



EMPLOYMENT TRIBUNALS

Claimant: S Newton

Respondent: Country Court Care Homes 2 Ltd

Heard at: South London Employment Tribunal by CVP

On: 10 June 2022

Before: Employment Judge Murphy

Representation

Claimant: Mr Joliffe, lay representative
Respondent: Mr Sheppard of counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the claim for unfair dismissal is not well founded and is dismissed.

REASONS

Introduction

1. The claimant brings a claim for unfair dismissal. A hearing took place remotely by video conferencing on 10 June 2022. The claimant was employed by the respondent a Care Assistant. She transferred to the respondent under the Transfer of Undertakings (Protection of Employees) Regulations 2006 (“TUPE”). She had continuous service from October 1998 until she was summarily dismissed on 19 March 2021.
2. The respondent made an application to strike out the claim on 7 February 2022 based on the claimant’s alleged non-compliance with previous case management orders. During the preliminary discussion Mr Sheppard confirmed that the respondent does not pursue that application. In the Grounds of resistance, the respondent alleged that the Tribunal lacks jurisdiction to hear the claim on the ground that Country Court Care does

3. not exist as a legal entity. Mr Sheppard confirmed that the respondent does not insist upon this argument. He clarified after an adjournment that the correct legal entity which latterly employed the claimant is Country Court Care Homes 2 Limited. By consent the respondent's name is amended to Country Court Care Homes 2 Limited.

4. I identified the following issues for determination:
 - (i) The respondent accepts it summarily dismissed the claimant.
 - (ii) What was the reason or principal reason for dismissal? The respondent says the reason was related to the claimant's conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
 - (iii) If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will require to decide, in particular, whether:
 - 1.iii.1 there were reasonable grounds for that belief;
 - 1.iii.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
 - 1.iii.3 the respondent otherwise acted in a procedurally fair manner;
 - 1.iii.4 dismissal was within the range of reasonable responses.

5. Evidence was heard from the claimant and from the respondent's Area Manager, Donna Baker (the Investigating Officer). The respondent also relies upon written witness statements which were lodged for Safiyyah (Cadence) Azad (the dismissing officer), Beverley Edmonds (notetaker at the disciplinary hearing), and Holly Towsey (People Business Partner and HR advisor to the Dismissing Officer). These three witnesses did not attend the hearing and were not, therefore available to be cross-examined on their witness statements.

Facts

6. Having heard the evidence, I make the following findings of fact on the balance of probabilities.

7. The respondent is a residential care provider for the elderly. The claimant was employed by the respondent as a Care Assistant in the

8. Respondent's Marling Court Care Home in London. The claimant worked latterly in this role for the respondent, having transferred from a predecessor employer under TUPE. At the time of her dismissal, she had more than 22 years' recognised continuous service for statutory purposes. At the time of her dismissal, she had an unblemished disciplinary record.
9. The claimant's duties included helping the respondent's residents with personal support and care, aiding their emotional wellbeing and social needs, interacting with them on a personal level and maintaining care plans.
10. At the material time, the respondent's London care homes were struggling to recruit and retain staff. There was high demand and competition for care staff in the London area. To ensure they maintained the necessary level of staff cover, the respondent has looked abroad and sponsored individuals from overseas to come to the UK to work for them at a sponsorship cost of £3,000 per individual.
11. Service user D was a resident in the respondent's Marling Court Care Home. She moved into the home in or around December 2020. She was not diagnosed with dementia but had an identified need with respect to memory and understanding. She could understand and deal with simple information but could not always retain the information. She required reassurance and support from staff as she could become anxious and confused. She had some insight in her memory but sometimes she felt anxious and frustrated when she forgot what she wanted to say. D spent most of her time in bed and used a call bell to obtain the attention of staff at the Care Home. D was incontinent and required personal assistance with changing incontinence pads.
12. On 19 February 2021, the claimant worked night shift. D was one of the residents under her care. The respondent had three staff rota'd to work that night. This staffing ratio met the respondent's regulatory obligations.
13. On 20 February 2021, the claimant's colleague, S Lewis, Care Assistant, worked the night shift. Mr Lewis was attending to service user D. D told him that the Care Assistant on duty the previous night had taken the call bell out the wall and threatened to hit her. D described the Care Assistant to Mr Lewis as being tall with dark hair and white skin. D did not know the name of the Care Assistant who she said had done this. Mr Lewis initially informed his colleague, Y Hameed of this allegation. Ms Hameed, in turn, informed the respondent's area manager, Donna Baker, on 21 February 2021. The claimant was due to work her next shift on 22 February 2022. Ms Baker took the decision to suspend the claimant. She telephoned her that day to inform her of the

suspension. On 22 February 2021, she wrote to the claimant confirming the suspension and informing her of the allegation.

14. Ms Baker took steps to investigate the allegation. On 24 February 2021, she held three investigation meetings. She met with Ms Hameed at 8 am. She prepared a note of their conversation. Ms Hameed confirmed that Mr Lewis had told her that D had told him that the claimant had taken her call bell away and threatened to hit her. Ms Baker later met with Mr Lewis at 10 am and prepared a note of their conversation. She asked Mr Lewis what D had disclosed to him. Mr Lewis told Ms Baker that D told him a care assistant who was working the night before had been rude to her and took the call bell out of the wall and threatened to hit D. He said the resident had told him that the staff member was tall with dark hair and had white skin.
15. Ms Baker met with resident D at 12 pm. Gloria George, Deputy Manager, was also in attendance at the meeting with the service user. Ms Baker asked D if she remembered telling Mr Lewis something. D said that she did. Ms Baker asked her what she remembered telling Mr Lewis and D told her that she told him the night before a Care Assistant took the call bell out of the wall, shouted at her and threatened that she was going to hit her. She described the care assistant to Ms Baker as being tall with white skin and dark hair. She said the carer was angry and told her not to call. Ms Baker showed D photographs of the two white members of staff who work on the unit, one of whom was the claimant. There were two other members of staff working the night shift but Ms Baker excluded them because one was Jamaican and one was Indian. D pointed to the claimant's picture and said this was the one. A note of the meeting was prepared.
16. On 1 March 2021, the claimant attended an investigation meeting with Ms Baker at Marling Court. During the meeting, Ms Baker asked the claimant about the night of 19 February and service user D. The claimant said she remembered D ringing her call bell a few times. She said that when it rang, she went into D's room and cancelled the call bell. The claimant told Ms Baker that when she pulled back the blanket, she thought it pulled out her call bell. The claimant said that D raised her hand and that she, the claimant, thought that D was going to hit her. She said that she told D, "don't you dare hit me". Ms Baker informed the claimant that the resident had given a statement that the claimant had pulled the call bell out of the wall and placed it where the resident could not reach. The claimant denied this. Ms Baker told the claimant that D stated that she (the claimant) had then shouted at her and told her not to call and threatened to hit her. The claimant responded that she never threatened to hit D at all. A note was prepared of the investigation meeting.
17. Later that day, at Marling Court, Ms Baker was showing a new manager, Ms R Ajula around the home to introduce Ms Ajula to the residents. When in D's room, Ms Baker asked her how she was and if she was feeling better. D replied, 'yes, my call bell stays in the wall now'. Ms

Baker considered this to be evidence relevant to the investigation. It was arranged that Ms C Wildman, Ops Support Manager would interview Ms Baker on 2 March 2022 to record her account of the exchange with D on 1 March 2021. Ms Wildman did so, and a note was prepared of the meeting. In it, Ms Baker recounted her conversation with service user D the day before. Ms Ajula was also asked to prepare a note of her account of the conversation the day before between Ms Baker and resident D. She did so. Her note confirmed that D recalled who Ms Baker was (and remembered her first name) and that D told Ms Baker “My plug stays in the wall!”.

18. On 2 March 2021, Ms Baker conducted a meeting with Ms M Bennett, Senior Care assistant, over the phone. Ms Bennett was not working on the night in question but had worked for 20 years at the Marling Court Care Home and had worked many shifts with the claimant. Ms Bennett said she had never witnessed the claimant shouting, being abusive or neglectful, or otherwise engaging in questionable practices.
19. On 5 March 2021, Ms Baker prepared an investigation report. In her report, she summarised the evidence she had gathered from the witnesses to whom she had spoken. She concluded by noting her view that there was a disciplinary case to answer and that the matter should be treated as gross misconduct in line with the Disciplinary Policy.
20. The respondent published a disciplinary procedure within its Culture Code. It lists examples of gross misconduct. These include verbal or physical abuse of a resident or serious neglect of residents. The procedure provides for the possibility of suspension on full pay during an investigation. It provides that prior to any formal disciplinary meeting, the respondent will write to the affected employee, inviting them to the meeting, giving them information about the allegations and the possible outcomes. It provides that possible disciplinary outcomes include a first written warning, a final written warning or dismissal. The Procedure states that gross misconduct “will usually result in immediate dismissal”. It specifies the right to bring a companion who is a trade union representative or a colleague to a disciplinary hearing. It also provides for a right of appeal against a disciplinary decision.
21. On 12 March 2021, Ms H Towsey, People Business Partner, was asked to assist in the matter following Ms Baker’s recommendation in her Investigation report that the matter should proceed under the disciplinary procedure. Ms Towsey prepared a letter inviting the claimant to a disciplinary hearing. The letter was posted and sent by email. It enclosed the respondent’s Disciplinary procedure, Ms Baker’s investigation report and copies of all witness statements gathered during the investigation. It was in the following terms:

Dear Suzanne

Disciplinary meeting

As you are aware an investigation has been carried out by Donna Baker, Area manager in relation to the following allegation:

- That on 19 February 2021 you went into the room of resident ... [D], pulled the call bell cord out of the resident's reach and threatened to hit her.*

You are invited to attend a disciplinary hearing on Wednesday, 17 March 2021 at 10:00 am at Marling Court Care Home to discuss the allegation above.

You are entitled to bring a fellow employee or a trade union representative to the meeting. If you wish to bring a companion, please let me know their name as soon as possible so I can make arrangements where that companion is a colleague of yours. If I think the person you choose is not appropriate to be your companion, I will ask you to choose someone else. Please note your companion will not be permitted to answer questions on your behalf.

I would be grateful if you could confirm your attendance and the name of your companion by emailing me at

As this matter is sufficiently serious and is listed as gross misconduct within our disciplinary policy, your employment may be terminated following the disciplinary meeting.

If you fail to notify me that you are not able to attend, then the meeting will go ahead without you and a decision will be made in your absence.

I enclose a copy of our disciplinary policy for your information. The disciplinary meeting will be held in accordance with our disciplinary policy. I will be accompanied by Beverley Edmonds, Home Admin, who will take notes at the meeting.

I enclose notes from the investigation meeting, along with an investigation report summarising the findings of the investigation. If there are any further documents you wish to be considered at the meeting, please provide copies as soon as possible and no later than two working days prior to the meeting. If you do not have those documents, please provide details so they can be obtained.

You are entitled to request statements from any relevant witnesses; please let me have their names as soon as possible so that I can make the necessary arrangements. If I do not consider that the witnesses are relevant to the disciplinary issues to be considered, then you will not be permitted to request statements from them.

After the meeting, I will notify you in writing of my decision and give you the right of appeal should disciplinary action be taken.

Yours sincerely

...

22. The disciplinary meeting went ahead on 17 March 2021 at Marling Court Care Home. It was not conducted by Ms Towsey but by Safiyyah Azad (known as Cadence Azad). Ms Azad had little or no previous knowledge of the claimant. She worked as Operations Support for the respondent. She had no involvement in the claimant's case before the meeting on 17 March 2021. Gloria George, Deputy Manager, attended as the claimant's companion. Beverley Edmonds, Home Administrator, attended as note taker. The claimant was present.
23. During the meeting, Ms Azad asked the claimant what happened on the night of 19 February 2021. The claimant said she went to D as her buzzer went off and, as she turned it off, she thinks she pulled the cord out. She told Ms Azad that 30-40 minutes later when she checked, she noticed the call bell was out so she put it back. Ms Azad asked about her earlier statement that she thought the resident was going to hit her. The claimant was asked which arm the resident used and the claimant said she used her left arm. The claimant accepted during the meeting that the resident had fractured her left arm before coming to the home and was on regular pain killers as a result. The claimant explained that the resident was able to pick up cutlery to eat though she wasn't sure if she was able to raise her arm above her head. During the hearing Ms Azad asked the claimant if anything at work was impacting on her behaviour. The claimant said that they were short of staff when only two care assistants were on duty. The claimant was given the opportunity at the end of the meeting to add anything further she would like to be considered before the meeting adjourned. The claimant did not add anything, but her companion said she had known the claimant for 20 years and that the claimant would do anything for any resident.
24. Following the meeting on 17 March, Ms Azad reviewed the staff rotas for the night in question to investigate the claimant's concerns about short staffing. She identified that there were sufficient staff on the rota for the number of residents on the night in question. She deliberated the

evidence. She believed service user D's account of events. She considered there was no option but to dismiss the claimant in the circumstances.

25. On 19 March 2021, Ms Azad telephoned the claimant. She told her that she had taken into consideration the mitigating factor raised during the meeting, namely understaffing. Ms Azad told the claimant she believed the nightshift was adequately manned. She told her that she believed, taking everything into account, that the claimant had gone into D's room and pulled the call bell out the wall and threatened to hit her. Ms Azad told the claimant this was gross misconduct under the Disciplinary Policy and that, given the seriousness, dismissal without notice was the only possible sanction.
26. Ms Azad herself left the respondent's employment on 19 March 2022. She discussed with Ms Towsey her reasons for coming to the decision to dismiss the claimant. Ms Towsey prepared a letter based on her conversation with Ms Azad. Ms Azad reviewed the letter and approved it before it was sent to the claimant. The delay in Ms Azad's approval of the draft letter was due to her having left the respondent's employment in the intervening period. The letter was sent on 29 March 2021 although it purported to be dated 26 March 2021. The claimant received the letter on 31 March 2021. It was in the following terms:

Dear Suzanne

Outcome of Disciplinary Meeting – 17 March 2021

I write to confirm the outcome of your disciplinary meeting held on 17 March 2021, which considered the following allegation:

- *That on 19 February 2021, you went into the room of resident ... [D], pulled the call bell out of the resident's reach and threatened to hit her.*

You exercised your right to representation with Gloria George, Deputy Manager in attendance. I attended the meeting with Beverley Edmonds, Home Administrator who took notes of our discussion. I enclose a copy of the notes for your information. If you have any amendments that you would like to reflect in the notes, please handwrite them on to the notes and return them to me by 2nd April 2021.

I have considered all of the statements, investigation notes, and the information gathered at our meeting. My findings and decision in relation to the allegations is as follows:

We heard on 19 February 2021, resident ... [D's] call bell cord was removed from the wall, removing ... [D's] ability to call for support as required. You believe that the call bell lead must have accidentally caught up amongst the cushions and bedding, so that when you pulled back the duvet, the pulling action, removed the call bell from the wall. You deny purposely removing the call bell from the wall. You report that upon realising the removed call bell on a further check of ... [D], 30-40 minutes later, you then rectified this. Resident ... [D] reported that you 'took the call bell out of the wall', 'shouted' at her and said that you were going to 'hit' her.

You confirmed that you knew the resident and that she had been at Marling Court since December 2020. You were aware of the resident's care plan, confirming to me that you wrote and regularly reviewed it. I asked you whether you considered the resident challenging in her behaviour and you replied that you would not say she was but that the resident was always concerned that she needed her pad changing when that wasn't absolutely necessary. You went on to explain that ...[D] frequently calls for pad changes, sometimes 7 times a night.

You confirmed that you did tell resident ...[D] to stop calling for pad changes, explaining to the resident the difference in pads used during the night and the frequency of change required. You deny becoming frustrated with ...[D]. You did not think ...[D] was happy with this response. I have noted from the resident's care plan that resident ...[D] has an identified need of memory and understanding, specifying that she may require additional support and reassurance which would fit with resident ...[D's] want for regular pad checks and her lack of understanding of the differences in the pads and why they do not require changing so regularly.

The care notes you made on the night of 19/20 February 2021 are not detailed enough to ascertain when the resident received pad changes, although it is worth noting that the hourly checks were done by you and you noted that the resident was asleep from 10pm through to 6am/7am the next morning. I also note that you did not make any comment on her care notes about the alleged challenging behaviour of resident ...[D], stating "changed bed, changed pad, no concerns", which is very much at odds with your explanation to me that the resident went to hit you. I would suggest that if this were the case then you know your responsibility is to record it on the care notes, and this was not done. This is because I believe that the incident, as you describe it, did not happen.

We also heard that the resident had sustained a fracture to her left before being admitted to Marling Court and often complained about it; she could not weight bear on her arms and you were not

sure whether she could lift her arms above her head – to brush her hair for instance – though you assumed she could because there was a hairbrush on her table.

You told me that the resident had been anxious about her eyes, which could get sore and that you acknowledged she was anxious about her continence and whether her pad needed changing. You admitted that she may have been anxious that night for these reasons.

When you pulled back the duvet, you report that ...[D] raised her hand to you. You confirmed that resident ...[D] has never raised her hand to you before and that this is out of character for her. You believe the arm she raised to you was the arm she had fractured. There is no record of challenging behaviour for resident ...[D], who has been with us since 13th January 2021 and has never made any serious allegations such as this about any member of staff. I have also reviewed the resident's medication record and general health and can safely state that she is not on any medication, or suffering from any medical condition that would lead her to have hallucinations.

You responded saying 'don't you dare hit me', which you say went unanswered by ...[D] and was said in reaction to her raising her hand to you. You stated during the meeting that upon reflection, you should not have said this to a vulnerable person, that it was said without thought in reaction to her raising her hand. You deny threatening to hit resident DD and are surprised by the allegations made. You do not feel that you are aggressive and are unsure as to why ...[D] feels this way.

During the investigation, your colleagues were spoken to regarding their observations of you. 'Aggressiveness' was a term used by your colleague, ... Hameed, Senior Carer. During the hearing you confirmed that you can speak in an aggressive term to her due to your discontent at her perceived checking up on you, though it has to be said, that she is a senior member of the team and it is her role to check. You do not feel that you are rude or aggressive generally, or to others, though two of your care assistant colleagues said that you could come over as rude and abrupt whilst another of your longstanding colleagues has said she has never witnessed you be rude or aggressive.

In mitigation, you explained that the business has been operating short staffed which adds additional pressure and may have impacted on your behaviour. During the adjournment, I closely reviewed rotas for 2021 and confirm that the nightshift has been adequately manned throughout this period and that the staffing was at safe levels/standard manning on the night of 19th/20th February 2021. For the avoidance of doubt, standard manning

levels are one Senior Carer and two Care Assistants and thirty-seven Residents, which was the manning level on the night of 19th/20th February 2021.

Taking everything into consideration, it is my reasonable belief that on 19th February 2021, you became frustrated with resident ...[D's] repeated calling for her pad to be changed. Although you explained you had expressed to resident ...[D] the difference in the pads and the frequency required of change, she continued to call and request changes. I believe that this frustration, led to you pull back the covers in an abrupt manner, either dislodging by accident or on purpose the call bell, and having done so in such an aggressive manner towards the resident, the resident raised her arm in self-defence rather than in an attempt to hit you as described within your account.

I believe it is then, as a result of the resident's actions, that you said, "don't you dare hit me" and I have reasonable belief, based on the balance of probabilities, that you also threatened then to hit the resident and that you said that in a fit of temper and frustration. Although we did not cover this off at our meeting, it is normal practice when a carer leaves a resident's room that their crash mat, if they have one, is checked, and that their call bell, is within reach. I believe you did not place the call back for the resident on purpose, but then must have thought better of this when you went into her room later and placed it back within her reach. You were well aware that the resident was anxious and needed reassurance, but she did not receive that from you and I believe you were annoyed and frustrated. I have also noted that during your disciplinary hearing you did not show any remorse for the resident and that to me your answers to my questions appeared to be given without emotion for the situation.

Furthermore, the resident was able to clearly describe in her witness statement taken five days after the incident on 19 February 2021 that when you were in her room, you were angry and that you were always angry with her. The resident was able to recollect the incident again some days later as itemised by Donna Baker's and Rita Ajula's statements, whereby upon checking in on resident ...[D] on 2nd March 2021 she referenced the incident by saying 'my plug stays in the wall', which clearly shows the incident had an impact on her and that she knew her call bell had been removed from her reach

For the reasons described above, the gross misconduct allegation of verbally abusing and using threatening behaviour towards resident ...[D] is therefore upheld.

I have decided to terminate your employment without notice as the allegation amounts to gross misconduct as detailed in our

disciplinary policy (abuse of Service User/residents). I have taken into account your previously clean disciplinary record and your length of service, however, given the seriousness of the finding of verbal abuse and threatening behaviour towards a resident, dismissal without notice is the only possible sanction for this offence.

The date of termination of your employment was 19th March 2021, as I adjourned your disciplinary hearing before considering the evidence and your version of events, and then told you of my decision by telephone on Friday 19th March 2021. You have the right to appeal against this outcome. If you wish to appeal, you must do so by emailing ... Towsey, People Business Partner at by 2nd April 2021, in accordance with our disciplinary policy. You can appeal on the following grounds:

- 1. new evidence has come to light that should be investigated;*
- 2. the sanction imposed was too severe or disproportionate to the misconduct;*
- 3. the sanction was inconsistent with one imposed for similar misconduct committed by another employee;*
- 4. there was unfairness or bias among the original decision-makers; or*
- 5. the employer has not taken into account a previously exemplary disciplinary record.*

Due to the nature of these proven allegation, I will be referring this decision to the Disclosure and Barring Service.

Yours sincerely,

Cadence Azad

27. The claimant emailed an appeal against her dismissal to Ms Towsey on 1 April 2021. Her email was in the following terms:

Dear Holly Towsey

I am writing in regards to the Disciplinary Decision reached by Cadence Azad on 19 March 2021.

The decision to terminate my employment for Gross Misconduct.

As per the letter confirming this decision arriving to me on 31 March 2021 , giving me the opportunity to appeal this decision by 2 April 2021 , I feel is a completely unreasonable timescale , However , I am now invoking my right to appeal this decision on various points.

Firstly, I do not accept any guilt in regards to this incident. At no stage did I threaten or act aggressively to the resident, and can see no proof whatsoever of the accusation.

I have worked in the care industry for over 22 years and have never had my integrity questioned in any way.

My team members have never , or residents ever questioned me for any reason with threatening behaviour

Throughout the past four years plus I have worked nights on my own wing, never with any issues.

I have been expected, and have always put the residents care first, and on many occasions covered extra shifts for the homes and residents benefit and care.

I have on many occasions been given extra responsibility, including the issuing of medication when senior staff were not available'

The assumptions made in the conclusion for the disciplinary, are without any reasonable proof, and also have no basis to be concluded. I have not changed my persona over the entire period of my employment and have never had this questioned at any stage, holding an impeccable history, with no blemish on my character.

For Cadence to reach these conclusions with the information that she has presented is completely biased.

I feel that my previous four Managers should have been approached to speak of my good conduct. Also, as on the majority of my working time is with me working alone overnight, I have never been questioned by any other resident at any time, surely a normal investigation would also ask the people who I interact with, IE , the other residents who I cared for that evening ,regarding my demeanour. I would also have expected a report from the hospital that the resident was transferred from would have been contacted to appraise

If any incidents had been noted.

I feel that the assumption of guilt has been assumed. This whole episode has impacted on me immensely, and I feel that I have been treated completely unfairly and feel that I have fulfilled my duties to the very best of my abilities , but feel that the companies duty of care for me has been completely ignored.

I therefore appeal this decision , also I appeal that you have any grounds for dismissal , or contacting of D.B. S.

To raise an accusation of abuse. This has been my whole career that you have decided to discard based on hearsay and an impression gained from a very biased view.

I look forward to hear from you with a review date. I would also like to be accompanied by a person of my selection to be my witness at the meeting, as I have heard comments from people still employed at the home that my reputation is being sullied within the workplace. Therefore I will be accompanied by someone from outside the home to witness the appeal process.

Many Thanks

Suzanne Newton

28. Later that day there was an exchange of emails between the claimant and Ms Towsey. The claimant asked whether the appeal meeting would take place at Marling Court and whether she could have Raymond Joliffe (who did not work for the respondent) attend the meeting. Ms Towsey replied on the same day suggesting that they could arrange to hold the appeal at an alternative home if preferable. She told the claimant she was entitled to be accompanied either by a trade union representative or a work colleague as outlined in the disciplinary policy.
29. The respondent's pay date is on the 9th of the month. The payroll team produced a provisional payslip on 2 April 2021 which they sent to the claimant. It was erroneous. It showed a payment of only £13.08 because the system had not been updated to reflect the claimant's suspension. The payslip had been prepared on the basis that she had undertaken no shifts. The claimant contacted the respondent on 2 April 2021 and was told that they would look into it. The error was rectified before the wage payment was processed on 9 April 2021. The claimant was paid correctly into her account on that date. She was sent an updated payslip on 8 April 2021 showing the correct amount paid, which included pay during the period of suspension.
30. On 8 April 2021, R Joliffe emailed Ms Towsey on the claimant's behalf. The email, purportedly from the claimant, was in the following terms:

I am writing in reply to your email inviting me to an appeal meeting

As you have stated that your company policy is either an employee or Union rep , as I have already stated,

I would have preferred a family friend, but owing to you not allowing that, I would accept Gloria George to accompany me as my witness. As I am not in contact with her, and also have no control or knowledge of her work commitments, I would suggest that you coordinate her attendance with me when you set a time and place for this meeting.

I would also like to clarify your companies intent of an unbiased view, as so far, Your company has tried and found me guilty of an offence of Gross Misconduct based on hearsay and assumption, have threatened to report me to the DBS to completely destroy any future career in care which I have built up over 24 years. Stopped paying me as of the start of March, even though I was suspended on full pay. Also sent a letter to confirm my termination to be delivered on 30 March, informing me I must enter my appeal by 2 April Giving me 2 days in which to reply. Which I have done. Informed me by phone 5 days before , that I had been dismissed and a letter would follow . I must, at this stage inform you that I feel very insecure at your companies impartiality, but as you have assured me I will take you at your word. Could you please arrange the details and inform me of the relevant information and location of the arrangements that you make, I would request at least 3 days notice for me to organise my travel etc.

I look forward to your reply with the details

Many thanks

Suzanne Newton

31. On 10 April 2021, Mr Joliffe sent a further email on the claimant's behalf to Ms Towsey. It was in the following terms:

Dear Holly

After considerable thought and consulting with legal advise, I have decided to not continue with the Appeal process and will be contacting ACAS for an application to enter a case with the Industrial Tribunal.

This is obviously my best solution bearing in mind the way I feel that I have been treated.

I am assuming that you will be the contact for this process , and I would also request that you confirm . 1 . The correct contact initially for ACAS

2 The correct address for all future correspondence including, if different, an email address

I have kept all correspondence so far, as I assume that it will all be needed. As the dismissal was in letter form I would appreciate if you could send copies of the letter and any statements by email if possible, as this will assist in the compilation of information

Many Thanks

Suzanne Newton

32. Ms Towsey was on annual leave on that date so the claimant forwarded her email to one of her HR colleagues who halted arrangements for the appeal hearing. Ms Bates replied to the claimant on 13 April 2021 to advise she had cancelled the dismissal appeal meeting. She provided the claimant with a contact email address for the respondent to provide to ACAS.

33. There was a significant delay, following the claimant's dismissal, in the respondent informing the DBS of the allegations against her. The claimant was added to the respondent's case log for DBS referral on the date she was dismissed. The respondent had resourcing problems in its HR team. It was carrying a significant administration backlog. Ms Towsey was not trained when she took up her employment with the respondent in DBS referrals. These factors, as well as Ms Towsey's workload at the material time, led to a delay in the referral of the claimant's case to the DBS.

Observations on the evidence

34. There was little if any dispute between the parties. The claimant denied the allegations on 19 February 2021, but she did not deny that the allegations had been made by the resident and investigated as set out in the respondent's witness statements. Given that Ms Azad, Ms Edmonds and Ms Towsey were not in attendance at the hearing and could not be cross-examined on their witness statements, I allowed the claimant to lead supplementary evidence in chief to provide the opportunity to comment on the witness statements of these individuals. I asked the claimant to review the witness statements of the absent witnesses in turn and to identify any aspects with which she disagreed. The claimant said that she did not dispute any aspect of any of the three statements.

Relevant Law

35. Section 94 of ERA provides that an employee has the right not to be unfairly dismissed. It is for the employer to show the reason or the principal reason (if more than one) for the dismissal (s98(1)(a) ERA). A reason that relates to the conduct of the employee is one of the 'potentially fair reasons' listed (s98(2)(b) ERA). Where, as here, the employer relies upon a reason related to conduct, it does not have to prove at this stage that conduct actually did justify the dismissal; the Tribunal will later assess the question of reasonableness for the purposes of section 98(4).
36. At this stage, the burden on the respondent is not a heavy one. A "reason for dismissal" has been described as a "*set of facts known to the employer or it may be of beliefs held by him which cause him to dismiss the employee.*" (**Abernethy v Mott Hay and Anderson** [1974] ICR 323).
37. Once a potentially fair reason for dismissal is shown, the Tribunal must be satisfied that in all the circumstances the employer has acted fairly in dismissing for that reason (Section 98(4) of ERA). There is no burden of proof on either party when it comes to the application of section 98(4).
38. I must not substitute my own decision for that of the employer in this respect. Rather, it must be decided whether the respondent's response fell within the range of reasonable responses open to a reasonable

employer in the circumstances of the case (**Iceland Frozen Foods Limited v Jones** [1982] IRLR 439). In a given set of circumstances one employer may reasonably decide to dismiss, while another in the same circumstances may reasonably decide to impose a less severe sanction. Both decisions may fall within the band of reasonable responses. The test of reasonableness is an objective one.

39. In a case concerned with conduct, regard should be had to the test set out by the EAT in **British Home Stores v Burchell** [1978] IRLR 379 in considering section 98(4) of ERA. This well-established guidance was endorsed and summarized by Mummery LJ in **London Ambulance Service NHS Trust v Small** [2009] IRLR 536 where he said the essential enquiry for Employment Tribunals in such cases is whether, in all the circumstances, the employer carried out a reasonable investigation and at the time of dismissal genuinely believed on reasonable grounds that employee is guilty of misconduct. If satisfied in those respects, the Tribunal then must decide whether dismissal lay in the range of reasonable responses.
40. Both the ACAS Code of Practice on Disciplinary and Grievance procedures (“the ACAS Code”) as well as an employer’s own internal policies and procedures should be considered in assessing the reasonableness of a dismissal. Again, in making an assessment of the reasonableness of the procedure, Tribunals should apply the range of reasonable responses test (**J Sainsbury’s Plc v Hitt** [2003] ICR 111). Similarly, the range of reasonable responses test is the appropriate one when it comes to the approach to the investigation.
41. Suspension is not a ‘neutral act’ (**Mezey v South West London & St George’s Mental health NHS Trust** [2007] IRLR 244). It must be justified on the facts of the case (**Gogay v Herts County Council** [2000] IRLR 703, CA).
42. Single breaches of a company rule may found a fair dismissal (e.g. **The Post Office t/a Royal Mail v Gallagher** EAT/21/99). Exactly what type of behaviour amounts to gross misconduct will depend on the facts of the individual case. However, it is generally accepted that it must be an act which fundamentally undermines the contract of employment (i.e. it must be repudiatory conduct by the employee going to the root of the contract – **Wilson v Racher** 1974 ICR 428, CA). Moreover, the conduct must be a deliberate and willful contradiction of the contractual terms or amount to gross negligence (**Sandwell and West Birmingham Hospitals NHS Trust v Westwood** EAT 0032/009).

Discussion and decision

43. The respondent’s representative gave an oral submission. Mr Joliffe, a lay representative, also made an impassioned oral submission on the claimant’s behalf. I have not attempted to summarise these here, but refer to the submissions within the structure of the discussion on the issues for determination.

44. The first issue to be determined is the reason or principal reason for the dismissal.

Did the respondent dismiss the claimant for the alleged misconduct?

45. The claimant did not dispute the terms of Ms Azad's witness statement. Ms Azad said the disciplinary outcome letter was an accurate reflection of what Ms Azad had told Ms Towsey when explaining her decision. That letter attributed the dismissal to her belief that the claimant had pulled the call bell out the wall and had threatened to hit resident D. Nevertheless, when I asked Mr Jolliffe during his submissions if the claimant accepted that Ms Azad dismissed her for misconduct, Mr Jolliffe said that she did not. He said the claimant did not believe Ms Azad had believed resident D's allegation. He said that Ms Azad hadn't worked in a care home as a carer and that the HR personnel were equally unfamiliar with the environment. In her witness statement, the claimant said that she believed she was dismissed for other reasons. She said she believed her dismissal was a financial decision. It was argued by Mr Jolliffe that the failure of the respondent to contact DBS in a timely manner suggested the respondent was not genuinely concerned about possible abuse on the claimant's part as, if they had been, their first concern would be to prevent it happening again.
46. Mr Sheppard submitted that the respondent believed that the claimant was guilty of the misconduct in question. He pointed to the evidence before Ms Azad, including the claimant's own acceptance that the call bell was removed for a period. He pointed to the absence of any evidence that dismissing the claimant would have any cost saving benefits. He referred to Ms Towsey's evidence about the respondent's problems with recruitment and retention. It was clear, said Mr Sheppard, that there was evidence before the dismissing officer to sustain a reasonable belief in the claimant's guilt at the time and that Ms Azad had formed that belief.
47. The burden at this stage is on the respondent. Although the claimant has asserted the existence of financial reasons for her dismissal, there was no elaboration or explanation in the evidence as to how her dismissal might benefit the respondent from a financial perspective. The respondent led evidence of a difficult labour market for the recruitment and retention of care staff which was not challenged by the claimant. Ms Azad was not available to be challenged upon the belief in misconduct she asserted in her witness statement. The claimant accepted, however, that Ms Azad had phoned her on 19 March 2021 and told her she believed the claimant had pulled the call bell out the wall and threatened to hit D. Likewise it was not disputed that Ms Azad told Ms Towsey this was her belief.
48. Neither was there any dispute as to the evidence which had been placed before Ms Azad. That evidence showed that the resident made the allegation and days later maintained the allegation.

49. I was not persuaded by Mr Joliffe's suggestion that an adverse inference might be drawn from the respondent's delay in informing the DBS about the allegations. If I understood Mr Joliffe correctly, he suggested this undermined the proposition that the respondent genuinely believed the claimant guilty of the conduct alleged. Ms Towsey's evidence about the reasons for the delay was not challenged and I accepted, on the balance of probabilities, that the factors she outlined indeed explained the delay.
50. Taking into account all of the evidence, I have no hesitation in finding, on the balance of probabilities, that Ms Azad did believe the claimant was guilty of the misconduct as explained to the claimant in the phone call on the 19th and narrated in the subsequent letter she approved. As the claimant noted in her own statement, she had considerable experience; was not prone to sickness absence and had passed all training, tests and legal requirements. There was no compelling evidence to challenge the reason put forward by the respondent for the claimant's dismissal.

Were there reasonable grounds for the respondent's belief?

51. Mr Joliffe argued that S Lewis and Y Hameed never worked with the claimant. He said that, although their statements were true, they were true in the sense of being an opinion. All evidence of the incident he says comes only from Resident D and the claimant. It was not, said Mr Joliffe, in the nature of a carer to be a bully. Resident D, he said, was frail and broken and had only been in the home for two months. On the date of the alleged incident he said she had been updated to more absorbent night time incontinence pads which were designed to last longer. He asserted this would cause confusion for someone old and vulnerable. He submitted that words were said on the night in question, but not in anger. Receiving personal care was a vulnerable moment for any person. He referred to the claimant's 22 years' service as a carer. In Mr Joliffe's submission, Ms Azad was biased and could not reasonably have formed an opinion that the claimant was guilty in circumstances where she did not know the claimant.
52. Mr Sheppard submitted that resident D was not on any particular treatment for an impairment and the evidence has to be viewed with that in mind. He said Mr Lewis gave relevant evidence though he was not a direct witness to what happened on the 19th February. He noted the lack of dispute that the call bell was out of resident D's reach for 30-40 minutes. She was, he said, a vulnerable person. He pointed to the claimant's own evidence during the investigation where she acknowledged that she had told D to stop pulling the call bell and that D wasn't happy with that. He suggested the evidence taken from the claimant in the investigation showed a degree of annoyance on the claimant's part. He referred to the claimant's admission that she had said "Don't you dare hit me" to the resident. The exchange must, he said, have been heated. There was an assumption by the claimant there might be physical contact from a vulnerable resident with a recently fractured arm who was completely dependent on her for care.

53. I considered the evidence before Ms Azad at the time she formed the belief. Ms Azad had evidence taken from resident D, who was one of the two parties to the exchange. D made the allegation on 20 February to Mr Lewis and repeated it to Ms Baker on 24 February. Later, on 1 March 2021, she appeared to allude to the incident again in the presence of Ms Baker and Ms Ajula when she talked about her call bell staying in now. Ms Azad had evidence of the claimant's contrary account of the incident. Further, she had before her the care notes which the claimant made during the shift in question. The notes recorded the resident was asleep from 10 pm through to 6am/7am the next morning. In the notes, the claimant made no comment about any alleged challenging behaviour on the resident D's part. On the contrary, the claimant had stated in the notes: "changed bed, changed pad, no concerns". Nor did the claimant record the unavailability of the call bell for a spell of 30 or 40 minutes in the notes she made that night. The letter of dismissal which Ms Azad approved recorded that she found the notes to be at odds with the claimant's explanation that she feared the resident was going to hit her. The question for the Tribunal is not whether it would have preferred resident D's account to the claimant's or vice versa. Instead, what must be determined is whether there were objectively reasonable grounds for the belief that Ms Azad formed in the claimant's guilt. The evidence gathered in the investigation, including in particular that to which I have referred in this paragraph, offered reasonable grounds for the belief she formed. I do not accept that resident D's identified care need with respect to her memory rendered it objectively unreasonable for the dismissing officer to believe her account of the incident in all of the circumstances.

Had the respondent conducted a reasonable investigation at the time the belief was formed?

54. Mr Joliffe submitted that every single person involved was biased or not trained, including the Area Manager, Ms Baker, who conducted the investigation. The witness statements gathered he said were "honest but biased". S Lewis, he submitted was a new carer, while the claimant had 22 years of experience. He suggested that the witnesses in the investigation were hostile to the claimant. He said they had an axe to grind.
55. In his cross examination of Ms Baker, Mr Joliffe appeared to criticize the time delay between the alleged incident on 19 February and the questioning of resident D which took place on 24 February. In her evidence, the claimant hinted she considered it unfair that Ms Baker, who had never met the claimant, conducted the investigation in circumstances where the General Manager, with whom she was more familiar, had left. My understanding of Mr Joliffe's submission was that he was also critical of the decision to take a statement from new manager, Rita Ajula because she was new to the home and not familiar with the claimant's work.
56. Mr Sheppard maintained that the investigation process was a reasonable one in all the circumstances. Both the claimant and resident D were interviewed during the investigation stage by Ms Baker. Additionally, at the disciplinary hearing itself, Ms Azad gave the claimant every opportunity to make representations about what happened on the night in question.

57. Although the claimant seemed to assert bias on the part of Ms Baker, Ms Azad and others, no evidence was given beyond the bald assertion. Neither Ms Baker nor Ms Azad knew the claimant before their involvement in the process and no evidence was put forward as to why either of these individuals would have “an axe to grind” with the claimant. It seemed that the objection to the Investigation Officer and Dismissing Officer instead came down to their lack of familiarity with the claimant and her work. I do not accept that their newness to the organization or lack of familiarity of with the claimant rendered the respondent’s appointment of Ms Baker as Investigating Officer or of Ms Azad as disciplinary manager objectively unreasonable.
58. I am satisfied that Ms Baker’s approach to the investigation fell within the range of reasonable responses. The investigation was carried out diligently within a reasonably short period of time. Ms Baker spoke to the relevant witnesses including, most importantly, resident D and the claimant. It would not be reasonable to expect her to exclude other potentially relevant evidence from Mr Lewis and Ms Ajula about their interactions with resident D regarding the matter simply because they had only recently joined the respondent’s employment. Ms Baker made efforts to be even-handed in her approach. Mr Lewis and Ms Hameed gave statements which were critical of the claimant’s manner, respectively describing her as “rude” and “aggressive”. Ms Baker also took a statement from M Bennett. She was not a witness to the incident, but knew the claimant well, having worked with her for many years. Ms Bennett’s statement was supportive of the claimant and was provided by Ms Baker along with the others to Ms Azad before the disciplinary hearing.

Did the respondent act in a procedurally fair manner?

59. Mr Joliffe relied upon the claimant’s receipt of an erroneous wage slip on 2 April 2022 which indicated the claimant had been significantly underpaid for the preceding month. He also seemed to criticise a proposed change of appeal hearing venue from Marling Court to another of the respondent’s homes. He further criticised the respondent’s refusal to allow him to accompany the claimant to the appeal hearing. The claimant, in her evidence about the arrangements for a companion at the appeal, referred to her suspension letter and the restrictions it placed on her when it came to contacting the respondent’s employees. My understanding is the claimant complains that the respondent’s procedure was not reasonable in respect of the arrangements offered for organizing a companion at the appeal hearing.
60. Mr Sheppard submitted that the procedure followed by the respondent was in accordance with its published disciplinary procedure. The claimant was properly notified of the conduct in question before the hearing. He said no challenge had been made to the procedure adopted. With respect to the pay slip error, he contended that the claimant had been properly paid by the time she decided to withdraw from the appeal. Her decision to withdraw was a reaction to the circumstances; it was not because of unreasonable acting on the respondent’s part.

61. I had regard to the respondent's published Disciplinary Procedure and to ACAS Code of Practice on Disciplinary and Grievance procedures. On the evidence before me, I find the process followed by the respondent complied with the internal procedure and with the principles of the Code. There is no respect in which the claimant has argued it did not.
62. Although the claimant was refused an external companion at her disciplinary and appeal hearing, she was offered the opportunity to be accompanied in accordance with her statutory rights and indeed was so accompanied at her disciplinary hearing. The right to be accompanied by a companion emanates from section 10 of the Employment Relations Act 1999 and the choice of companion under that legislation is restricted to a fellow employee or trade union representative. The respondent made clear in the disciplinary invite that, if she wished to be accompanied by a colleague, the claimant should provide the individual's name for them to arrange this. The organization of a companion was not, therefore, made excessively difficult by the instructions regarding contact with colleagues in the suspension letter. The respondent's refusal to permit accompaniment by an external companion did not fall outwith the range of reasonable responses in all of the circumstances of this case.
63. With respect to the appeal venue, Ms Towsey's suggestion that it be altered arose from the claimant's allegation in her appeal email that her reputation was being sullied by comments of employees working at Marling Court. It was this which prompted the respondent to suggest an alternative venue for the hearing if the claimant considered it preferable. The respondent did not insist on a different venue and agreed to hold the appeal meeting at Marling House when the claimant appeared to indicate this was her preference. The procedure in this regard fell within the range of reasonable responses.
64. The respondent made an error with respect to the claimant's pay which was resolved before payment was due to be made. There was no evidence that this was anything other than a payroll error arising from a communication breakdown. While the error was unfortunate, it was raised by the claimant with the respondent at the time and was quickly resolved. I do not find that it rendered the overall disciplinary procedure objectively unreasonable.

Did dismissal fall within the range of reasonable responses?

65. Mr Joliffe placed a heavy emphasis on the claimant's length of service, her unblemished record and her loyalty and flexibility as an employee, including during the challenging period of the pandemic. He talked about the lack of available support from a General Manager because, on the night in question the General Manager had recently departed the respondent's employment. Mr Sheppard submitted that dismissal fell within the range of reasonable responses, having regard to the nature and severity of the allegations.
66. The respondent's core service is to provide care to vulnerable adults. Its Disciplinary Procedure identifies verbal or physical abuse of a resident or serious neglect as an example of conduct which the respondent would regard as gross misconduct gross misconduct. I remind myself that it is important to avoid a substitution mindset. It is not relevant whether I

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would or would not have dismissed the claimant in the same circumstances. The role the claimant was employed to carry out required that she have regular unsupervised interactions with vulnerable adults. The question to be determined is whether dismissal fell within the range of reasonable responses open to an employer of the respondent's type and scale. Given the belief which the respondent held about the claimant's conduct on 19 February 2021, I am satisfied that it did so having regard to all of the circumstances.

**Employment Judge Murphy (Scotland),
acting as an Employment Judge (England
and Wales)**

Date 22 June 2022