sides were up, you wanted to get both sides down, you said the side she is weakest on should stay up and the other down?
Yes. We cleaned her; we did everything perfectly. R said 'can we be friends?'. My colleague said, "we are already friends, I am the best friend you have!"

25 You have read the statement. You have seen the stories which have been said. The resident said there was a long time which she had to wait.
No that's not true.

30 Can you share with me then your point of view? I'm very aware that this lady was sitting by herself in the bedroom. So, I am asking you how long did she wait? Sometimes when you are by yourself five minutes can feel like ten, ten can feel like fifteen. So how long do you think she had to wait? Because up until then you hadn't had anything to do with her?
I think it was about 10-15 minutes. My colleague told her we were coming I was with someone else.

35 So, you couldn't attend to R straight away because you were with someone else. How much care does this person need?
They need it 10-15 minutes.

40 So, R had the bedpan, and you were with someone else, in theory she could have been waiting up to half an hour, if she knew she needed 15 minutes you also need 15 minutes with your other resident, could that be possible?
To be honest, we need to finish with the other person first.....

45 How did she approach you and your colleague when you attended?
She was ok, she had brought out the bedpan and told us she did that.

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Was she angry, fed up, tired?
No, she was fine.

5 Even though she felt she had been sitting there a while?
Yes, she was ok. She said "can we be friends?"

10 Why would she have said that?
I don't know, but she has said it before, asking if she will see me tomorrow.....

15 So, to summarise, this lady needed a bedpan, may have been waiting longer than she expected to, and you and your colleague attended to her needs. This lady claims to have been subjected to something which shocked her on this one occasion.

20 RA (Union Representative) – I would like to clarify that we are talking about one occasion, but throughout her statement there are occasions which can be evidence.

25 SM – Yes and regarding this night in particular, she was fearful and wanted to call the Police. She said you picked up the remote control mimicked phoning the Police, and then you threw this remote at her.
TB – No never.

She is claiming you were there with her.
She never said she wanted to call the Police.

30 She said she wanted to be friends. Do you think you may have overstepped the boundary? Could this lady have misinterpreted your actions, in this way, and perhaps you were being overly friendly? The lady said, "are we friends?"
She said "can we be friends.

35 Do you think you overstepped the boundary, and she misinterpreted the situation?
No, I think so. I've never spoken badly to a resident, never.

We are talking about this lady in this situation.
I don't know, I don't do anything like that.....

40 I am struggling to understand that this lady, who you say has never told a lie like this before, is making these claims and you are saying she is lying.
I did not do any of these things she is saying. If you want to know more about me, you can ask my colleagues or look through my files.

45 We have had people in the past who have impeccable records, I don't doubt yours, but people can misjudge situations and we always have to the residents (sic).
I didn't do anything, God knows, God knows I didn't do this.

5 Well unfortunately God and I can't have a chat. I need you to share with me the communications you had with the resident that night. You are saying there was no communications when you entered the room. It was just to clean her. You cleaned her without speaking to her.
The only time we spoke was about the bedrails.

10 So, you and your colleague carried out personal care and bed change in silence?
Only 1 person should talk when there is 2 people.

You didn't say any words to this lady?
No nothing.

15 Could she perceived you were angry? Do you normally chat to her?
I wasn't angry.

20 No, I am saying this lady was in a very vulnerable situation, on her bed, with urine and faeces around her. And you are saying you didn't offer any reassurance?
No, I didn't say anything bad.

25 I'm not saying it was anything bad. But after the bedrail situation, she was cleaned in silence?
Yes.

And then she asked, "can we be friends?"
Yes. And my colleague said "we are friends already....."

30 But this lady was vulnerable in bed, and no one was speaking to her.
But we had nothing to say to her."

31. At the end of the meeting the claimant's trade union representative expressed satisfaction with the conduct of the meeting by Ms McDonald which he said
35 had been, "*very well handled*" (P163).

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32. On the same day at 2pm, some two hours after she had conducted the disciplinary meeting with the claimant, Ms McDonald conducted a disciplinary meeting with Ms Wololwolo. Minutes of that meeting were produced (P.231-237). I was satisfied that they were reasonably accurate. Ms Wololwolo was not represented. The following are excerpts from the Minutes:-

“Can you tell me clearly why you are here?
About an allegation against me.

What’s the allegation?
About a resident in room 2. That we pushed, mimicked her by using a remote, and unprofessional manual handling techniques.

Have you spoken to your colleague today who is also being investigated?
No.

Not at all today?
No.

Can you start with an account of your first interaction with resident R that shift? What happened on that shift?
The investigation said it was the 12th but it was the 5th. When I came in, she was buzzing so I went to her, and she said she needed bedpan. I haven’t used bedpan with her before. Day staff were still there and I asked them what to do.

Had she needed to go to the bathroom at night before?
She has a catheter, and she is always in her bed. I put the bedpan under her and said when she is done to buzz. It should be about 15 minutes. Room 11 had done a bowel movement, so I was with him. I heard her screaming so I thought she may be done. I went to tell her we were coming but she had taken it out already, I told her we would finish with the other resident and we would come to her.

How long do you think she’d had to wait?
I think it was about 30 minutes.

So, she is in her room alone and she had to wait about 30 minutes to be attended to?
We were with another resident.

That’s fine, I understand that. We understand that you are sometimes with other residents. I am asking you if you think it was about 15 minutes until she had finished, but then had another 15 minutes to wait as you were with another resident?
Yes. I think so.

So, when you went in the room after, what did you see?

She'd taken the bedpan out already. I took the bedpan to the bathroom while my colleague went to get the bedsheets as she had soiled the bed. One of her hands she can't use properly so we had to turn her, but the bedrail had to stay up. I said don't worry, you won't fall, I'm holding you. My colleague cleaned her and changed the bedsheet. When we left, she said, "are we friends". I said "yes, we are" and my colleague said "I am jealous. I thought I was your only friend".

Have you ever known this lady to make up stories?

No, I don't know.

Has she ever told you a made up story?

No.

The resident tells a different story from what you have recalled. What did you say to the lady when you entered?

She'd already taken the bedpan out. I didn't say anything. I said we were busy with other residents and said sorry for taking so long.

What did you say to her when you were caring for her?

We just said we will take care of her.

What did your colleague say to her?

She didn't say anything, she was just cleaning her.

When you first reassured her, what did you say after that?

Nothing, I didn't say anything, I just said we had been with another resident.

Was she making comments about being unhappy about having to wait?

Yes, she was screaming that she'd been waiting on the bedpan. I told her that I would be there soon.

What did your colleague say when you said that?

She didn't say much.

Your colleague heard you apologise for the wait as you were with someone else?

Yes.

So, after you reassured her, you were quiet after that?

I just kept reassuring her. I was talking to her when my colleague was doing the cleaning.

What happened after your colleague had finished cleaning her?

We changed the bed and put a pad on her then we left. That was when she said about "are we friends", and I said yes.

.....

5 This resident has never made up stories to you personally?
No.

But she is telling her son, daughter and the manager a story that you were angry.
Me?

10 Yes. She also said that she was angry herself for having to wait.
Yes.

15 Was the lady anxious, agitated or upset when she was getting washed?
Yes. That was the issue, and I had to calm her down.

Describe her behaviour to me on the bed.
I could see she was angry. When we went in, we attended to her and kept reassuring her.

20 How was she behaving towards you when you were reassuring her?
After a while she was calm.

25 What was she like before she calmed down?
I don't know how to put it in words. She wasn't physical. She was angry, saying we left her on the bed.

Did she raise her voice?
Yes. Definitely. She does that. She screamed that we left her for hours.

30 What did you do?
We said sorry we left you, but we were busy with another resident, that he had done a poo.

35 You told her this?
No, we just said it was the resident opposite her.

How long did it take you to calm her down?
About 2-3 minutes I think.

40 Was she angry enough to say things like "I'm going to phone the Police"?
No.

45 How did you leave her when you were finished?
We changed the bed and drained the night bag, made her comfortable, put the covers on the bed and remote close to her. We took the bottles away to refill and that was it.

50 She doesn't tell that story how you tell it. She says she was upset and was so upset she wanted to phone the Police.
She said that to me?

Yes, she said that she'd told you she wanted to phone the Police. She also said that someone in the room took the remote control and mimicked phoning the Police who was that?

5 *No one did that. I was shocked to read that.*

So the lady has made this up?
Maybe.

10 Or did she see it?
See what?

Her account says this is what she saw.
When I came for the investigation, they said that I said I would phone the Police on her, but now you are saying she would phone the Police on me? Why would I do that? I don't know why she would say that.....

15 The lady was upset and angry.
Yes very.

20 Was she scared?
Scared? Of what?

25 That's why I'm asking. Was she frightened that you were angry she had messed the bed?
Why would she be? It is my duty to clean this and take care of her. I think she said it because we are friends.

30 Was she frightened and worried about what she had done?
No.

35 But she was angry and upset.
But she had calmed down. I think she only said it because I had cleaned her and helped her.

40 Did your colleague mimic the lady? What did your colleague say to her when she was upset and anxious?
No. She didn't say much, she just said we were attending to the other resident. She was the one doing the cleaning, she didn't say much.

45 Did she pick up the remote and pretend to phone the Police?
Not when I was there.

If you know that this happened, you have to tell us.
Yes, I would tell. I know to tell.....
R was able to confirm it was you and your colleague in her room and to say what happened.
I am saying I didn't say anything that you say happened. Not in my presence. No. She did not say she wanted to call the Police.

50

5 That is your recollection. But hers is different. The story you both share is similar up until a point. We have established she had to wait, that she was angry, shouting, upset, needed personal care. But where the story differs involving you and your colleague, according to you, never happened. Everything R says is up until a point, you agree happened, but after that you say nothing else happened.
Yes it didn't happen.

10 Are you covering up for your colleague?
Why would I do that.....

I am going to ask you again. Did you witness anything from your colleague that you are covering up?
No.

15

20 Do you have any further questions?
I am just exhausted by this. I can't wait for it to be over. The Police came to my house and my daughter asked why. She keeps asking me.

The Police are taking this very seriously. This is a very serious accusation.
Yes, I understand....."

25

Claimant's second disciplinary meeting on 18 May 2022

33. Ms McDonald was not satisfied with the disciplinary meeting she had had with the claimant. She felt the claimant had not been particularly communicative.
 30 She decided to convene another disciplinary meeting.

34. Minutes of the meeting were produced (P.165-170). I was satisfied that they were reasonably accurate. The claimant's Trade Union representative, Robert Allan, was in attendance again. The claimant was more
 35 communicative at the meeting. The following are excerpts from the Minutes:-

"SM – Briefly tell me how that particular shift started, to clarify your interactions with resident and previous meeting.

40 *TB – That night, I started around 19.30hrs, I normally start with the tea trolley, nurse goes to another floor. My college (sic) started at 20.00hrs, room 2 had called asking for bedpan. I was there early serving tea. Edith went to her to let her use bedpan. I returned tea trolley and started with checks. We normally start with the doubles. Room 2 had called, and Edith went to explain that they*

(sic) were attending to another resident and that they would be back. When we got there Edith removed the bedpan, I left to get bedding and towels.

SM – Edith was in the room? What did you see when you returned?

5

TB – Edith had gotten the wipes out, we raised the bed and lowered the bedrails down. R had stated “No, no, no bedrail up”. I explained we can’t support you with bedrail down. I told Edith that it was ok as she has right sided weakness. Asked R to roll onto her side which she did. Edith held her while I cleaned her bottom. Edith kept reassuring R throughout while I cleaned bottom, new pad, new sheets, and nightwear. R went onto her back and Edith was still talking to R. I don’t like 2 people speaking at the same time when dealing with a resident, I normally assign one person to talk when dealing with residents.....

10

15

SM – So nothing untoward happened, but you agree you were involved with the task?

TB – (paused) I cleaned her with wipes.

20

SM – Ok what happened next?

TB – We sorted her and went to leave, she said is ok.

25

SM – Before that was anything said?

TB – She said “are we still friends? I said yes”. Edith asked if she was her friend and R said yes. I said “R, I thought I was your only friend”. We were laughing.

30

SM – So what you’re telling me is that in this situation it wasn’t loud, upsetting or untoward.

TB – No.

35

SM – We have previously agreed this lady was waiting for over 30 minutes to come off the bedpan. What was she like?

TB – She was ok, she said she was sorry.

40

SM – She apologised to you?

TB – We said it’s ok and tried to reassure her. I always try my best not to hurt anyone. If I see anything I would raise the alarm.

45

SM – This lady in her mind had a traumatic experience. She shared this with her son, daughter, and Manager. She was able to pick you out from a photo, as this interaction in the bedroom that night, caused her such distress and you telling me nothing happened? And she was able to identify you, why is that?

50

TB – *I never do what she says, that I don't know.....*

5 SM – *We have a difference of opinion here, there were 3 people in the room and all give a different account of what happened. You're saying that when you went into the room and left the room this lady wasn't upset or distressed, that she was fine?*

TB – *Yes, ask her.*

10 SM – *I have the lady's statement, she had told her family and the manager on three separate occasions she was upset at how she was treated. Upset enough to want to call the Police.*

15 TB – *No she was fine.*

20 SM – *This lady believes she was on a bedpan for hours, we were able to establish, you're your (sic) help, the lady was on the bedpan for over 30 minutes. In that time she had used the buzzer for help. She was told once staff were busy, and she had to wait. The lady removed the bedpan herself, she spilled the contents of the bedpan on the bed and on herself and had to wait for someone to clean this up. She was on the bedpan for 3hrs, and if she was distressed I can imagine over 30 minutes, it would feel like 3hrs, but she wasn't upset, anxious or annoyed. You say she was fine?*

25 TB – *No, she was fine.*

30 SM – *So to clarify at no point in this incident, no part of your interaction or actions caused distress. The time spent with this lady she was fine and no distress or upset?*

TB – *Nothing I did to make her upset, ask Edith.*

35 SM – *I have asked Edith when I met with her. I want to speak to you again to ask about the lady, ask how she was, ask how distressed or anxious she was. You have explained the lady had to wait for assistance, she was covered in urine and faeces when she removed the bedpan and it spilled on the bed. She was needing her bed and night clothing changed. This lady was so upset after this happened and she was clean she wanted to call the Police because of the way she was treated, do you remember that?*

40 TB – *No mention of Police, I don't shout or do anything, never mentioned Police.....*

45 SM – *Ok let's take a step back. Could you have upset her without knowing?*
TB – *(laughed) No.*

SM – *Ok I don't want to be misconstrued, could you have perhaps unwittingly upset this lady or caused her distress unknowingly?*

50 TB – *(mouth click) No. I don't think so.*

SM – So, confirm that she was not upset and no mention of Police?

TB – No mention.

5

SM – And no remote control was thrown?

TB – No Edith gave her, my partner should clarify, that's why best if 2 in room. My partner should be best to say nothing happened (click of fingers).

10

SM – That's why you and I are speaking again, the lady's events have remained unchanged. The bones of the statement remain unchanged. She has said in one statement that no one swore at her, but fundamentally her statement has remained the same. She was so upset at what happened and wanted to call the Police, a staff member used the remote control to mimic a telephone and mimic calling the Police, then threw the remote onto the bed hitting the resident.

15

SM – So to confirm this lady was not upset in any way?

20

TB – No.

SM – You never seen her upset?

25

TB – No, only heard she was waiting long time:-

RA – There was an allegation of swearing, and remote thrown and no bruising, thought she was hit on blouse?

30

SM – Confirmed it was thrown onto the bed on top of resident and hit her.

RA – Could this have been over exaggeration (from resident)?

35

SM – I could take that point, a staff member may have thrown the remote onto the bed and unintentionally hit the resident, however the bones of the statements remain unchanged. I just wanted to clarify on what happened.

RA – too – TB – If she was so upset wouldn't you know?

40

SM – Do you think that you could have walked away leaving this woman unintentionally upset or your actions might have been misinterpreted by her later?

TB – No, nothing happened, no should be an issue (sic).

45

SM – So that's your version. No upset, no anger from lady.

TB – No."

Dismissal

35. On 27 May, Ms McDonald wrote to the claimant to advise that she had decided to dismiss her summarily (P.172-174). The following are excerpts from her letter:-

"I am writing to confirm my decision to terminate your employment with immediate effect.

The reason for dismissal was Gross Misconduct. I have reasonable grounds to believe that you have interacted inappropriately with a resident and communicated in an unacceptable manner.

Inappropriate and unacceptable interaction and communication

R, who has capacity, informed her son, daughter, the care home Management Team and Police Scotland that she was upset and distressed about an incident on the night of 5 April 2022 which she clearly recalls.

Following alerting care staff, by using the bedside buzzer, that she required assistance to attend to her continence needs, R became distressed due to the length of time she waited for a carer to arrive.

When a Carer did respond to the buzzer, R was provided with a bedpan, the buzzer was turned off by this carer and R was told someone would return. You were not present at this interaction however you told us of these events during our meeting as your colleague had informed you of this.

R said it felt like hours, and by your own admission it was 30 minutes before you and your colleague (the Carer who intended initially) returned to remove the bedpan. By this time R had attempted to tend to her own personal care needs and removed the bedpan which had resulted in the bedsheets and R's bedclothes becoming soiled. R states you were very angry with her when you returned to the room and saw this.

R required to be moved on to her side in order for her personal care needs to be attended to. You stated at interview you did not speak to the resident at this time as you don't think you should be talking when interacting with the resident. You stated you raised the resident's bed and lowered the bedrails down. R had stated "No, no, no bedrail up". You explained you couldn't support R with bedrail up. We believe R was distressed at this time however she did not receive the reassurance that we would expect from our carers whilst carrying out intimate personal care. R felt that the way she was treated warranted a report to the Police.

R maintains that she wanted to inform the Police of how you had treated her and of the lack of care, and that when she said this to you and your colleague, she was ridiculed, laughed at, and the remote control was used to mimic her

calling the Police. R reported that she was spoken to in a derogatory manner, and that the remote control was then thrown at her, striking her on the chest.

5 R by her own admission was distressed, agitated and scared. You have stated however, to the contrary of everyone else present at the time, that R was not distressed or agitated and needed no reassurance. You have stated that you did not communicate with R during this interaction.

10 R has clearly identified the two staff members in her room at the time of this incident and by your own admission you were one of the two staff members present in the room on this night and at this time when R's personal care needs were tended to.

15 You have denied the allegations whereby you mimicked R by using the remote control as if it was a phone, and then threw the remote control; however, we have reasonable grounds to believe that R's account of the events is true. There were no visible signs of bruising upon examination of R, however, R exhibits symptoms of abuse. R exhibits disrupted sleep patterns, is tearful, fearful of repercussions and is withdrawn. R's recall of events remains consistent, however the accounts given by the two staff members present at the time differ from each other.

25 You were asked at the meeting why would R make up this story, indicating it was you, clearly point you out by photographs. You stated you believed there was a possibility R looked at your "my appearance, my colour or my dressing, my hijab". It was discussed at the meeting that R has not, in any way, brought race or colour onto this incident and you stated 'maybe because of my hijab'. You were asked if R identified you because you wear a hijab and you stated "maybe". You were asked if R had ever called you names regarding your race and you stated "no, I was surprised she says the things she say, could be possibly maybe off my colour" (sic).

35 At your first disciplinary meeting you stated R asked you "are we still friends" as you left the room, and you reiterated this at your second disciplinary meeting. You gave no rationale as to why R would seek reassurance asking for continuing her friendship except to say about the incident; "it did not happen".

40 I have reasonable grounds to believe that you did physically and verbally abuse R who was in your care.

45 We reference the following examples of Gross Misconduct as stated in the Deeside Care Home Disciplinary Policy: "Serious breaches of professional conduct for example, falsification of service user records, negligence, cruelty, misuse of prescribed drugs, sexual, physical or mental harm or abuse".

36. Ms McDonald went on in her letter to make reference to the SSSC Code of Practice which she considered to have been breached by the claimant.

Appeal

37. On 4 June, the claimant’s Trade Union representative sent an e-mail to the respondent to intimate that she wished to appeal against her dismissal. It was in the following terms (P.177):-

“I wish to lodge an appeal on the grounds of procedural failing and the sanction too severe. There was no conflicting statements from a second staff member presented at the hearing. It was made clear that it was a separate and confidential matter. However, I believe both staff statements collaborate (sic) each other completely as how upset the resident was is subjective to individual opinion. Taiwo states Edith reassured the resident, and this is consistent in both statements. There are inconsistencies highlighted in the investigation (incorrect dates and exaggerations made by the resident and later retracted) that also cast doubt. The ratio of residents to staff on shift should have been taken into consideration. The set up meant that it was inevitable that residents would be left waiting and therefore become upset and this was outwith the staff on shift’s control. Further mitigating circumstances include an unresolved conflict between nightshift staff that had been highlighted to management.”

Appeal meeting on 16 June 2022

38. The appeal was conducted by John Park, Regional Director, from whom I heard evidence at the Tribunal Hearing. Minutes of the appeal were produced (P.181-183). I was satisfied that they were reasonably accurate. Robert Allan represented the claimant again at the meeting. The following are excerpts from the minutes:-

“RA said resident information was inaccurate and there had been several changes in relation to the swearing and conflict he felt was all as a result of the resident not wanting to move. The resident was unhappy. He also felt there had been unresolved conflict of staff.....

JP – Police matter dropped immediately as from the law aspects there has been no crime committed.

RA – The fact that TB has been working here for 10 years he felt the resident’s feeling of not being happy with the prospect of moving resulted in the upset situation. The fact that some residents would have had to wait for their care would make them aggravated.

JP asked if TB was feeling ok?

TB replied I am fine but it's the false allegation. It's too much for me.

5

RA replied we understand. He states that TB has a 10 year unblemished record, the fact the resident was unhappy about the move, the residents were agitated due to having 2 staff members to 23 residents were a contributing factor. He stated that TB does all the induction training for new staff members and has not had any previous conflict with other staff members. Also the language barrier as when TB walked into the room the resident was not upset."

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Appeal outcome

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39. On 28 June, Mr Park wrote to the claimant to advise her that he had decided to uphold the original decision to dismiss her for gross misconduct and reject her appeal (P.184-185). In his letter he addressed the appeal points which had been raised by Mr Allan in his letter (P.177). The following are excerpts from Mr Park's letter:-

20

"Point 1:

RA said he felt there had been a procedural failure. I clarified there was no statement made to us as part of the investigation process that had not been provided, and as you stated when you lodged your appeal, it was a separate, and confidential matter.

25

Point 2:

You felt the date provided by the resident in her statement was incorrect. I can confirm that the dates were checked during the process and that the correct date was provided. You agreed with this during the appeal hearing.

30

35

Point 3:

RA said that the Police investigation had been dropped immediately and that this should be taken into account. I clarified that the Company procedures are carried out independently of any Police enquiries.

40

Point 4:

RA felt that Deeside staffing levels of 23 residents to 2 members of staff had led to residents being conflictive and asked if this level of staffing was usual.

45

I clarified that this is dependency based and also regulated by the Care Inspectorate.

Point 5:

5

You felt the sanction was too severe. However we have reason to believe that you breached professional conduct.

Point 6:

10

You felt the resident exaggerated. I can confirm the resident has recounted the events many times, to many people. The resident is unsure as to whether she was sworn at, and she does say that herself. She is, however certain about the rest of the events.

15

Point 7:

20

You felt the set up meant that it was inevitable the residents would be left waiting and therefore become upset. We do acknowledge that residents in our care can become upset for many reasons, however we do expect staff to react and to respond to this in an appropriate manner.

CONSIDERATIONS

25

- RA felt there was unresolved staff conflict and that you were being set up as a result of a complaint you made about a colleague. Although this has not been mentioned at any point throughout the process to date, I can clarify that I did explore this and that this is not the case. The investigation and subsequent disciplinary action was a direct result of the allegations of abuse.*

30

As a result of my findings and based on the considerations above, my decision is to uphold the original decision to dismiss you for gross misconduct. Therefore your appeal is rejected, and the original decision still stands.”

35

40

45

Edith Wololwolo

40. Ms Wololwolo was also dismissed by reason of gross misconduct. The relevant documents relating to her disciplinary procedure were also submitted (P.208-237).

5 **Respondent's submissions**

41. The following is a brief summary of the respondent's submissions.

42. In support of her submissions, Counsel referred to **British Home Stores Ltd v. Burchell** [1978 IRLR 379].

43. She submitted that it was not disputed that conduct was the reason for the dismissal.

15 44. She submitted that the three-fold test in **Burchell** had been satisfied. The evidence of both the respondent's witnesses was credible and reliable and Ms McDonald, in particular, who took the decision to dismiss, took account of what R had said to her daughter and son and Ms Bain the Manager of the home. She submitted that the investigation was a reasonable one, that the
20 "best person to take the evidence was the Manager" which was normal practice. She submitted that the evidence was "properly tested" by Ms McDonald.

45. She submitted that the claimant's evidence that she had said nothing to R
25 that evening was not credible and nor was her evidence that R was not upset which conflicted with the evidence of Ms Wololwolo who said that R was upset and angry when she went into the room.

46. In response to a question which I asked, she said that it would not have been
30 proportionate for the investigating officer, Ms Hoffmann, to discuss R's evidence again as she was a "vulnerable person" and she had already "told the same story" on three occasions.

47. Counsel submitted that in these circumstances the respondent had a reasonable belief in the claimant's guilt and that her dismissal was within the band of reasonable responses open to a reasonable employer.

5

Claimant's submissions

48. The claimant who was unrepresented simply re-iterated that the allegations against her were "false" and that R never mentioned calling the Police. R had "shouted and balled" before her colleague Ms Wololwolo went into her room. The claimed denied that she had ever "mimicked" R and that she had abused her.

10

Discussion and Conclusions

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49. In every unfair dismissal case where dismissal is admitted s.98(1) of the Employment Rights Act 1996 ("the 1996 Act") requires the employer to show the reason for the dismissal and that it is an admissible reason, in terms of s.98(2), or some other substantial reason of a kind such as to justify dismissal of an employee holding the position which the employee held. An admissible reason is a reason for which an employee may be fairly dismissed and among them is conduct. That was the reason which the respondent claimed was the reason for the claimant's dismissal. I was satisfied that she was dismissed for that reason. That was not an issue between the parties.

20

25

50. The remaining question which I had to determine, therefore, under s.98(4) of the 1996 Act, was whether the respondent had acted reasonably in treating that reason for dismissing the claimant as a sufficient reason and that question had to be determined in accordance with equity and the substantial merits of the case.

30

51. To determine whether a conduct dismissal is fair valuable guidance was provided in the well-known case of **Burchell**, to which I was referred by the respondent's Counsel. Mr Justice Arnold gave the following guidelines in that case at page 380:-

5 *"What the Tribunal have to decide every time is, broadly expressed, whether*
10 *the employer who discharged the employee on the ground of the misconduct*
 in question (usually, although not necessarily, dishonest conduct) entertained
 a reasonable suspicion amounting to a belief in the guilt of that employee of
 that misconduct at that time. That is really stating shortly and compendiously
15 *what in fact is more than one element. First of all, there must be established*
 by the employer the fact of that belief: that the employer did believe it.
 Secondly, that the employer had in his mind reasonable grounds upon which
 to sustain that belief and thirdly, we think that the employer, at that stage at
 which he formed that belief, on those grounds, at any rate at the final stage
 at which he formed the belief, on those grounds, had carried out as much
 investigation into the matter as was reasonable in all the circumstances of the
 case."

52. So far as the first branch of that three-fold test was concerned, I was satisfied
20 that Ms McDonald who took the decision to dismiss and Mr Park who heard the appeal believed that the claimant was guilty of misconduct.

53. The principal issue for me, which emerged in the case, was whether the
25 respondent had carried out as much investigation into the matter as was reasonable in all the circumstances.

54. Under paragraph (a) of s.98(4) the question of whether the employer acted
reasonably, particularly if the reason for dismissal was related to the conduct
of an employee, frequently involves consideration of the adequacy of the
30 employer's investigation into some alleged wrong doing and thus whether a reasonable employer could have concluded that he or she was guilty.

55. I am bound to say that I did not find this at all easy to determine. I was not
unsympathetic to the difficult position in which the respondent found itself,
35 having to deal sensitively with a serious complaint from a vulnerable elderly resident. However, the potential consequences for the claimant, a long serving and valued employee with an unblemished record, who had been

promoted and seemed to get on well with her colleagues and residents alike (P65-70), of a finding of gross misconduct, were extremely serious indeed. A balance had to be struck.

- 5 56. I was mindful that the “range of reasonable responses test” applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances, as it does to other procedural and substantive aspects of the decision to dismiss a person from his or her employment for a conduct reason (see **Sainsbury’s Supermarkets Ltd v. Hitt** [2003] IRLR 23 CA).
- 10
57. On the one hand, the respondent had R’s statement which was taken by Gayle Bain, the Home Manager, with R’s daughter in attendance (P.120). They also had the e-mails/letters from R’s daughter and son (P.113-15 117).
58. On the other hand, the respondent had direct evidence from both the claimant and Edith Wololwolo which conflicted fundamentally with R’s account. They both denied the alleged misconduct and by and large, in my view, their evidence was consistent and corroborative. Their evidence differed about R being upset but it was Ms Wolowolo who went to see R first and tried to calm her. Also, according to their evidence, Ms Wolowolo did most of the talking and endeavoured to reassure R and the claimant said very little. They also gave corroborative evidence that after they attended to her, 20 R had asked “are we still friends?”, or words to that effect. I sensed that Ms McDonald considered this to be prejudicial to the claimant and in in the dismissal letter she criticised the claimant for not being able to give any “rationale” as to why R would say that (P. 173). However, R was never asked if she said this and if she did, what she meant by it.
- 25
- 30
59. In my view, the claimant and Ms Wolowolo both gave their evidence at the Tribunal Hearing in a consistent, measured and convincing manner and presented as credible, as did the respondent’s two witnesses. Faced with this

conflicting evidence, a reasonable employer would require to take all reasonable steps, by way of investigation, to get to the bottom of it.

5 60. However, my task was not to determine whether or not the alleged misconduct had occurred, but rather whether the evidence which the respondent relied upon was reliable and reasonably tested.

10 61. I did not hear evidence from the Manager, Gayle Bain, who took R's statement, the only person who spoke to R, on behalf of the respondent, "face-to-face"; or from the investigating officer Ms Hoffman; neither Ms McDonald, who took the decision to dismiss, nor Mr Park, who heard the appeal, ever spoke to R, or to Ms Bain.

15 62. I was mindful that R was a lady in her seventies who had been in hospital after having a stroke and there was understandable concern on the part of her daughter and son. However, R had "full capacity" and Ms McDonald and Mr Park were faced with a significant conflict in the evidence which they had obtained. The claimant was facing the possibility of the very serious
20 consequence of dismissal, having worked for the respondent for over 11 years which would be career ending. The decision takers only had R's evidence, taken by someone else, and hearsay evidence from her daughter and son who were understandably concerned about their mother; but the conflicting evidence they had was direct and corroborative from the two other
25 persons who had been the only other persons in R's room attending to her in the evening in question.

30 63. The statement Ms Bain took from R was very brief and lacked detail (P.120); there were only two paragraphs, 8 lines, relating to the allegations which resulted in the claimant's dismissal. Also, there was uncertainty as to whether it was being alleged that it was the claimant who had the remote or Ms Wolowolo. While R claimed in her statement that it was the carer who wore a

head scarf who threw the remote on to the bed and it struck her (the claimant does wear a head scarf) in her letter/email R's daughter said that it was the "first carer" and the respondent had consistent, corroborative, evidence from the claimant and Ms Wolowolo that Ms Wolowolo was the "first carer" who went in to see R that evening. Also, there was no further detail in her statement of what R alleged the claimant did and what Ms Wolowolo did, no detail of what each of them said or did which demonstrated their "attitude" and "anger" towards her.

5
10 64. Despite this lack of detail and clarity, I heard no evidence of either Ms Hoffman, Ms McDonald or Mr Park ever speaking to either R or Ms Bain; nor did Ms Bain express her opinion on the credibility and reliability of R's account to either the investigating officer or those involved in the disciplinary process.

15 65. Further, the respondent had been advised by R's daughter and son that their mother had spoken to "JS", who I understood to be another carer, "in the morning" after the incident (P. 114 and P.116)) but no statement was taken from JS either. That evidence, relatively soon after the incident, could have been significant.

20

66. It seemed to me that the respondent was prepared from the outset to accept R's account at face value. I noted that R's daughter informed Ms Bain that she and her brother were, "*both relieved and reassured that Mum has been believed*" (P. 115), but this was before the incident had been investigated and before the claimant and Ms Wolowolo's accounts had been obtained.

25

67. Apart from the evidence of the claimant and Ms Wolowolo, there were a number of other reasons why a reasonable employer would have taken steps to test the reliability of R's account and there is no reason why that could have been done in a sensitive way without causing R further distress. There was evidence from R's daughter (P.113) that R had been very unhappy at being moved to the Home on 15 February; she had told her at one time "*you've got*

30

5 *to get me out of here*". She had complained previously about the conduct of carers towards her. She also made other wide-ranging allegations in her statement and spoke of *"unpleasant interactions with the night staff in general"* (P. 120). These were very serious allegations indeed but I heard no evidence of these being investigated and actioned. It was not suggested that R had complained previously about the claimant and these other allegations were not part of the allegations which led to her dismissal. R's daughter had also reported that her mother had told her on 12 April that in the previous evening someone had "asked her some questions", that her mother was "a
10 *bit confused*" and had *"told some stories of when residents had come into her room and caused her some distress"* (P. 114). In her statement she also claimed that residents had come into her room and were swearing at her (P.120).

15 68. I was surprised not to hear that there had been a wide-ranging investigation into all R's serious allegations about her treatment by Carers and residents, allegations from the time she moved to the Home in February, some 3 months previously.

20 69. R also said that before the incident she felt she had been waiting for "hours" (it was around 30 minutes) and was very angry when the care assistants came into her room. It was clear that R was not favourably disposed towards the claimant and Ms Wolowolo, at least on the night in question. It must have been distressing for R waiting, having spilled her bed pan and it may well
25 have seemed like "hours" to her, but neither the claimant nor Ms Wolowolo were at fault as they had to attend to another resident at the time.

70. Further, although it was clarified subsequently that the date of the "incident" was 5 April 2022, Ms Hoffman carried out her investigation on the mistaken
30 assumption that it was 12 April 2022 (P.130); she also referred to "inappropriate manhandling techniques" which did not appear to feature thereafter (P.133); I did not know what these were; she also recorded in her Report under the heading "Facts that could not be established" that the

claimant had, “denied any wrongdoing and denied all allegations” (P. 140). If that was a fact “not established”, it surely required further investigation as part of the disciplinary process.

5 71. I was driven to the view that, in all these circumstances, no reasonable employer, acting reasonably, would have proceeded with disciplinary action against the claimant and taken the decision to dismiss her summarily for gross misconduct, without first reverting to R with the conflicting accounts from the claimant and Ms Wololwolo and testing the reliability of R’s account.

10 72. R’s evidence was not reasonably tested. In all the circumstances, the respondent’s investigation was not within the band of reasonable responses which a reasonable employer could have adopted. The respondent did not have a genuine and reasonable belief in the claimant’s guilt, reasonably
15 tested.

73. Accordingly, the claimant’s dismissal was unfair.

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30 **Remedy Hearing**

74. Parties are encouraged, in the first instance, to explore the possibility of a settlement, failing which a Remedy Hearing will require to be fixed. In that event, when assessing what would be a “just and equitable” award of compensation, one of the issues will be what would have been the likely outcome if the respondent had carried out a reasonable investigation (see 5 ***Polkey v. AE Dayton Services Ltd*** [1987] IRLR 503HL).

Employment Judge: N M Hosie

Date of Judgment: 12 June 2023

10 **Date Sent to Parties: 13 June 2023**