



EMPLOYMENT TRIBUNALS

Claimant: Miss C Porter

Respondent: One Fylde

Heard at: Manchester Employment
Tribunal via CVP on 3 & 5
March and on Teams on 4
March

On: 3, 4 and 5 March
2025

Before: Employment Judge Dennehy

REPRESENTATION:

Claimant: Mr J Ratledge (Counsel)
Respondent: Mr Islam-Chaudry (Counsel)

JUDGMENT

The judgment of the Tribunal is:

1. The claimant's complaint of unfair dismissal is well founded and succeeds.
2. The claimant's claim that she was wrongfully dismissed is not well founded and fails.
3. The claimant's claim for breach of contract for unpaid wages is dismissed upon withdrawal by the claimant.
4. Judgement on remedy is reserved.

REASONS

1. The claimant complains she was unfairly dismissed by the respondent. She also says her dismissal without notice was a wrongful dismissal in breach of contract. She is no longer pursuing her claim of unlawful deduction of wages and as such that is withdrawn. The claimant says the process/ investigation was flawed and insufficient account of her unblemished employment record and length of service. The claimant is seeking financial compensation only and does not wish to be reinstated or reengaged.
2. The respondent says its fairly dismissed the claimant for conduct following a fair investigation into an allegation of gross misconduct, namely *“the use of physical force and abusive language towards a person we support” and the decision to dismiss was within the band of reasonable responses. The claimant was able to present her case and the respondent had a genuine belief in her guilt.*
3. I heard the final hearing for this case over 3 days by CVP remote video link. On the second day of the hearing there was a nationwide failure of the HMCTS servers and neither I nor any of the parties could connect successfully using CVP. As a contingency measure, on the second day of the hearing was conducted on the Microsoft Teams platform, and I was satisfied that all the parties could participate.
4. Written reasons were requested at the end of the hearing and these will follow after the reserved judgment on remedy.

Evidence

5. I had an electronic bundle of 309 pages. Respondent’s counsel explained that the documents at pages 230-309 were the staff handbook, Discipline Policy and Procedure and Safeguarding Adults Policy and Procedure, were the correct versions of these documents in place at the time of the claimant’s dismissal. I reminded the parties that I had not read the whole bundle and they must draw my attention to any specific documents they wish me to take note of during the hearing by reference to page number of the bundle. Page number references in this judgment are those in the bundle of documents.
6. I had witness statements from Terry Mears (appeal officer) (“**TM**”), Rachel Byrne (investigating officer) (“**RB**”) and the Claimant. Each witness was cross examined and answered my questions.

Preliminary Matters

7. At the start of the hearing the Respondent made an application without notice for a witness order for TM to order him to attend the Tribunal. This had been

submitted in writing via email to the tribunal on Friday 28 February 08.53 but it had not come to my attention until 09.00 on day one of the final hearing. I granted a ten-minute adjournment to Mr Ratledge to enable him to get instructions, then I heard submissions from both parties, adjourned to consider and granted the application. I gave oral reasons at the hearing and written reasons have not been requested for this.

Issues to be decided

Unfair Dismissal

8. There had not been a case management hearing in this case and these were discussed on the first morning. The agreed issues are set out below. As this was a conduct dismissal the issues to be determined include those set out in the case of **British Homes Stores v Burchell [1980] ICR 303** Employment Appeal Tribunal. The issues were:

8.1 Did the respondent have a potentially fair reason for dismissing the claimant? the respondent says the potentially fair reason was her conduct

8.2 Did the respondent act fairly in treating those reasons as a reason for dismissal in this case? In deciding that issue I need to ask the following questions:

- (a) Did the respondent have a genuine belief that the claimant was guilty of the misconduct for which she was dismissed?
- (b) At the time that belief was formed, did the respondent have reasonable grounds for it?
- (c) Had the respondent carried out as much investigation as was reasonable in the circumstances?
- (d) Did the respondent follow a reasonably fair procedure?
- (e) Was dismissal within the band of reasonable responses.

Wrongful Dismissal

9. As the claimant was also bringing a claim of wrongful dismissal, I needed to decide whether in fact she had acted in fundamental breach of contract entitling the respondent to dismiss her without notice.

9.1 What was the claimant's notice period?

9.2 Was the claimant paid for that notice period?

9.3 If not, can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice?

Remedy for unfair dismissal

10.

10.1 Does the claimant wish to be reinstated to their previous employment?

10.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

- 10.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 10.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 10.5 What should the terms of the re-engagement order be?
- 10.6 If there is a compensatory award, how much should it be? The Tribunal will decide:
- (1) What financial losses has the dismissal caused the claimant?
 - (2) Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - (3) If not, for what period of loss should the claimant be compensated?
 - (4) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - (5) If so, should the claimant's compensation be reduced? By how much?
 - (6) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - (8) If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
 - (9) If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?
 - (10) If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
 - (11) Does the statutory cap of fifty-two weeks' pay apply?
- 10.7 What basic award is payable to the claimant, if any?
- 10.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Relevant Law

Unfair Dismissal

11. Section 94 of the Employment Rights Act 1996 ("**ERA**") sets out the right of an employee not to be unfairly dismissed.
12. If there has been a dismissal the first issue is whether the respondent has shown that the reason or principal reason for dismissal was a potentially fair one within the meaning of section 98(2) of the ERA. In this case the respondent alleged the reason for dismissal was conduct.
13. The second question is was the decision to dismiss fair or unfair in all the circumstances? When it comes to making that decision there is a neutral burden of proof ie it is not for the employer to prove that it acted fairly. As this is a misconduct dismissal, the Burchell test set out above applies. The question is whether the conduct of the respondent fell within "the band of reasonable responses" It is not whether I would have reached the same conclusion as the respondent did but whether the respondent acted within the range of reasonable responses to the employee's conduct in deciding to dismiss the claimant.

14. The same approach applies to considering the respondent's conduct of the investigation and whether the investigation was within the range of reasonable responses which a reasonable employer might have adopted (**J Sainsbury PLC V Hitt [2003] ICR 111 Court of Appeal**).
15. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Unions and Labour Relations(Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.
16. The appeal is to be treated as part of the dismissal process **Taylor v OCS Group Ltd [2006] IRLR 613**.
17. If the three parts of the Burchell test (a, b & c) are met I must then go on to decide whether the decision to dismiss the employee (instead of imposing a lesser sanction) was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

Unfair Dismissal Remedy

18. S118 (1) ERA says:
*"Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of:
(a) Basic award (calculated in accordance with sections 119-122) and 126 and
(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126)"*
19. The basic award is calculated based on a week's pay, length of service and the age of the claimant.
20. The compensatory award is *"such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal"* (s.123(1)ERA).
21. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee could have been dismissed at a later date or if a proper procedure had been followed (the so called Polkey reduction named after the House of Lords decision in **Polkey v A E Dayton Services Limited [1987] IRLR 503**.)
22. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).
23. Where the tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly (s.122(2) ERA).

Wrongful Dismissal

24. When it comes to wrongful dismissal the tribunal is not concerned with the reasonableness of the employer's decision to dismiss, but the factual question, was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract (**Enable Care & Home Support Ltd v Mrs J A Pearson** **UKEAT/0366/09/SM**).
25. In **Laws v London Chronicle (Indicator Newspapers) Ltd 1959 1 WLR 698** the Court of Appeal said that to amount to a repudiatory breach, the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract. I must therefore decide whether the claimant was guilty of a repudiatory breach. If she was then that would justify the respondent terminating her contract of employment without notice and her claim of wrongful dismissal will fail. Otherwise, the respondent would be in breach of contract and would be required to provide compensation equivalent to the notice pay which the claimant should have received under her contract.

Findings of fact

Background

26. The claimant was employed as a support worker by the respondent from 23 May 2013. She was primarily based at 3 Margate Road, St-Annes-on-Sea where she provided night shift support for two ladies who were both non-verbal and one who had physical disabilities. She also worked at Pilling Road, St-Annes-on-Sea one day a week where she provided night shift support to one person.
27. The respondent is a registered charity that provides support, accommodation and activities for adults and young people with learning disabilities ("**service users**"). It employs 350 staff and supports 220 service users. As such, the service users of the respondent are vulnerable, and safeguarding is central to the respondent's operations.
28. Employees of the respondent are required to sign a **Code of Conduct** (p 46) The code stresses the need to maintain the dignity and human rights of service users. The claimant signed the code of conduct on 29 January 2014.
29. The respondent's **Code of Conduct** sets out that: "*failure to adhere to this code or any breach of its standards may initiate the Disciplinary Procedure*". The service users rights states all employees must
- (i) "*Safeguard and promote the interest of the service users using our services
Strive to maintain the trust and confidence of service users who use our services
Respect individuals rights to choice, independence and dignity
Protect the service users who use our services, as far as possible, from danger or harm.*"
 - (ii) It goes on to state that as a "*staff member you must promote honesty and trust worthiness and lead by example...*
Communicate with everyone that you come into contact with as part of your work in a polite courteous and respectful manner"

(iii) Finally it states as a *“staff member you must challenge any dangerous abusive oppressive exploitative and discriminatory behaviour or language ...*

Adhere to Ormerod’s policies and procedures

Follow Ormerod’s policies and procedures designed to keep you and service users safe from violent, dangerous, abusive, oppressive, exploitative and discriminatory behaviour at work”

30. The respondent also has a **Safeguarding Adults Policy and Procedure** (p285) which states *“we will work with others involved in their support/care to ensure they receive the support and protection they may require; that they are listened to and treated with respect and that they are treated with compassion and dignity..”* The policy goes on to say it follows *“..the six principles set out in guidance to the Care Act 2014 ..”*
31. The support workers responsibilities are set out as *“ to be able to recognise and report instances of harm, to report concerns of harm or poor practice that may lead to harm, to remain up to date with training, to follow policy and procedures, to know how and when to use the whistleblowing procedures, and to understand the Mental Capacity Act and how to apply it in practice.”*(p287).
32. It goes on to state at p287 that during induction training all employees will complete the “Understanding Abuse” workbook. Examples of abuse are given at p300 and the Care Act 2014 types of abuse and behaviours are listed at p302.
33. At p295 is states that *“Safeguarding means protecting an adult’s right to live in safety, without suffering abuse and/or neglect”*.
34. The respondent’s **disciplinary procedure** (pg 253) states that the respondent *“regards certain issues as serious enough to warrant “summary dismissal” without prior warning. These issues would constitute gross misconduct, that is a single act of misconduct that is sufficiently serious to break the employment contract between us. Matters that may justify summary dismissal, include, but are not limited to: Actions which may harm the well being of a user (“abuse”) Physical violence or aggressive behaviour”*

September Incident

35. On 19 September 2022 a co-worker of the claimants reported to the respondent's on call team that she had witnessed the claimant slap a service user on the stomach twice and call her fat, push down on the service users making her break wind, and then said she stank and proceeded to spray deodorant on the service users face and body for an extended period of time (**the allegation**) (p182).
36. There was some dispute as to the date of the incident which caused confusion with both the respondent and claimant. The claimant told the respondent that it had the wrong date at the disciplinary meeting.
37. The claimant was suspended on 20 September pending a disciplinary investigation which was confirmed via letter (p 93). The letter gives the reason for suspension as *“Allegation for the use of physical force and abusive language*

towards a person we support". The claimant was advised that she would be paid in full, her email account had been suspended, a copy of the disciplinary Procedure and Disciplinary Rules was included and she would be advised of the outcome of the investigation. The claimant was also advised of the respondent's free to use employee assistance programme. There was some confusion as to the date of the letter as it was dated 22 September but RB confirmed in her oral evidence to the Tribunal that it was sent on the 19 September.

Investigation of the allegation

38. RB was the investigation officer and interviewed the co-worker on 22 September. The co-worker had reported her account of events to the respondent on call team (p91). RB in her witness statement says the co worker confirmed her initial account given to the on call team at this interview.
39. The claimant was invited to attend an investigation meeting with RB on 27 September 2022 (p95) via Microsoft Teams. This was the first time that the claimant became aware of the specifics of the allegations.
40. At this meeting the claimant denied some of the allegations but admitted that she had said to the service user that she looked pregnant and that her belly was swollen. The claimant denied spraying deodorant all over the service users' body, saying she had instead sprayed the service user's incontinence pad with deodorant once. The claimant also mentioned a motive for the co-worker lodging the complaint, because the claimant had criticised the co-worker previously, re use of hoist which the claimant said the service user didn't like it going to high, the boiler had been turned off by the co-worker, so the service users were left without central heating.
41. The meeting lasted fifteen minutes. The claimant was given the opportunity to ask questions. RB introduced three other historic allegations RB says these incidents were not taken into consideration when making her decision. Notes were taken and the claimant was given the opportunity to comment on these (p102). The claimants' comments on the meeting notes show that there is confusion re the date of the incident, she asks for clarification around what the verbal and physical abuse was and mentions that the service user comes out in a rash if sprayed with deodorant (p122-126).
42. Following the meeting RB made the recommendation that the matter go to a disciplinary hearing and produced a report (p115-120) which states "*my recommendation is that the allegation goes to disciplinary due to spraying deodorant on her pad which is against good practice and with reasonable belief that Carol placed her hands on [service user]*"
43. By doing this the respondent's safeguarding process was triggered which involved alerting the service user's family, local authority, police and Care Quality Commission. This also meant that the disciplinary process was delayed until the police confirmed that they were taking no further action on 30 November 2022.

Disciplinary Hearing

44. The claimant was invited to a disciplinary hearing via letter dated 12 December for a meeting to be held on 21 December 2022 (p135). The letter stated that she faced an allegation of gross misconduct and dismissal was a potential outcome. The allegation of gross misconduct stated was *"the use of physical force and abusive language towards a person we support"*
45. She was advised of her right to be accompanied, and the letter contained the evidence that the respondent was relying on. The hearing was chaired by Wendy Magee (WM) who has since died. Notes were taken at this meeting (p137). The meeting opened with WM raising the three historical allegations that had involved the claimant.
46. The hearing was adjourned so that WM could make further enquiries, specifically around the date of the incident which the claimant had challenged in her comments to the notes of the investigatory meeting. When the meeting was reconvened on 5 January 2023 WM confirmed that she had checked the date and that the on call provider had logged the wrong date in error. Notes were also taken for this meeting (p146).
47. The meeting was adjourned so WM could make a decision, and the claimant was informed by letter on 10 January that she had been summarily dismissed for gross misconduct and had the right of appeal (p147). The letter stated that the claimant had been dismissed for gross misconduct without notice, the gross misconduct being *"the use of physical force and abusive language towards a person we support"*.

Appeal Hearing

48. The claimant appealed the decision (p148) on the grounds that:
- (i) The allegations were false and malicious because she had challenged the co-worker on three occasions, re use of the hoist, turning the boiler off and that the co-worker had smelt of cannabis whilst at work;
 - (ii) there was no direct evidence to support the allegation;
 - (iii) there was no clarification of the abusive language used;
 - (iv) there were inconsistencies in the co-worker's statement;
 - (v) the confusion over the date on the incident; and
 - (vi) the minutes of the disciplinary meeting were inaccurate eg the frequency of the use of the word irrelevant was not noted.
49. The claimant was invited to the appeal via letter (p161) The letter stated that the claimant could be accompanied and could bring any additional evidence she might have.
50. The appeal meeting was chaired by TM and took place on 26 January 2023. Notes of the appeal were taken (p150-160)
51. TM dismissed the appeal and confirmed this to the claimant in a letter dated 30 January 2023 (p162). In answering the specific grounds of appeal, the letter stated:

- (i) TM did not believe that the explanation given by the claimant for motive were sufficient evidence of a malicious complaint against the claimant. The co-worker had been in the employment of the respondent for three months and had only worked with the claimant four times. TM found that the fact that the allegations were raised promptly was normally an indication of genuine concern for the welfare of a vulnerable adult.
 - (ii) The evidence looked as was the investigatory report, the statements made by both the co-worker and claimant.
 - (iii) TM found that the use of language referring to the service user as looking pregnant which the claimant had admitted was *“abusive, humiliating, lacking empathy and not protecting a person’s dignity”*
 - (iv) TM told the Tribunal that he found consistency in both the claimants and co-worker and claimant’s statements but TM found that on the balance of probabilities that the events as described by the co-worker did in fact take place.
 - (v) TM agreed that there had been an error with the date of the incident but that this had now been corrected.
 - (vi) TM found that the notes were a summary of the meeting rather than a verbatim account of what was said by each party.
52. TM confirmed in the letter dismissing the appeal that he had considered the claimant’s length of service and unblemished record. TM told the Tribunal that he had also considered a whether a lesser sanction was appropriate but on the claimants own admission of her behaviour he found that her conduct was in spraying the service users incontinence pad was *“extremely inappropriate, degrading, humiliating lacking empathy or respect for this person’s dignity and never acceptable”* and in making the comment that the service user looked pregnant is *“ again completely unacceptable, given on your admission, you had a very good understanding of this individual’s long standing health needs and such a comment in the presence and hearing of the person, could be deemed as humiliating, unkind and degrading, lacking in any empathy or respecting this person’s dignity”*
53. The claimant contacted ACAS on 27 March 2023 and the Early Conciliation Certificate reference R150556/23/74 is dated 08 May 2023.
54. A claim was submitted to the Tribunal on 26 May 2023 and the respondent filed a response on 14 June 2023.

Final submissions

55. I heard oral submissions from Mr Ratledge and Mr Islam-Chaudry.

Respondent’s submissions

56. The respondent’s case is that it dismissed the claimant fairly after reaching a genuine and reasonable belief in guilt that the claimant had committed physical and verbal abuse of a service users on 19 September 2022. If the tribunal find that the dismissal is unfair then Mr Islam-Chaudry suggests that the award should be reduced to zero due to contributory fault and/or Polkey reduction.

57. The respondent's position is that the claimant was not credible in giving her evidence and cited the following examples: the taping of conversations but not disclosing them, not updating the service users health plan to mention her adverse reaction to deodorant, her appraisal and non-acceptance that there might be concerns with her performance, the lack of challenge until the appeal meeting, lack of further explanation from her on the acts that she did admit to and not alerting the respondent when she found her co-worker breaching the code of conduct.
58. All of this says Mr Islam-Chaudry demonstrates she lacked insight into her conduct and behaviour on others, especially the service users as the claimant maintains that she has done nothing wrong.
59. Mr Islam Chaudry says of its own witnesses TM that his evidence was well reasoned despite the fact that he was unwell. RB's evidence was honest and she admitted shortcomings in the process.

Claimant's submissions

60. Mr Ratledge says that the genuine belief of the respondent is not obvious. There wasn't much covered at the disciplinary hearing, there was no further discussion. There had been no finding of primary facts even though there had been a significant dispute between the parties as to what happened on 19 September. The letter dismissing the claimant contained no analysis or explanation by the decision maker.
61. Mr Ratledge says there are several inconsistencies between the original on call report and the co-worker's statement which have never been corroborated by anyone else or by any other documentary evidence. The investigation was "woeful" and the differences in the two versions of the allegation were never explored, or any further enquiries made with the co-worker once the claimant had given her version of events. There was no enquiry as to whether the service user had come out in a rash if as the co worker said the service user had been subject to the spraying as alleged. Finally, there was no investigation into the motive.
62. He says that the respondent when weighing the balance did not give sufficient weight to the long service and unblemished record of the claimant. He says the claimant was never trained on the use of language or deodorant and that her admitted conduct did not warrant dismissal without notice.

Conclusions

63. **Did the respondent have a potentially fair reason for dismissing the claimant?** The respondent says the potentially fair reason was her conduct, the conduct being gross misconduct regarding an incident that occurred on the 19 September 2022.

64. RB stated in her witness statement that *“a support worker is responsible for maintaining the service user’s dignity and ensuring that they are safe from harm, as per the code of conduct, which was signed by the claimant on 29 January 2014”*.
65. I find that the respondent has established it had a potentially fair reason for dismissing the claimant.
66. **Did the respondent act fairly in treating those reasons as a reason for dismissal in this case?** In deciding that issue I need to ask the following questions:
- (a) **Did the respondent have a genuine belief that the claimant was guilty of the misconduct for which she was dismissed?**
67. One of the difficulties I have is that the dismissing officer, due to the passing was unable to give any evidence of her genuine belief at the time of dismissal. I have considered the evidence from all the witnesses.
68. The claimant says that the dismissal letter does not reveal any analysis of the reasons for dismissal, no primary findings of fact, no mention of significant dispute, no mention of what the claimant did or didn’t do. In summary there is no analysis of how the decision maker made the decision, so the genuine belief is not obvious.
69. The respondent says that WM (the dismissing officer at the disciplinary meeting) was faced with a binary choice in that she could either believe the co-worker or the claimant’s version of events. RB told us that WM was confident that WM would have acted with integrity and fairly. This point was not challenged by the claimant.
70. In the dismissal letter WM states that *“looking at the balance of probabilities and the vulnerable adults we work with we feel there is no other outcome”*
71. Although Mr Ratledge told the Tribunal that the claimant had been blindsided by the mention of the three historical events at the disciplinary meeting, I did not find that the historical incidents had any influence on the decision maker or appeal officer. RB told the Tribunal that the historical allegations were included for background purposes only.
72. I found that TM, who heard the appeal in giving his evidence did have a genuine belief that the claimant was guilty of the misconduct. He said this belief was because (i) the claimant had admitted to him that she had said that the service user looked pregnant (even though the claimant knew the service user was not sexually active) and that she did spray the service users clean incontinence pad with deodorant; and (ii) on the balance of probabilities he believed the account given by the co-worker, rather than the claimant’s account.
73. I found TM to be emphatic and genuine when giving his evidence on this point and that on the claimant’s admitted conduct it did amount to abuse and that *“it would have been “extremely invalidating and distressing to the service user”*

74. Taking the above into consideration I find that the respondent did have a genuine belief that the claimant was guilty of gross misconduct at the time the claimant was dismissed.

(b) At the time that belief was formed, did the respondent have reasonable grounds for it?

75. Mr Ratledge's position is that the inconsistencies in the allegations, the uncorroborated evidence of the co-worker, lack of uncorroborated medical evidence of service user suffering a rash, the failure to weight up the balance between the length of service of the co-worker and the claimant (and her unblemished record) and the unshakably consistency of the claimant's version of events suggest that the belief of the respondent was not based on reasonable grounds.
76. The Respondent had a process in place for safeguarding and had received a report from a co-worker who raised safeguarding concerns regarding the claimant and an incident re a service user who was vulnerable due to her numerous physical and mental health conditions. She was non mobile, non-verbal, and doubly incontinent. This meant she could not tell us her experience on the 19 September. Safeguarding of its service users was paramount to the respondent.
77. The report had been lodged shortly after the time of the incident and the co-worker's later statement was materially consistent in the allegations being made against the claimant, although there were some omissions which I will discuss later.
78. Once a safeguarding report is lodged (even if it mistaken lodged) the respondent has a duty to not only investigate it but it also has a duty to report it to the local authority, the Care Quality Commission, the service user's family and the police.
79. By the claimant's own frank admission, she had engaged in conduct, namely making the derogatory comment about the service user looking pregnant and spraying her incontinence pad with deodorant that was says the respondent in breach of the respondent's code of conduct which the claimant was aware of and had signed in 2014.
80. The Disciplinary Policy at para 5.7 categorises "abuse" of a service worker as a gross misconduct offence. Abuse can be physical or verbal.
81. The respondent was not aware of any bad feeling between the claimant and the co-worker and therefore did not accept the claimant's mitigation that the co-worker was lying and was making a malicious complaint against the claimant.
82. Taking all of the above into account I find that the respondent had reasonable grounds for believing the claimant was guilty of the alleged misconduct.

(c) Had the respondent carried out as much investigation as was reasonable in the circumstances?

83. The claimant was very critical of the way that the respondent had carried out the investigation. In particular she was adamant in giving her evidence before the Tribunal and consistent that the co-worker was a liar and had maliciously made the on call report on the 19 September, because the claimant had criticised the co-worker on three occasions. The claimant says this was never investigated. Mr Ratledge counsel described the respondent's investigation in his final submissions as "woeful". In particular there were no further enquiries into the motive issue, the skin rash, the three slaps never mentioned by the co-worker, the context of the pregnancy comment, and the fact that the claimant was told about the previous incidents being included in the report thus blindsiding the claimant and the confusion around the actual date of the incident which was not resolved until the disciplinary hearing was reconvened.
84. Mr Islam-Chaudry says that although RB has admitted that there the investigation could have been more thorough the respondent has done enough fact finding as was reasonable in light of the size of the respondent's resources, the fact that RB was not a decision maker but a fact finder, there was no allegation that she acted in bad faith, and after receiving the on call report about the incident she:
- (i) interviewed the co worker the witness to the incident (p91);
 - (ii) interviewed the claimant (p[103];
 - (iii) collated background information, including the Health Plan (p79); and
 - (iv) checked the payroll records to establish the correct date of the incident; and
 - (v) produced a brief investigation report, appending the relevant documents (p115).
85. Part of the difficulty in this case is that the allegations of "misconduct" that the claimant is accused of and on which the decision to dismiss was based seemed were not as clear and consistent as they could have been.
86. The incident on the 19 September 2022 was based on a co-worker's report of it via the respondent's safeguarding processes (first para p91) yet the interview statement with the co-worker by RB did not exactly match what had first been reported.
87. The differences were there was no mention of derogatory comments that the service user "*stank*", "*was fat*", or that she had "*pushed her on her stomach*" or the fact that this "*was not the first time this had happened*" in the interview statement taken by RB.
88. I am mindful that a detailed forensic examination is not required rather as Mr Islam-Chaudry reminded me and as cited in the case of **Taylor v OCS Group Ltd** "*the tribunals duty is to look at the question in the round and without regard to the lawyers technicalities. It has to look at it in an employment context and not the context of the Temple and Chancery Lane*"

89. In considering the allegations and the differences between those reported in the on call report and the statement given in the interview with RB on 22 September I find that the investigation fell outside the band of reasonableness.
90. The respondent as part of the investigatory process interviewed the co-worker but does not appear to have made any further enquiries into similar events happening before that the co-worker claimed she was aware of, the specific derogatory words used, the slapping/the pushing of the service user.
91. RB told the Tribunal that she did investigate and went to back to see if there had been any previous instances on record and these were included in her report, but that she did not re interview the co-worker about what her reference to "*this not being the first time*" meant.
92. The claimant denied and has consistently denied that she ever slapped the service user and I find it was unreasonable not to have made further enquiries into the details of the specific allegation made by the co-worker as this was a primary matter of fact that was in dispute. RB told the tribunal that the co-worker was not reinterviewed after the 22 September, her initial statement. I find that it would have been within the reasonable bands of an investigation to have made further enquiries.
93. There was much confusion around the date of the incident, and this was not resolved until the disciplinary meeting had been adjourned and reconvened. The fact finding investigatory meeting and report did not address this issue, much to the frustration of the claimant with is understandable.
94. Taking into consideration all of the above together with the difficulty faced by the respondent in that that this case is based on one person's version of events against the other, the seriousness nature of the conduct in relation to safeguarding of an extremely vulnerable service user I find that the respondent had not carried out as much investigation as was reasonable in the circumstances. I find that no reasonable employer in the respondent's position would have disregarded the claimant's explanation and mitigation without further enquiry.

(d) Did the respondent follow a reasonably fair procedure?

95. I have already mentioned the failure of the investigatory process and only the confusion about the date was resolved at the disciplinary process.
96. There was a failure to be clear about the consistency and inconsistencies of the allegations and a failure to explore all the allegations that were specifically put to the claimant at the disciplinary hearing. There was no re interviewing the co-worker and putting the claimant's position to her ie a motive for the complaint.
97. The claimant was invited to a disciplinary hearing and advised of the right to be accompanied, the seriousness of the meeting, the risk of dismissal, the evidence the respondent had and her right to ask questions.

98. At the disciplinary hearing the meeting began with reference to previous incidents which the claimant was unaware would be mentioned. I accept that the claimant was blindsided by the historic allegations and that the confusion around the actual date of the incident had not yet been resolved.
99. The dismissal letter was brief and provided no explanation or analysis as to what had been considered by the respondent .
100. The claimant was given the opportunity to appeal, the right to be accompanied and ask questions.
101. I have considered whether the defects were in the process were cured on appeal and I find they were not. TM was honest in his evidence that he said he had looked at the points in the claimant's appeal letter and dealt with those. These are set out at p162 -165 of the bundle. However, there was no action taken to explore the claimant's arguments re motive or make further enquiries with the co-worker.
102. Taking all of the above into consideration I find that the respondent did not follow a fair procedure.

(e) Was dismissal within the band of reasonable responses.

103. Under the Code of Conduct which the claimant had signed, conduct that does not meet the standards of care required when caring for service users can be a disciplinary matter and the Disciplinary Policy at paragraph 5.7 categorises "*abuse*" of a service user as a gross misconduct offence.
104. The claimant accepted in her evidence to the Tribunal that the safeguarding of service users was paramount, particularly in respect of disabled service users who may not be able to speak up for themselves.
105. The service user was a very vulnerable adult female, who did not have mental capacity to make decisions about her own healthcare, had severe mobility issues, was doubly incontinent and was non-verbal.
106. TM told us that when he questioned the claimant, she did not think she had done anything wrong (and the claimant herself told me during the hearing that she had done nothing wrong) even though she had admitted to calling the service user pregnant and spraying her incontinence pad (although it was clean and service user just showered).
107. TM says that he had no evidence to support any reason for the malicious of the co-worker and as such he accepted the version of events on the whole that had been presented to him as given by the co-worker. He was entitled to do that and on the balance of probabilities he accepted the co-worker's version of events instead of the claimants.
108. TM explained why that lack of insight meant that, with safeguarding of service users being paramount to the respondent, dismissal was a reasonable

sanction. He had considered action short of dismissal and had considered lesser sanctions but again because of the safeguarding of vulnerable adults he felt this this was not appropriate.

- 109.I questioned TM on whether he had considered the claimant's length of service and disciplinary record, and I find that the respondent had properly considered the claimants length of service and unblemished record.
- 110.Taking all of the above into consideration I find that the respondent acted within the reasonable band of responses in dismissing the claimant without notice.
- 111.I have also considered the size of the respondent; it has a HR resource of three persons and well drafted written policies. A formal disciplinary process was followed, although flawed and the respondent acted within the range of reasonable responses, However I find that the respondent size and resources do not excuse the unfairness of the investigation and procedure in this case.
- 112.I find therefore that the claimant was unfairly dismissed by the respondent within S98 of the Employment Rights Act 198.

Wrongful dismissal

- 113.When it comes to wrongful dismissal, I need to find out what actually happened and whether what actually happened justified the claimant being dismissed for gross misconduct.
- 114.Both WM and TM found that on the balance of probabilities the claimant had committed a repudiatory breach of contract and the respondent was entitled to summarily dismiss the claimant.
- 115.I find that by her own admission of her conduct by calling a vulnerable service user pregnant and spraying her incontinence pad, the claimant did not behave in accordance with the code of conduct or safeguarding adults policy and procedure and this is sufficient to amount to a repudiatory breach of contract entitling summary dismissal.

Employment Judge Dennehy

Date 14 March 2025

JUDGMENT SENT TO THE PARTIES ON

3 April 2025

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

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