



EMPLOYMENT TRIBUNALS

Claimant: Mrs Alka Puri
Respondent: Royal Masonic Benevolent Institution Care Company
Heard at: Leicester **On:** 8, 9 and 10 July 2019
Before: Employment Judge R Clark (Sitting alone)

Representation

Claimant: Mr Uduje of Counsel
Respondent: Mr Young of Counsel

JUDGMENT

1. The Claimant's claim of unfair dismissal **succeeds**.
2. The Respondent shall pay the Claimant compensation in the sum of **£5,821.30**

REASONS

1. Introduction

1.1 This is a single claim for compensation alleging unfair dismissal. The case is set in Devonshire Court, a residential care home. The Claimant was an experienced care assistant. The employer dismissed her for gross misconduct. The allegation is one of abuse of a resident.

1.2 The claim of breach of contract alluded to in the schedule of loss is not pleaded and not before the tribunal for determination.

2. Issues

2.1 So far as liability is concerned, the Claimant accepts Mrs O'Connor held a genuine belief in her alleged misconduct. The issues in dispute arise from the application of section 98(4) of the Employment Rights Act 1996 ("the 1996 Act"). In the context of this case they are:-

- a) Whether the Respondent had a reasonable belief in the misconduct alleged.
- b) Whether that belief was informed by a reasonable investigation into the misconduct
- c) Whether the sanction of dismissal was within the range of reasonable responses of a reasonable employer.

2.2 There is no issue raised as to the disciplinary procedure adopted save to the extent the procedure becomes relevant to the substantive issues identified and in respect of a limited issue concerning the arrangements for the appeal.

2.3 If liability is established, the Claimant seeks compensation. In addition to determining the loss that flows, the remedy issues include: -

- a) Any reduction to reflect any contributory conduct of the Claimant.
- b) Any other just and equitable reductions under s.126 of the 1996 act (such as those identified in *Polkey v AE Dayton Services Limited [1987] UKHL 8*)

3. EVIDENCE

3.1 I heard from the Claimant in support of her own case. For the Respondent I heard from, Juliet O'Connor, the Home Manager and dismissing manager; Laurie Barton, the Respondent's investigation officer and Pauline Hunter; the Respondent's Northern Regional Operations Manager. All adopted written statements and were questioned.

3.2 I considered a bundle of documents running to a little over 200 pages after additional documents were disclosed during the hearing.

3.3 Both Counsel made closing submissions.

4. FACTS

4.1 It is not the role of this tribunal to resolve each and every last dispute of fact between the parties but to focus on those matters necessary to resolve the issues in the case and to put them in their proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

4.2 The Respondent provides residential care home services to residents with varying levels of support and care. The events in this case concern a resident requiring nursing care, "J".

4.3 The Respondent is a large employer. It has in the region of 1,500 employees nationally. The organisation has an organised management structure and dedicated support roles, particularly in training, HR and investigations. It has developed HR systems and policies relating to the care of its residents and staff including moving and handling.

4.4 The Claimant was employed as a care assistant. She has been employed since 3 April 2010. She was experienced and had recently been promoted to a level 3 or "CA3" care assistant in 2017. This is not a management role as such, but it is a senior role in which she may be expected to delegate work and direct tasks to other junior staff within a shift, to train them and to supervise their work.

4.5 The Claimant had regular 1:1 supervision. She was fully trained although, at the material time, had not attended her safeguarding and safety update training. She was also yet to receive the specific training identified for her to perform her CA3 role, the need for which had recently been identified following a previous disciplinary allegation to which I will return shortly.

4.6 Like many employers in this sector, I find there is pressure in recruiting, training and keeping suitably experienced staff to provide the care needs of their residents in a setting where dignity, safeguarding and care are critical. I find there were often staffing shortages and that was so on the day in question.

Previous Disciplinary Proceedings

4.7 At the time of the instant disciplinary process, it is right to say the Claimant had a clean disciplinary record. However, it is also right to say that over the previous two years she had become familiar with the disciplinary process applied by this Respondent. In 2016, and again in 2017, she was taken through the employer's disciplinary process. On the first occasion, she was initially dismissed but reinstated on appeal. On the second, the allegations were dismissed on the basis there was "no evidence to substantiate the allegations". Both disciplinary matters had been investigated by Mrs Barton. In both cases, after completing her investigations she had concluded that there was a case to answer and had recommended the employer "schedule a disciplinary hearing".

4.8 The 2016 matter concerned an allegation that, on 7 March 2016, Mrs Puri had forced medication on a resident saying "I am sorry but this is sometimes what we have to do". Witnesses were interviewed who confirmed the allegation. The principal witness had been employed for around 2 weeks at the time of the allegation. The Claimant denied being involved in the administration of medication as alleged and explained her practice and the limits of her role in administering medication. She

could not provide any reason why the witnesses would fabricate the allegation. Mrs Barton recommended that a disciplinary hearing was held. The matter went to a disciplinary hearing before Margaret Cade, the then Home Manager. She found the allegation proved and summarily dismissed the Claimant partly on the basis that "it was highly unlikely that a registered nurse who was new in post would make up the allegation". The Claimant's appeal was heard by Elizabeth Corbett, the Regional Business Operations Manager, who appears to have carefully considered the inconsistencies in the account, accepted the main points of the Claimant's appeal and overturned the decision and reinstated the Claimant.

4.9 The 2017 matter concerned a series of 15 allegations that, on 1 October 2017, the Claimant had committed acts of verbal and physical abuse and serious negligence. These included the process of rolling a resident and the manner of providing hygiene care to residents. She denied each allegation and explained her practice with the residents in question. Mrs Barton recommended that a disciplinary hearing was held. The matter went to a disciplinary hearing before Mrs O'Connor, now the Home Manager. During the hearing Mrs O'Connor explored the manner in which others could perceive rough handling when it wasn't the case. Mrs Puri explained her normal practice. Issues arose about the staff not respecting the fact that Mrs Puri was now a new CA3 and had a leadership role in the delivery of care. The Claimant referred to her manual handling practice as having been assessed as "very good" by Diane and that Jenny had recently undertaken supervision and had said she was "doing really well". Mrs O'Connor wrote to the Claimant with her decision on 22 November 2017. After setting out all 15 allegations, she succinctly stated: -

I write to confirm there is no evidence to substantiate the above allegations. Therefore, no disciplinary action will be taken against you and you will be reinstated.

4.10 About 6 months after this, Mrs O'Connor would again be the disciplinary manager for the present allegations. She maintained she did not approach the current allegations with any notion of "no smoke without fire" and I accept therefore, she considered what was before her in isolation.

4.11 Similarly, Mrs Barton was asked in evidence about her previous contact with the Claimant. She had undertaken both of the Claimant's previous disciplinary investigations. I find she did recall the Claimant from her recollection and notes of the 2017 investigation but could not recall the 2016 investigation. She said she was not aware of the outcome of either. It must have followed from logic that the previous matters had not resulted in dismissal even though they were each allegations of gross misconduct.

The Instant Allegation

4.12 J had been a resident for some time. She suffered with an unspecified dementia and had other mobility and care needs. She had her own room on the

“care floor”, that is a floor where the residents’ had certain additional care needs. I have seen limited evidence of her care plan. It seems common ground that she often liked to remain in bed and required some encouragement to engage in a daily routine.

4.13 Many residents require assistance from staff to be moved or transferred between chairs and beds etc. The Respondent’s moving and handling policy has more than one objective. One is the safety and well-being of staff performing the handling. Another is maintaining the dignity and well-being of the resident being handled. Some moving and handling tasks require two staff, even though the care being given, such as toileting, personal hygiene or dressing, may itself only require one member of staff to provide the care. In J’s case, I find she required two members of staff to assist with the moving and handling, even though the associated care tasks would otherwise only require one.

4.14 Mrs Puri had cared for J many, many times before over a number of years. In any one day she would see her many times in the course of providing both the scheduled care and would also support her many more times when responding to ad hoc calls. As was the case on this particular day, the provision of most of the care involved moving and handling and therefore two carers. Over the years, this had therefore been performed by Mrs Puri alongside a second carer who would have witnessed the care being given. I find there had been no previous concerns about the care provided to J by the Claimant. Beyond the allegations that led to the two disciplinary matters that were overturned or dismissed, there had not been any concern expressed about Mrs Puri’s provision of care towards J or other residents. The only references before me were positive and this is entirely consistent with her recent promotion to CA3.

4.15 On 18 April 2018 the Claimant was paired to work with a new colleague, Jodey Headley. She was a new member of staff who at the time had been employed for a matter of weeks. Whilst in training, I find care staff were not directly rostered to provide care but rostered on shift supernumerary. I find Jodey had not yet completed all her moving and handling training and she therefore started her work on 18 April as supernumerary. It was not long into this shift, however, that the effect of the short staffing meant the double carer jobs were being held up. Jodey was effectively added to the roster meaning she was expected to provide care with another carer. The local phrase to describe this was that she was now “one of the numbers”. Whether she should have been allowed on the floor as a qualified carer is moot but it was something the Claimant was concerned about on the day.

4.16 The Claimant and Jodey had met twice before this day. On one occasion the Claimant had instructed her to carry out some work, but that instruction seems to have been taken as it was intended. I find there was no personal difficulties between them.

4.17 The two were involved in getting J up, washed, changed and ready for her breakfast. As was her usual preference, J chose to take breakfast in her room and remain in bed rather than visit the communal area. As already indicated, the care itself required one carer but the associated moving and handling required two. It does not seem from the accounts given by Jodey that she was actually involved in providing any of the care or even in assisting in the “two-person” moving and handling procedures. Mrs Puri’s recalled Jodey explicitly saying she could not do moving and handling as she was not yet trained and I find that to be consistent with Jodey’s own accounts of what she did or didn’t do. It seems J was capable of repositioning herself on the bed to some degree but, apart from that assistance, I find Mrs Puri performed the two-person handling on her own. She and Jodey were in each other’s company for about an hour or so that day without Jodey expressing any comments or concerns to the Claimant, to other members of staff, or to her manager about what had happened or what she had seen. It was this activity with J which is said to contain the abuse. I return to what was found by the investigation later.

4.18 The following day, 19 April 2018, Jodey was attending what I find was the third and final training event in a series of 3 on moving and handling. During that training, there must have been some discussion with the trainer although I have seen no evidence of what that entailed because that was not investigated. It follows there is, therefore, no evidence before me, just as there wasn’t before the employer, of what Jodey’s first account was of the events the day before, the circumstances in which it was prompted, whether this arose from Jodey’s own concerns or whether they were prompted by another party. It is not possible to put her recollections in any context.

4.19 Whatever was said by Jodey or the trainer, someone asked her to put her account of the previous day in writing. There is a written account. It is not clear exactly when that was written but it must have been on 19 or 20 April as it was on 20 April that the matter came to the attention of Sue Rochester, the Deputy Manager. The account is short. It states:-

18th April 2018 approximately 10 am

Alka and I went into J’s room to do personal care with her. We said we were going to give her a sponge wash and change her clothes. While turning her Alka was pushing and pulling her around to move her rather than being gentle. When washing her she was very rough with a wash cloth. When it came to washing her face she was still being very rough and after washing her face Alka threw the towel very hard onto J’s face and told her to dry it herself. Also when dressing her Alka was rough pulling her top down. All of this, especially the towel being thrown in her face, J was shocked at and was saying that she didn’t like her to me.

4.20 This account would be split into 3 allegations of abuse during the provision of person care. They were pushing and pulling when turning; being rough with the wash cloth and throwing a towel hard on to her face and telling J to “dry it yourself”; and, finally, being rough when dressing her and pulling her top down

4.21 The Claimant continued to work throughout the rest of 18 April and, again, throughout 19 April and continued to provide care to J. She was at work on 20 April 2018 when the matter came to the attention of Sue Rochester. I find that allegation must have also been conveyed to Mrs O'Connor on that day. Each had an involvement in the initial response. An issue in this case is why J was not asked about the matter which, by the time it was reported was only a day old. The issue of speaking with the resident herself was clearly something that arose from the home's initial safeguarding response as, around this time, Mrs O'Connor spoke on the telephone with J's son. He did not give permission for his mother to be spoken to. I found it surprising that Mrs O'Connor made no record of this significant conversation. It is also surprising that if such a clear instruction was given, it was not in any way conveyed to the person that was known would soon undertake the disciplinary investigation. I am not satisfied that the decision of J's son is a reflection of J's capacity. It was explained as an issue of his wishes. This was something that Mrs O'Connor had not mentioned in her evidence despite the issue of whether to speak with the alleged victim being a clear issue in the case. She accepted that had the disciplinary investigator later decided to speak with J, that could have happened despite the son's wishes. I return to the investigator's decision on this point later.

4.22 The issue of J's capacity is relevant to areas of recall of recent events and experiences, her understanding of her immediate surroundings and expressing her feelings and recollections. I have not seen any formal evidence going to her capacity nor how any deficiencies in capacity that she may have may vary from time to time, or issue to issue. In any event, I understand encouraging personal independence is an aim in all care plans and just because a carer is present who could perform a care task like washing, does not mean that they always should if the resident is capable of doing it and can be encouraged to perform it for themselves. I find the staff were expected to support residents in order to maintain some independence. I find J was such a resident and I find Mrs Puri was well aware of this objective.

4.23 I accept Mrs O'Connor's evidence that there was a lasting power of attorney in place in respect of J both for property and finance decisions and health and welfare decisions, but that in itself is not an indication of a lack of capacity at any particular time or in respect of all matters. I have no evidence that J lacked capacity to be asked questions about the care provided by Mrs Puri. I have seen no capacity assessment and I do not accept there was one before Mrs Barton. The high point in the evidence before me is a diagnosis of unspecified dementia but which itself includes a reference to lucid periods. The strongest evidence of limited capacity is that J was subject to DoLS, that is the process under the Mental Capacity Act 2005 which provides safeguards to protect a resident's fundamental human rights where the provision of care amounts to a deprivation of liberty. Even then, that does not mean such an individual lacks capacity to express views, recall events and

communicate them. Capacity is issue specific and the legal presumption is the presence of capacity until the contrary is proven.

4.24 On Saturday, 21 April 2018, Sue Rochester, the deputy home manager, spoke with the Claimant for the first time about the allegations. I find Mrs Puri was simply told that an allegation had been made against her about her care of J. She was not told who had made the complaint, nor what was said to have happened, nor when it was said to have happened. I find she asked for details of what she was supposed to have done wrong and explained how difficult it was to provide an account without knowing what she was responding to. In response she was asked to simply provide an account of her usual routine and, as she had continued to care for J, was asked to set out what she had done that morning.

4.25 I find she provided her response that same day, Saturday 21 April [146]. As it happens, that day was slightly out of the usual routine as J's son had visited and so J was assisted to get up for his visit. I accept Mrs Puri's evidence that her account was given in the abstract on the basis that what she did that day was the same as she would do on any day, except of course Saturday was slightly different. Her account was: -

"21/4/18

Went into give J personal care and asked her if she is ready for the personal care, we took her nighty off and covered her with bath towel. Gave J a warm flannel to wash her face, J said why can't you do it. I said because you can manage to wash your face but we will help you to wash your body as we do not want to take your all independence away. J did wash her face and dry with a towel which was on her chest. We dressed J in bed after washing her body, and transferred her in the wheelchair"

4.26 The reference to a transfer to the wheelchair fixes this account as being Saturday and not the day of the allegations.

4.27 Sue Rochester prepared a file note of her conversation with Mrs Puri [130]. Mrs Puri is said to have replied that she behaved in the same way every time she provided morning care to J and had done for years. Mrs Rochester did not suspend the Claimant but confirmed a decision would be taken later on that. It is said she was put on supervised duties. There was a lack of consistency in the evidence of what "supervised duties" meant. Mrs O'Connor understood that meant she would mean working in a pair. The Claimant's evidence was that there was no difference as most of the work with this particular resident group was conducted in pairs anyway. There is no evidence of any other senior carer being allocated to supervise the Claimant and I find there was no difference in practice and that the Claimant continued to provide care to J on 21 and 22 April 2018 in the same way as she had on any other day.

4.28 The Claimant was not rostered to work on 23 and 24 April. On 24 April, she received a letter dated 23 April suspending her from work. The terms of the

allegation were the three matters set out above. The terms of the suspension meant Mrs Puri could not enter the Respondent's premises nor contact any members of staff without permission, save her chosen companion. The letter of suspension identified Mrs Barton, once again, as the Respondent's investigation officer. An investigation meeting was set up for 17 May 2018, that is, around 4 weeks into the future.

The Investigation

4.29 Mrs Barton is the Respondent's investigations officer. The Respondent has chosen to structure its functions to appoint a dedicated investigator to undertake its employment investigations rather than use other managers and she is employed solely to conduct investigations. The work she does is in demand. I find there are about 60 investigations each year and it was clear that, as the only investigator, she was not coping with the workload. At the time of this matter, the Respondent had established, and was in the process of appointing to, a second post of Investigating Officer.

4.30 There were actually two investigations undertaken. One was undertaken by Mrs Barton, relating to the disciplinary matters. The other relates to the safeguarding investigation under the direction of the local authority and is alluded to in the background only. I find the two did not cross refer even though there was a substantial overlap between the two. I have not seen the safeguarding investigation. Both must have examined the allegations and reached conclusions. Each seems to have proceeded on parallel tracks without ever considering the other's findings or outcome. Reference was made in evidence to some sort of proforma generated in respect of a safeguarding investigation when the local authority first receives a safeguarding concern which was not before me. I do not know what allegations those conducting the safeguarding review investigated or the detail of what investigation was undertaken. I do not know whether Jodey was interviewed in that investigation and, if she was, that was not included in the disciplinary process. The same goes for J. I accept Mrs O'Connor's evidence that she was aware that the outcome of the safeguarding referral was a conclusion that there had in fact been abuse of J. She said she could not remember the detail of when that was. On the balance of probabilities, I find the "release" form from safeguarding will be indicative of the outcome. I therefore find that Mrs O'Connor knew the safeguarding conclusion before the disciplinary hearing. That was something in her mind which was not known to the internal investigator or the employee.

4.31 Mrs Barton was delayed in starting the investigation by nearly 4 weeks. The Respondent's evidence was not consistent on the reason for this delay. It was suggested that the delay was because of the embargo imposed by the local authority preventing any investigation in the employment context whilst the safeguarding investigation was taking place. There was nothing in the contemporaneous documentation to support this and this seemed unlikely as the Claimant's letter of

suspension dated 23 April set the date of the investigation interview for 17 May 2018 when it could not have known when the safeguarding investigation would conclude. Whether that was the case or not, I find it the safeguarding investigation had no bearing on the timing of the investigation which was due to Mrs Barton's workload. That pressure of work explains the investigation meeting being set for 4 weeks' time.

4.32 Mrs Barton's investigation methodology was to interview only Mrs Puri and Jodey. She considered the resident's risk assessment and behaviour chart, the safeguarding policy and the moving and handling policy and the Claimant's letter of suspension. The reason for considering the letter of suspension was said to be 'to ascertain if [the Claimant] had been given an opportunity to provide further written statement'. The reference to "further" needs clarifying. The statement Mrs Barton had was the account of how the Claimant cared for J on Saturday 21 April 2018 when Mrs Rochester spoke to her in abstract terms. I find that Mrs Barton initially proceeded in the belief that this statement was Mrs Puri's account of what had happened on 18 April when working alongside Jodey when it was not. Mrs Barton's conclusions include a criticism of the Claimant not providing any further, more detailed response to the allegations and rationalise that as the basis for recommending the matter proceed to disciplinary hearing.

4.33 Mrs Barton was bound by the Respondent's investigation policy. She described her role under the policy as having a single focus of undertaking a full, fair and impartial investigation. Her role meant she did not attend any disciplinary or appeal hearings. Despite her role being independent, there were many references in her evidence to "we agreed" or "we decided" which hinted at what I find was more likely, namely that there was some cross referencing between her and Mrs O'Connor. The policy makes clear that the purpose was to establish a fair and balanced view of the facts relating to any disciplinary allegations and, in order to do that, the investigator may interview any witnesses.

4.34 Mrs Barton's initial view was that there was no relevance in a witness who did not actually witness the incident in question. I do not accept that is what the Respondent expects from its own policy. Mrs Barton herself later accepted it could include others of relevance and it is clear from her approach in the previous investigations of the Claimant, that she has in the past adopted a practice of interviewing people who could speak to the way in which the accused performed the task in question, even if they were not present at the time of the allegation. She did not do that wider analysis in the instant investigation of the Claimant. I find this was because of the pressure of time and Mrs Barton's heavy workload. As a result, the investigation did not explore how the Claimant worked with J over the many years she had provided care to her, it did not consider the way similar care was provided to other residents, it did not explore how that care was provided when working alongside other colleagues, nor how others interacted with J.

4.35 Similarly, I find Mrs Barton did not explore the circumstances of Jodey's complaint coming to light during the training session, on 19 April, and from which the allegation seems to have emerged. In particular, the trainer or course leader. I find she regarded that person, whoever they were, as not being relevant. I find the investigation did not consider the circumstances in which Jodey was rostered that day.

4.36 Despite Mrs Barton's narrow interpretation of the relevance of a witness being limited to those who witness the event, Mrs Barton did not explore the allegation with J herself. She was the only other person present at the time of the alleged abuse. I find this decision was not as a result of the resident's son asking that she not be interviewed as Mrs Barton was not aware of this. It follows she decided not to seek to approach the resident herself and for other reasons. I find there is no rule or standard that residents are not to be interviewed as part of investigations where appropriate. Mrs Barton accepted that could happen. Mrs Barton's witness statement suggested her reasoning for not doing so was because time had passed and she was concerned not to distress her nor was she confident that she would be able to remember and give reliable evidence. In oral evidence, Mrs Barton was asked why not test her recall and reliability first before dismissing this potentially crucial witness. The reason given was that Mrs Barton was concerned that J might say something else that would add to the allegations against Mrs Puri and that was why she was not asked.

4.37 Mrs Barton agreed she could not determine the level of capacity and ability of the resident to participate in any questions. On balance, I find there simply wasn't any real consideration of whether the resident could give any meaningful account and, although she was obviously a crucially important witness, there is no explanation in the investigation report as to why the prospect of obtaining her account was rejected. As to what else was available about the resident's response to the situation, Mrs Barton conceded that the evidence did not establish whether she was experiencing a lucid or confused episode and whether she was upset by the manner of care received. In fact, it established that Jodey had asked J if she was ok and that the resident replied she was fine.

4.38 Mrs Barton stated the documentation she considered but the body of her report suggests other documentation was considered. For example, the report refers to the training record of Mrs Puri without it being identified as a record being considered. Conversely, I am satisfied the training record of the complainant, Jodey, was not considered. Had it been known it was likely to have led to challenge about the moving and handling training being completed and gives scope for the context in which discussion about how things were done in certain situations could have been discussed and, in turn, led to the allegations. Indeed, Mrs Barton accepted, and I find, that if the Claimant was right that she was working on a double carer task with someone not trained that would have altered the course of the investigation.

4.39 Despite these matters, the report identifies the mitigating factors to take into account as “none”.

4.40 Similarly, I am not satisfied that the investigation considered the resident’s care plan in any detail. Reference was made in evidence to an extended care plan in contrast to that which was included. Whatever was viewed by Mrs Barton was something different and less detailed. I find on balance it was the individual moving and handling assessment and the two extracts from the behaviour chart around the time.

4.41 The reference to the resident’s risk assessment and behaviour chart refers simply to an entry by Mrs Puri on 18 April of a 2-5 minute interaction at 12.40 when it was recorded that the resident “choose to stay in bed all morning when staff encouraged her to get up then she was getting angry with staff and telling them to leave the room.” This is included in the report but it is not clear that this is the care provision from which the allegations emerge. There is a very similar entry by a Ms Taylor on 24 April around the same time of day.

4.42 I turn to Mrs Barton’s two investigation meetings. She interviewed Mrs Puri on 17 May 2018 as planned in the earlier suspension letter. The interview was structured in three sections covering each of the three allegations. In respect of the first allegation, the evidence obtained was, in summary:-

- a) Mrs Puri had been employed for 10 years. She had been on mandatory training but not completed her H&S and safeguarding updates as yet.
- b) She described J in her own words. She had been a resident for about 7 years. She spent the mornings in bed. She got up at lunchtime. She liked sitting in her room. She would be transferred on a wheel chair to the dining room and then back to her room. She needed persuading to stay out of her room.
- c) She was able to summarise the care plan for J and told Ms Barton that J:-

“Could communicate fine, sometimes more confused but most of the time able to tell you what she wants and doesn’t want”
- d) Mrs Puri was paired with Jodey for the first time. She guided her through the routine and felt she took directions fine.
- e) Mrs Puri explained her daily routine with J. She explained what she said. She drew a plan of how J’s room was arranged and the use of the floor mattress. The moving and handling process involved pulling J’s bed away from the wall. Mrs Puri explained undressing J and how J was able to help herself in some tasks. She prepared a flannel with hot water and asked J to wash her own face. Most of the time J washed her own face. She used one flannel.

Care wipes were used for intimate parts. She could not remember whether Jodey helped provide the care to J as most co-workers would.

4.43 In respect of the second allegation, throwing a towel at J, the evidence obtained was gained in only 4 questions and answers. In summary:-

- a) Mrs Puri could not recall who washed and who dried. The towel used to dry her face would be the one covering J so sometime J would dry herself.
- b) She could not recall what mood J was in that day. She recalled she awoke when they entered the room.
- c) She denied throwing a towel in J's face and explained she would be stood next to her. She asked rhetorically why she would do something to set the wrong example when she was stood next to J with a new member of staff with her.

4.44 In respect of the third allegation, the investigation obtained the following evidence:-

- a) Mrs Puri described how for 95% of the time J would be in bed. She described her night clothes, her day clothes and the process of sitting her up and undressing and dressing.
- b) She described not pulling a dress down fully due to J's incontinence pads.

4.45 The investigation then put to Mrs Puri why the allegations were made which Mrs Puri could not answer. She explained the statement was written on 21 April and not 18 April but the washing procedure was always the same. Mrs Puri then explained how she felt someone or some people were behind this as every 5 months she has experienced a false disciplinary allegation. She explained her relationship with staff generally including the fact that, on 18 April Jodey had said she could not do moving and handling as she had not been trained.

4.46 On the same date, Mrs Barton interviewed Jodey. Her evidence was, in summary: -

- a) She had been employed for 2 months. (I find this must have been about 4 weeks at the date of the allegations). She was employed as a carer 1.
- b) She described J as lovely, a bit vocal if you annoy her and having lucid moments despite her dementia. (Mrs Barton did not explore the circumstances in which J had been annoyed by carers and became vocal or why she was not vocal on this day.)
- c) She described the care plan as requiring two carers to give care.

- d) She described her recollection of 18 April when Mrs Puri was washing J. She recalled her washing her legs first. She recalled the flannel was not changed. When she went to wash her face, J moved her face and said hold on. Mrs Puri threw the flannel and shouted “do it yourself”. Then got the towel and threw it on J saying dry your own face. Mrs Barton did not explore the differences in the two accounts given.
- e) She described J not drying her own face because, Jodey thought, she had not heard her. She described Mrs Puri roughly drying her face hard for about 10 seconds. Mrs Barton then gave Jodey opportunity to physically demonstrate how she had dried J.
- f) She described Mrs Puri getting J dressed and that she didn't think she hurt her but she seemed to be pulling her. She was dressed only in a top and underwear as she was staying in bed. J didn't seem like she was in pain. She asked J if she was ok and she replied she was fine. She describes the Claimant behaving differently with the one other resident they both then attended to.
- g) She explained not reporting her concerns at the time because she was scarred, without explaining why that was or it being explored further. She described speaking with the trainer the following day without it being explored further.

4.47 I find Mrs Barton did not press or test Jodey's evidence and did not explore the absence of any reference to what is allegation 1 which was completely omitted from her account nor did she explore the care or other tasks Jodey herself provided to J. Jodey was given opportunity to physically demonstrate the washing and drying. Mrs Puri was not.

4.48 In her investigation report, Mrs Barton recommended that each of the three allegations proceed to a disciplinary hearing. As to the first allegation (pushing and pulling J) it was reasoned on the basis that there was implicit doubt that the account given by the Claimant on 21 April was not her account of the day in question. It does not reason why Jodey did not mention this during her investigation interview. In respect of the variations in Jodey's two accounts, Mrs Barton said in evidence how she believed an amalgamation of the two.

4.49 This recommendation whether to proceed to disciplinary or not is a stage in the Respondent's disciplinary policy. The test is simply whether there are grounds for disciplinary action. I had not anticipated any issue with this as Mrs Barton's investigation conclusions explicitly include a recommendation to schedule a disciplinary hearing for all three allegations. In explaining this stage, however, I found the Respondent's explanation became confused as to whether it was Mrs Barton as investigator who made the decision; whether she made a recommendation to Mrs O'Connor and Mrs O'Connor accepted or rejected the recommendation; or

whether Mrs O'Connor made the decision for herself. Mrs O'Connor's evidence was that she had made the decision herself in this case. It therefore follows that there was not the degree of separation between her and Mrs Barton as first appeared to be the case and she must have communicated this to Mrs Barton for Mrs Barton to include it in her report. The issue with this preliminary stage is that it is not expressed merely as a case to answer. I find the situations in which Mrs Barton or Mrs O'Connor would not proceed to a disciplinary hearing are where there was a clear-cut defence, such as the accused was not on duty at the time of the alleged event. Otherwise, it goes forward to a hearing. But because it is expressed more definitely than merely a case to answer, I find it means when it gets to the hearing the facts of the allegation are taken as proved and the employee then has to prove their innocence without further consideration of the accuracy or truth of the allegation.

The Disciplinary Hearing

4.50 By letter dated 24 May 2018, the Claimant was invited to a disciplinary hearing to be held on 7 June 2018. It set out the same three allegations, the right to be accompanied by a Trade Union representative or work colleague, that the nature of the allegations amounted to gross misconduct and that the sanction could be dismissal.

4.51 The invite included a copy of the investigation report, the notes of the interviews with the Claimant and Jodey, the written statements, the letter of suspension, the safeguarding policy and the Moving and Handling policy. It did not include any of the other documents Mrs Barton had considered. J's Moving and Handling Risk Assessment and her behaviour chart were referred to but were explicitly withheld from C for a reason said to be "in accordance with data protection".

4.52 The hearing went ahead chaired by Mrs O'Connor. In her evidence she insisted that because of Mrs Puri's previous disciplinary hearings, she was "even more determined" to give her a fair hearing. The Claimant attended accompanied by Debbie Ward, a UNISON representative. Also in attendance was Jane Green, HR adviser.

4.53 The Claimant denied the allegations as she had throughout. She recalled how Jodey was not in the handover at the start of the day but that they were short staffed that day. She had worked on single carer tasks to begin with and was later paired with Jodey by Sharon Ward. Again, she stated that Jodey had told her she had not yet had her moving and handling training and could not undertake that role. In respect of allegation 1, she explained her usual practice and regarded her interaction with J on this day as uneventful saying "nothing happened". She also commented how it was important to maintain a consistent routine with J. She explained how angry and vocal she could be if her routine was changed but on this particular day she was fine. She explained her limited contact with Jodey in response to a question

from Mrs O'Connor. She was asked to explain why Jodey would make these allegations. Mrs Puri answered that she "could only think she was being targeted and was not wanted here". She did not know why Jodey would target her as a new member of staff.

4.54 I find this issue of being targeted was not Mrs Puri's positive defence as much as it was her honestly answering the questions put to her by Mrs O'Connor. I find it begins to demonstrate the approach of Mrs O'Connor which I find was to believe the allegations were accurate unless the Claimant could prove the contrary. I reject Mrs O'Connor's evidence to the extent she went into this hearing with an open mind. I find that the allegations were believed and unless the Claimant could come up with something to exculpate herself, the allegations would remain proved. There was no consideration of the accuracy or reliability of the allegations themselves.

4.55 In relation to allegation 3, she explained how she went about dressing and how J would roll to help the carer, but that there would still be some need to pull at her vest as she was a big woman. It was not put to the Claimant in the hearing but I find Mrs O'Connor was of the view that J was not a big woman and this conclusion would provide the basis to dismiss Mrs Puri's explanation.

4.56 Mrs Puri explained the routine adopted for washing for breakfast and how that might vary depending on J's mood. It was put to her that she might fall into a trap of following a routine and not considering the person. Mrs Puri rejected this saying J was given the choice but always chose in the same way. Mrs Puri explained the safeguarding training principles which did not prompt challenge and I therefore find were a reasonable summary. I find this "trap" she felt the claimant to have fallen into was something Mrs O'Connor had already considered as an explanation of the misconduct and it would remain through to her final decision.

4.57 Mrs Puri explained how she felt sad by the allegations and that she did her job properly. She was asked what she had learned from the situation and replied "*what could I learn? I have not done anything wrong*". She was a carer 3 and set an example to everyone. Once again, reference was made to J's character and how she would react if these things had been done to her. The lack of such a reaction was evidence that these things did not happen. I find this explanation was then dismissed, not by the experienced care manager, but the HR adviser on the ground that J "might be too shocked to shout". Mrs O'Connor decided there was a difference between being angry and scared which I find was a further indication that the allegations had been accepted without question. Mrs Puri persisted. She explained how J would ask the question, "why throw a towel on me" which again prompted Mrs Green to intervene on the premise this account may indicate Mrs Puri had done the this to her in the past. I find the points being raised by Mrs Puri were valid and powerful factors to weigh in the balance of which of the competing accounts to accept, but because Mrs O'Connor had already formed her belief they were dismissed.

4.58 Before Mrs O'Connor closed the meeting, she asked Mrs Puri if she had anything else to add "as part of your mitigation". The meeting closed after around 40 minutes.

4.59 The decision was communicated in writing by letter dated 8 June 2018. The decision was to dismiss Mrs Puri without notice. The reasoning was:-

I have concluded that; on the balance of probabilities, it is highly unlikely that a colleague previously unknown to you would suggest you had behaved in this way towards the resident and would make such serious allegations if they were not true. You were unable to provide any explanation as to why she would do so or why anyone in the home would wish to "target you" as you suggested.

I believe it is far more likely that, during your interaction with J, you have become so task focused on delivering her routine, that you have failed to treat her kindly and with patience. I have checked the weight of J and she is not a big woman as you suggest, currently weighing in at only 67 kilos. As you have denied the allegations in their entirety and have suggested you have learned nothing from this incident as a result, I am unable to consider any other sanction than your summary dismissal.

4.60 The Claimant was told she would be referred to Disclosure and Barring Service ("DBS"). She was given the right of appeal against the decision to dismiss and a copy of the minutes of the disciplinary hearing. I find this letter was not written by Mrs O'Connor. It was more likely to have been written by Mrs Green. I find Mrs Green played more than a passive role in the process and did more than take notes and advise Mrs O'Connor.

The Appeal

4.61 The Claimant appealed against her dismissal by letter dated 13 June 2018. Her grounds of appeal adopt an approach of attacking Mrs O'Connor's reasoning rather than revisiting the underlying issues in the allegations themselves. She poses a possibility that Jodey took exception to how she had been instructed during their shift and being challenged for working as a number, rather than supernumerary. Similarly, she challenged the conclusion that she was too task focused and stressed her long service and understanding of providing caring and patient care to the residents. She again pressed the illogicality of being penalised for not learning anything from the incident when she was not guilty of the allegations. She accused Mrs O'Connor of being biased in taking Jodey's word against hers pointing out that:-

None of my other colleagues were interviewed, or asked about how I work with residents, no other statements were taken and it was her word against mine.

4.62 The appeal was arranged for 2 August 2018 to be heard by Pauline Hunter assisted, once again, by Mrs Green. It was postponed on the day due to the Claimant's trade union representative, Mrs Ward, not being in attendance, apparently due to some miscommunication between her and the Claimant. It was rescheduled to take place on Friday, 17 August 2018. Mrs Ward sent an email to

Mrs Hunter as chair of the appeal on 8 August 2018 explaining her absence, acknowledging the hearing had been reconvened, and requesting an alternative date of 16 or 21 August to enable her to support Mrs Puri as, otherwise, "bereavement leave and annual leave" would mean she could not attend or send an alternative representative. This request was refused by Mrs Green due to their own diary difficulties, the need to refer to the DBS and warned that the matter will be deemed withdrawn if Mrs Puri did not attend.

4.63 The hearing went ahead on 17 August 2018. Mrs Puri attended alone. She declined the opportunity to try and find an alternative companion from amongst her work colleagues.

4.64 The Respondent's disciplinary procedure leaves open the question of how an appeal will be conducted to the appeal chair. It says

"the appeal hearing may be a complete rehearing of the matter or it may be a review of the fairness of the original decision in the light of the procedure that was followed and any new information that may come to light. This will be at our discretion depending on the circumstances of your case. In any event the appeal will be dealt with as impartially as possible.

4.65 In this case, Mrs Hunter chose to adopt a review of Mrs O'Connor's decision. I find she did not make that decision in the light of anything arising in the circumstances of this case. She reached that decision because that was what she always did. I find the practical effect of this is that the decision to dismiss would stand unless the Claimant could produce some argument to displace it.

4.66 The areas considered in the appeal were whether the Claimant had any new evidence, which she did not. She confirmed she was seeking reinstatement. The substance of her appeal was summarised as being that there was no investigation to warrant taking one person's word against her and that there was no investigation with any of the Claimant's regular work colleagues about her practice. That contention was extinguished swiftly by Mrs Hunter on the basis the investigation was not about obtaining character references and that those colleagues could be expected to have reported inappropriate conduct if they had witnessed it. As a result, speaking to them served no purpose and she could accept that the Claimant had never behaved in this way before. She gave her view that that did not mean that she had not behaved in this way on this day.

4.67 Mrs Puri was then asked why Jodey would have made the allegations. She responded that she had not finished her moving and handling training and may have misunderstood. Mrs Hunter dismissed this as it had not been raised at the disciplinary hearing and was not relevant to the face cloth allegation.

4.68 By letter dated 21 August 2018 Mr hunter wrote to the Claimant to confirm her appeal was dismissed. Mrs Hunter's reasons were:-

- a) Only those who witness the incident are interviewed
- b) She believed a fair and impartial investigation was conducted of allegations of gross misconduct
- c) She accepted it is difficult to ascertain the true facts when it is one person's word against another but the Claimant had no new evidence to put forward and there was no reason why the allegation should be fabricated.

4.69 The DBS is the national agency providing information for employers in care and other sectors in respect of those working with children and vulnerable individuals and other specific occupations. Following the appeal decision, the Respondent referred the Claimant to the DBS. In view of its conclusions, I find it was obliged to do so. The DBS then reviewed the case. That process took some time. The Claimant was first contacted on 1 November 2018 to say it was considering including her in the children's barred list and / or the adults' barred list. By letter of 26 June 2019, some 7 months later, the Claimant was informed that: -

“having considered the full circumstances, we have decided that it is not appropriate to include you in the Children's Barred List or the Adults' Barred List.”

5. Law

5.1 The reason for dismissal being accepted as conduct, my analysis moves directly to Section 98(4) of the Employment Rights Act 1996 (“the 1996 Act”) which provides:

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

5.2 This being a conduct case, I am to apply **British Home Stores – v – Burchell [1978] ICR 303** (approved in **Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588**) which requires me to consider two further questions:

- a) did the Respondent (in this case Mrs O'Connor) have reasonable grounds for the belief which she held, and
- b) at the time the belief was formed had the Respondent carried out as much investigation as was reasonable in the circumstances.

5.3 The factors that may inform the standard of reasonableness vary with the circumstances. An employee being caught in the act or admitting the misconduct clearly requires less in the way of investigation than a case based on inference. (**Gravett v ILEA [1988] IRLR 497**). In other cases, a relevant factor may be the likely sanction. An allegation likely to lead to dismissal will typically require more by way of investigation than one likely to lead to a first warning. Similarly, the greater the impact and consequences the decision will have on an individual being able to work in their chosen field in the future, the more that will be expected of the investigation. (**A v B [2003] IRLR 405 EAT**, approved in **Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721 CA**). In Av B, Elias J as he then was said of the reasonableness of investigations in these serious cases:-

"Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."

5.4 In **Sneddon v Carr-Gomm Scotland Ltd [2012] IRLR 820**, at para 15, the Court of Session described the approach to deciding whether the sufficiency of an investigation into misconduct is adequate as one that:-

"the tribunal necessarily has to examine and consider the nature and extent of the investigations carried out by the employer and the content and reliability of what those investigations reveal before it can reach a view on whether a reasonable employer would have regarded the investigatory process as sufficient in matters such as extent and reliability or as calling for further steps. That decision is essentially one for the assessment of the tribunal, as a specialist, first instance tribunal."

5.5 If the belief is reasonable and based on a reasonable investigation, the remaining question is whether the sanction of dismissal fell within the band of reasonable responses open to a reasonable employer.

5.6 Finally, **Sainsbury's Supermarkets Ltd v Hitt** is also authority for the proposition that the range of reasonable responses applies as much to the steps taken by the employer to reach its decision as it does to the decision itself.

6. Discussion and Conclusions

6.1 I deal first with the sanction and the procedure. Whilst there were some challenges by the Claimant during cross examination to some aspects of the procedure adopted and whether the sanction fell within the range of reasonable responses, the reality in this case is that the Claimant accepted that a worker in her sector who was found to have done what she was accused of could reasonably be

dismissed. In my judgment she is right in her assessment. Dismissal clearly was a sanction within the range of reasonable responses of the reasonable employer.

6.2 Similarly, there is no real attack on procedure and what I have seen satisfies the minimum procedural safeguards required of the ACAS code of practice and therefore falls within the range of reasonable responses. The only potential procedural issue was the form of appeal and refusal to relist it on a second occasion to accommodate the Claimant's trade union representative. I did consider this further and within the procedure set out in the Employment Relations Act 1999 but it was not put in those terms and I am not satisfied the specific requirements of this provision are made out on the evidence. I am persuaded that the circumstances of the adjournment derive from errors of communication between Mrs Puri and her representative and that it was reasonable for the employer to expect alternative professional representation would be available and that fitting in the regional operations manager's diary with a representative imposing two day week for representing members was simply not possible within a reasonable further period. For that reason, the decision not to postpone the appeal for a second time was not outside the range of reasonable responses. Similarly, the fact that Mrs Hunter routinely approaches appeals as reviews and not rehearing is not in itself an unreasonable approach. The fact that the procedure suggests she should consider which approach on a case by case basis is potentially something that could give rise to unfairness in the right case, but unfairness does not exist in a vacuum. There is nothing in this particular case from which the choice to adopt a review, rather than a rehearing, can in itself be said to be unfair.

6.3 That brings me to the central issues of fairness in this case. They are the reasonableness of belief in Mrs Puri's guilt and the reasonableness of the investigation which informed it. The two questions overlap to the extent that they will often be answered together. In this case the allegations were denied and the employer was faced with preferring one word against another. The basis on which it reached that choice determines the fairness of it.

6.4 I do have concern about the basis on which Mrs O'Connor and Mrs Barton formed their conclusion that Jodey's evidence was to be preferred. It is not entirely clear whether Mrs O'Connor independently reached that conclusion or whether she simply adopted the conclusion reached by Mrs Barton in her investigation report. The manner of the disciplinary hearing suggests it was the latter but, either way, it amounts to the same thing. Was the employer's investigation reasonable for that belief to be reasonably held? I have come to the conclusion that the investigation was cursory and left too many areas open to be a reasonable basis for the belief in guilt.

6.5 That starts with the Respondent's approach that there was no reason for Jodey to lie. For my part I do not accept that a reasonable employer analyses the evidence by reference to one or other of the competing accounts being a lie. It need not be

about lying but degrees of mistaken interpretation and recollection. When it comes to forming its belief, the reasonable employer would adopt an approach to its investigation in line with the guidance in **A v B**, modified to suit the particular gravity and circumstances of the case. The central principle in those serious consequence cases is that the account from both sides is tested in the investigation, both for and against, before determining whether the allegation is to be accepted.

6.6 There is a sense gained from the disciplinary hearing that because the Claimant's previous disciplinary hearing had involved some animosity from colleagues related to Mrs Puri's new role as a CA3, the only answer to this allegation would also be found in whether there was a motive for Jodey to fabricate the allegation. The fact that Jodey was new and appeared to have no motive to falsely accuse Mrs Puri is of course a relevant factor that the reasonable employer could reasonably weigh in the balance. In this case, however, it became a determinative factor and one which blinkered the investigator and the decision maker, obscuring any reasonable examination of the wider evidence available to it and on which the hypothetical reasonable employer would then base its conclusion. This is seen in the transfer from investigation to disciplinary hearing where the decision whether a hearing is needed becomes a de facto finding that the allegation is proved. It is also seen in the disciplinary hearing itself, the focus of which was for Mrs Puri to offer "mitigation". Mrs Puri did try to advance various relevant points during her hearing as to why Jodey's account should not be preferred but those points were immediately rejected.

6.7 Yet the very fact that Jodey was new was also highly relevant to the Claimant's defence and was not reasonably explored in the investigation. She was not only new, having been employed for around 4 weeks, but she had not yet completed her training in moving and handling. Her inexperience was not considered in the investigation from the point of view of her reliability nor were the circumstances in which she was added to the numbers on 18 April 2018. The purpose of that action was for her to assist in providing two-person moving and handling. She indicated to Mrs Puri she was not trained and could not assist. The investigation did not consider the effect that may have had on her perception of the care being provided. There were potentially two issues arising from that. One was her lack of knowledge and experience of the correct techniques. The other was that Mrs Puri was left to undertake the two-person task on her own. Against that background there was clearly ample scope for Jodey to misunderstand what was happening. This is especially concerning as this allegation, the first of the three, was not mentioned at all in Jodey's investigation meeting and Mrs Barton conceded in evidence that had she realised Jodey was expected to assist with a two-person task without completing her training the investigation would have taken a different course.

6.8 The investigation does not explore how the allegations come to light only the following day and not on the day. The nearest was Jodey's explanation that she was scared but Mrs Barton does not establish why, or what she was scared of or why,

after leaving Mrs Puri after about an hour she did not raise the concerns with another member of staff. The obvious likely trigger for the allegation was something in the moving and handling training course the following day. Mrs Barton does not explore that or speak with the person who received the first account and, presumably, suggested the concerns be reduced to writing.

6.9 The investigation did not consider the scope for evidence from the alleged victim. I have found this difficult to fully understand. On the one hand, there was the separate local authority investigation which Mrs O'Connor was aware of and which seems to have caused her to contact J's son who asked that J was not spoken to. If that was advanced as part of the investigation, that would clearly have been a reasonable step and the decision not to speak to J would have been within the range of reasonable responses. I retain some doubts about the extent to which Mrs Barton and Mrs O'Connor worked independently of each other but, on the other hand, their evidence was that on this point they did operate independently. It follows that Mrs Barton's decision not to attempt to speak with J principally because she might make further allegations against Mrs Puri is the basis of fact that explains why J was not spoken to, albeit there was no explanation in her report of any consideration of J at all. That was a decision I find falls outside the range of reasonable responses. There is no case before me to suggest asking the question would have caused J any distress or would not have been in her best interests. Indeed, if there had been rough treatment it must have been in her best interests to be given the opportunity to express a view and if that meant there was something else, the Respondent had a duty to the resident to find out and deal with it. The issue is whether the weight of that view would be diminished by any concern over its accuracy. The fact is, there is nothing before me to say she could not have expressed a view about the Claimant in the days following the alleged abuse. The explanation given by Mrs Barton was not based on capacity, but on a concern to limit the allegations against Mrs Puri.

6.10 Even without speaking with J, there are insights to the way care was provided and how it was provided on this particular day. One area which both Jodey and Mrs Puri touched on was J's ability to express her satisfaction or dissatisfaction with her care. Both refer to her becoming vocal if she was annoyed. Neither describes her being vocal or annoyed on 18 April. Jodey describes asking her if she was ok and her answering that she was fine. It very much leaves open the likelihood that the manner of washing and dressing as Jodey perceived it and variously described it, her two accounts not being consistent, was nonetheless within the realms of how it can reasonably be performed with J to meet her needs and maintain some independence.

6.11 In my judgment the reasonable employer would have satisfied itself of the Claimant's performance of the impugned caring tasks on other occasions as these had been performed for J, day in day out, for many years. The two-person nature of the care provided meant the Claimant performed these tasks alongside a number of different colleagues. Any of them could have provided an insight into how it was

carried out by the Claimant. It is not, as Mrs Hunter stated in the appeal, a question of obtaining character references but of the reasonable employer reasonably informing itself of the relevant facts so that its decision to prefer the account of the accuser over the accused, has a reasonable foundation. This line of readily available evidence goes further. The Claimant had recently been promoted, there existed supervision records which contained positive observations. There was specific reference to her moving and handling being very good by someone called Diane. As Mrs Hunter observed, none of these necessarily mean that a person cannot be guilty of abuse, but the absence of investigating them and weighing them in the balance in the circumstances of this case undermines the reasonableness of both the investigation and the subsequent belief that Mrs Puri was guilty of the allegations. In that regard, Mrs Hunter at one stage of the appeal appeared to accept that Mrs Puri had never behaved in that way before without weighing the effect of such a factual conclusion on the basis for the belief that she did on this occasion. Of course, all this happened to someone who twice in recent times has been wrongly accused of failures in her care practice and is likely to be on her guard with how she presents to others, particularly those she does not know well.

6.12 The investigation stage of a disciplinary process encompasses everything up to the point when a decision is made. Many employers, this one included, separate the investigation from the hearing as a matter of process which may have an unintended consequence of treating the fact finding as being closed by the time of the hearing. The reasonable employer remains open to matters which may come to light and challenge the investigation to date or suggest new areas of investigation. During the disciplinary hearing, Mrs Green was quick to close down areas that were raised by the Claimant which were relevant to the decision to be made. The law does not place a heavy burden on the employer, it need only show its decision was one a reasonable employer could have reached. It is not even always right to describe it as a particular standard of proof. The measure of reasonableness is in the matters that it reasonably should have considered before asking itself whether it prefers Jodey's account over Mrs Puri's denial. At this stage it is not about whether those enquiries would have made a difference to the outcome, only that if they were reasonable to make they should have been made and weighed in the balance.

6.13 When the decision was being made at the disciplinary hearing, I have not accepted that Mrs O'Connor went in with an open mind as stated and her statement that the previous disciplinary hearings meant she was "even more determined" to give the Claimant a fair hearing are not seen on the day. The starting point was that the allegations were proved unless the Claimant could somehow set them aside. Two areas of enquiry further served to blinker the employer from the overall assessment of which to prefer. One was Mrs Puri's explanation about J being a big woman the other her hypotheses that she was being targeted which was itself a reasonable question for her to ask after her experiences over the previous two years. Both arise out of an attempt to explain something she cannot explain. The process of

then dismissing both matters meant Mrs O'Connor was lulled into a sense of false certainty in the accuracy of Jodey's allegations. Those allegations were not, as the Respondent concluded, consistent across the two accounts but contained differences which required consideration.

6.14 In reaching these conclusions, I have considered the fact that this employer was dealing with two very serious issues. One is the need to protect vulnerable residents from abuse. The other is to ensure employees facing gross misconduct allegations receive a fair hearing. They are two discrete duties, as Mr Young for the Respondent acknowledged. But they are not in conflict and this is not a situation where the requirements of one should alter the standards necessarily required by the other. In other words, there is no reason why both cannot be applied to any given case. There is no reason to give undue weight to protecting an employee from the potential for additional allegations of safeguarding abuse coming to light, as seems to have been the objective at one stage of the investigation, nor should the seriousness of the allegation itself elevate it to the status of a fact, and bypass the need for the employer to demonstrate the reasonableness of coming to its belief. There is clearly a risk that where an employer unduly focuses on one of those duties, it may fail to discharge the other. Mrs O'Connor was aware at the time of the disciplinary hearing that the local authority had concluded abuse had occurred. That must have heavily influenced her thinking but that was based on matters that were not before her, were not shared with the employee and have not been advanced before me in this hearing.

6.15 For all those reasons I have concluded the employer had not undertaken a reasonable investigation from which it was reasonable for it to hold the belief that the Claimant was guilty of the allegations.

7. Remedy

7.1 The Claimant seeks financial compensation only.

7.2 I find the following additional facts relevant to remedy on the balance of probabilities.

a) Prior to her dismissal, the Claimant was earning an average weekly net wage of £352.71 (£423.08 gross which is below the relevant statutory cap). She benefitted from an auto-enrolment defined contributions pension scheme to which the Respondent contributed 2%.

b) The Claimant was able to secure new employment with effect from 21 January 2019. That is 32 weeks after her dismissal. The new employment pays slightly more than her previous employment and fully mitigates her loss. To the extent the payslips show a lower net payment, this is explained by the temporary tax code and the effect of greater deductions being made albeit they were refunded at a later date.

c) The losses for which the Respondent is responsible stop from that date. The question remains whether they should stop earlier because it is said the Claimant could have mitigated her loss fully by doing more work and because in some pay periods her pay exceeded the earnings in her previous role. I have rejected that contention. Firstly, the Claimant was faced with the DBS investigation and the effect that might have on securing permanent work. Secondly, I accept she was struggling with not insignificant mental ill health following her recent experiences. Thirdly, and despite her ill health, the work she was doing was done out of a necessity to bring in an income. In those circumstances, the agency work was a reasonable temporary step to make. It could not be said to be the long-term solution. That was found in January 2019.

d) I find therefore that during the intervening period, the Claimant has not failed to mitigate her loss. She has been able to earn a wage through an agency working most, but not all, weeks and even then on a zero hours basis. She secured this during the first week in July, about three weeks after her dismissal. She was not able to work if there was no work offered. I find she was concerned about going back into the same care setting. In view of her experience over the previous two years, I am satisfied that was a reasonable decision and if work was offered in that setting it was reasonable for her to refuse. I find there were periods when she could not work due to waiting a new DBS check and another period when she took holiday.

e) During the intervening period she would have earned the following net payments. $32 \times £352.71 = £11,286.72$. In addition, I find she would also have benefited from the employer's pension contribution at 2% amounting to £225.73 giving a total financial loss of £11,512.45.

f) I find her net earnings in casual employment during the relevant period to amount in total to £6,399.64.

7.3 At the date of her termination she was aged 42 and had completed 8 full years of continuous service. She is entitled to a basic award calculated on the basis of $(1 \times 1.5 \times £423.08) + (7 \times 1 \times £423.08)$ which results in a figure of £3,596.18.

7.4 She is entitled to a notional award in respect of the loss of her statutory rights which I assess in the sum of £450.

7.5 I am satisfied that those losses flow from the employer's decision to dismiss the Claimant. Before applying those figures to arrive at a final award, I must have regard to the two possible adjustments contended for by the Respondent.

7.6 The first is the effect any prior culpable conduct of the Claimant has on the calculation of a basic and compensatory award under sections 123(6) and 122(2) of

the Employment Rights Act 1996 and the principals set out in **Nelson v BBC (No 2) [1979] IRLR 346 CA** so far as they apply to the compensatory award.

7.7 The foundation of either reduction is that the tribunal is able to make a finding of fact of some culpable conduct on the part of the Claimant in respect of which it is just to make the reduction and, in the case of the compensatory award, contributed to the dismissal. Such a finding is a primary finding for the tribunal to make. Unlike the liability decision, I am not assessing the Respondent's assessment of the evidence but making my own assessment of it. In this case I am not satisfied that the evidence does show, on the balance of probabilities, that the Claimant did what she is alleged to have done. For my part I give weight to the fact that this interaction between Mrs Puri and J was long standing over many years and has occurred hundreds if not thousands of times, each of which was witnessed by a range of others, yet all have passed without incident. I find it more likely that her recent experiences meant she was careful in how she performed her care tasks. Similarly, I give weight to the fact Jodey was inexperienced and not yet fully trained. I am cautious about the accuracy of her evidence, as opposed to her honesty, as there are inconsistencies between her two accounts and there were clearly aspects of the care that were apt for being misinterpreted. For example, the interaction between Mrs Puri and J in encouraging her to wash and dry herself and the manner of moving and handling J by Mrs Puri alone in what was assessed as a two-person activity. All those reasons mean I am unable to accept Jodey's account at face value. It follows, therefore, that I am not able to find there was culpable conduct on the part of Mrs Puri and I make no reduction for her conduct under either statutory provision.

7.8 The second reduction contended for is that I make a reduction under s.123(1) of the 1996 Act on the basis it is just and equitable to do so. It is a challenge reduced to the shorthand of a "**polkey**" reduction. (**Polkey v AE Dayton Services Limited [1987] IRLR 503 HL**). That may arise where there is a chance that the defects found to make the dismissal unfair would, had they been conducted fairly, have resulted in the same outcome. Similarly, it may be just and equitable to reduce compensation where the evidence shows the employment would have come to an end fairly at some point in the future in any event.

7.9 In respect of the latter, I am satisfied that but for the dismissal, the Claimant's employment with the Respondent would have continued at least until late January 2019 when I have otherwise found the Respondent's liability for her loss ceases. That much of the just and equitable analysis does not result in any reduction or limitation of the period of loss. In respect of the former, however, I have concluded there should be a reduction.

7.10 Despite my criticisms of the investigation and the basis on which the employer formed its belief, it must remain the case that a wider and more thorough investigation could have led to the same conclusion being reached. It is right that the evidence does not show it definitely would have been the same, in which case

there would be a 100% reduction, nor does it show that it definitely would have been a different outcome, in which case there would be a nil reduction. I must, however, do what I can to reflect the possibility that the outcome would have been the same and apply that to the final figures. This is a broad assessment of what the reasonable employer would have done and what reasonable belief that might have established.

7.11 Firstly, I am satisfied that had the investigation recognised the potential importance of promptly speaking with J herself, it is likely that nothing of real substance would have come of that. It would either have been ruled out due to the views of J's son or, if she was spoken to, there is evidence to suggest the employer would have had reasonable grounds for giving little weight to her recollections. Although there is within that the risk of a different type of unfairness arising if the weight given to her recollection was different depending on whether she supported the allegation or undermined it, it seems to me this is a factor pointing more towards the same outcome occurring.

7.12 Secondly, I am satisfied there was value in understanding how the allegations come to be framed as they are the following day whilst that might shed light on Jodey's misunderstanding of what had happened, it may equally do no more than contextualise her allegations, as opposed to undermining them. It points more to the same outcome.

7.13 Thirdly, were the failure to properly consider the Claimant's track record and extensive experience caring for J properly put in the balance when reaching a decision, that should have pointed to a different outcome, as too would a proper assessment of Jodey's inexperience and lack of training on the day.

7.14 These are the key aspects of the employer's approach which could have had potential to alter the final outcome. Of course, each time one of the constituent decisions is decided differently, there is potential for the whole exercise to have a fundamentally different outcome, hence why this is a broad assessment of the evidence. Had the investigation been more thorough, had the evidence been more finely balanced, it may well have left the final decision of whether it had happened or not to Mrs O'Connor who, in turn, would not have commenced the disciplinary hearing on the basis of it was proved unless the Claimant could explain why it was false. Nevertheless, applying that broad assessment it seems to me that, had a reasonable investigation been conducted, there is a real prospect that the employer could have reached the same decision. Doing what I can to weigh the likely outcome it seems to me slightly greater than 50/50 that the same outcome would result. I assess the prospect of that at 60%. Accordingly, I calculate the Claimant is entitled to the following awards.

7.15 A basic award of £3,596.18 to which I make no deduction for conduct.

7.16 A compensatory award of £2,781.41 made up as follows:-

- a) The total loss from dismissal to when losses cease is £11,512.45 + £450 = £11,962.45
- b) There are no payments by the Respondent to credit.
- c) From that figure, I deduct the earnings received in mitigation of £6,399.64 = £5,562.81.
- d) I reduce that by 60% under s.123(1) of the 1996 Act resulting in a figure of £2,225.12
- e) In this case, there are no further adjustments or deductions to be made for contributory fault, accelerated receipt, grossing up or compliance with the ACAS code.

7.17 The total award is therefore £5,821.30 (2225.12 + 3596.18). The recoupment provisions do not apply.

EMPLOYMENT JUDGE R Clark

DATE 6 October 2019

JUDGMENT SENT TO THE PARTIES ON

.....

AND ENTERED IN THE REGISTER

.....

FOR SECRETARY OF THE TRIBUNALS