

RESERVED JUDGMENT



# EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

RESPONDENT

MR G HUTCHINSON

V WREXHAM COUNTY BOROUGH  
COUNCIL

HELD REMOTELY ON: 14, 15 & 16 MARCH 2022

BEFORE: EMPLOYMENT JUDGE S POVEY  
MRS L BISHOP  
MRS J KIELY

REPRESENTATION:

FOR THE CLAIMANT: IN PERSON  
FOR THE RESPONDENT: MR ALI (COUNSEL)

## JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claim for unfair dismissal is not made out and is dismissed.
2. The claim for wrongful dismissal is not made out and is dismissed
3. The claim of harassment related to disability is not made out and is dismissed.
4. The Tribunal makes an order under Rule 50 of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 that the identities of those referred to in these proceedings as 'SL' and 'LD' must not be disclosed to the public.

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## **REASONS**

1. These are claims brought by Gary Hutchinson ('the Claimant') against his former employer Wrexham County Borough Council ('the Respondent').

### **Background**

2. By way of a brief background to the claims:

- 2.1 The Claimant was employed as a care worker by the Respondent from March 2002. He was dismissed for gross misconduct with effect from 28 April 2021. At the time of his dismissal, the Claimant's post was that of Temporary Senior Support Worker.

- 2.2 Following a period of early conciliation, the Claimant presented his claims to the Tribunal on 4 August 2021, alleging unfair dismissal, wrongful dismissal and disability discrimination (by reason of unlawful harassment). In its response, the Respondent resisted the claims in their entirety, although it accepted that the Claimant was disabled at the relevant times (as defined by section 6 of the Equality Act 2010), by reason of depression, obsessive compulsive disorder and intermittent explosive disorder.

- 2.3 On 16 December 2021, the Tribunal conducted a preliminary case management hearing with the parties. This resulted in the Case Management Order of Judge Frazer ('the CMO').

### **The Hearing**

3. The hearing was conducted remotely. We heard oral evidence from the Claimant, who represented himself (with the assistance of his partner). For the Respondent, we heard oral evidence from Alison Griffiths (HR Officer), Gillian Foulkes (the investigating officer), Alwyn Jones (the disciplinary officer) and Lawrence Isted (the appeal officer). All witnesses provided and adopted written statements as their evidence in chief.

4. The Tribunal was also provided with a paginated bundle of documents to which we were referred throughout the hearing ('the Bundle'). We also permitted the Respondent, on application, to adduce an occupational health report regarding the Claimant, social media guidance and additional email exchanges between itself and the Claimant.

5. Finally, we received oral submissions from the Claimant and from Mr Ali for the Respondent.

6. These claims involved reference to two individuals who are receiving or have received various support services provided both by the Respondent and other agencies. It is not necessary to identify them for the purposes of determining these claims and, given the sensitive and personal nature of

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the information relating to each of them, it was agreed that they should only be identified by their initials. On that basis, the Tribunal made an anonymisation order under Rule 50, referred to in our judgment, above. Their identities must not be revealed by the parties or the Tribunal. For the avoidance of doubt, these orders protect the identities of SL and LD both within and following these proceedings.

7. In reaching our decision, the Tribunal had regard to all the evidence we saw and heard, as well as the submissions we received.

**The Relevant Law**

**Unfair Dismissal**

8. By virtue of Section 94 of the Employment Rights Act 1996 ('ERA 1996') an employee has the right not to be unfairly dismissed by her employer. In respect of what constitutes an unfair dismissal the relevant law is to be found within Section 98 of the ERA 1996.
9. Section 98(1) requires that in deciding whether a dismissal was unfair it is for the employer to show the reason for that dismissal. That reason must fall within a list of potentially fair reasons to be found within Section 98(2) of which subsection (2)(b) states:

*"A reason falls within this subsection if it relates to the conduct of the employee."*

10. Section 98(4) of ERA 1996 requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for one of the reasons in Section 98(2). In a conduct dismissal, the Tribunal is bound to consider the guidance issued by the Employment Appeals Tribunal in the Courts (including the decisions in British Home Stores Ltd v Burchell [1978] 379, Iceland Frozen Foods Ltd v Jones [1993] ICR 1, Post Office v Foley [2000] IRLR 827, Sainsbury's Supermarkets v Hitt [2003] IRLR 23).
11. In particular, the case law requires me to consider four sub-issues in determining whether the decision to dismiss on the grounds of conduct was fair and reasonable:
  - 11.1. Whether the employer genuinely believed that the employee had engaged in conduct for which he was dismissed;
  - 11.2. Whether they held that belief on reasonable grounds;
  - 11.3. Whether in forming that belief they carried out proper and adequate investigations, and
  - 11.4. Thereafter, whether the dismissal was a fair and proportionate sanction to the conclusions they had reached.

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12. In addition, the Tribunal must consider the reasonableness of the employer's decision to dismiss and, in judging the reasonableness of that decision, the Tribunal must not substitute its own decision as to what was the right course to adopt for the employer. Rather, the Tribunal must consider whether there was a band of reasonable responses to the conduct within which one employer might reasonably take one view whilst another quite reasonably takes a different view. Our function is to determine whether in the circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band it is fair. If it falls outside that band, it is unfair.
13. The Tribunal is also required to consider the fairness of the procedure that was followed by the employer in deciding to dismiss the employee. However, if the procedure followed was unfair, the Tribunal is not allowed to ask itself whether the same outcome (i.e. dismissal) would have resulted anyway, even if the procedure adopted had been fair (per Polkey v AE Dayton Services Ltd [1987] IRLR 503 HL).
14. The requirement for procedural fairness includes consideration of the reasonableness of the decision to dismiss up to and including any appeal process undertaken (West Midlands Co-operative Society v Tipton 1986 ICR 192, HL).

**Wrongful Dismissal**

15. By virtue of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 SI1623, proceedings may be brought before the Tribunal in respect of a claim of an employee for the recovery of damages or any sum for breach of a contract of employment where the claim arises or is outstanding on the termination of the employee's employment.
16. Section 86 of the ERA 1996 affords rights of notice to employees, the length of which is determined by their period of continuous employment with their employer. Any failure by the employer to give correct notice constitutes a breach of his contract of employment, save where either the employee waives his rights to, or accepts payments in lieu of, notice. In addition, an employer is entitled to dismiss an employee without notice where satisfied that the employee's conduct amounted to a repudiatory breach of the employment contract and discloses a deliberate intent to disregard the essential requirements of that contract. The employer faced with such a breach by an employee can either affirm the contract and treat it as continuing or accept the repudiation, which results in immediate dismissal.

**Discrimination**

17. Section 40(1) of the Equality Act 2010 ('EqA 2010') states:

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(1) An employer (A) must not, in relation to employment by A, harass a person (B)—

(a) who is an employee of A's;

...

18. Harassment is defined by section 26 of the EqA 2010 and, so far as is relevant, states as follows:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

- age;
- disability;
- gender reassignment;
- race;
- religion or belief;
- sex;
- sexual orientation.

**The Issues**

19. The issues to be determined by the Tribunal were agreed as being those set out at Paragraphs 45 to 48 of the CMO, reproduced in full as follows:

Unfair dismissal

45. What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.

46. 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 usually decide, in particular, whether:

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- 46.1.1 there were reasonable grounds for that belief;
- 46.1.2 at the time the belief was formed the Respondent had carried out a reasonable investigation;
- 46.1.3 the Respondent otherwise acted in a procedurally fair manner;
- 46.1.4 dismissal was within the range of reasonable responses.

47. Wrongful dismissal / Notice pay

47.1 What was the Claimant's notice period?

47.2 Was the Claimant paid for that notice period?

47.3 If not, was the Claimant guilty of gross misconduct / did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

48. Harassment related to disability (Equality Act 2010 section 26)

48.1 Did the Respondent do the following things:

- 48.1.1.1 Fail to respond to the Claimant's requests for information as to why the individual in relation to whom the Claimant was disciplined was 'vulnerable';
- 48.1.1.2 Remove s.5 of the management statement of case;
- 48.1.1.3 Withhold the recording of the Claimant's disciplinary interview;
- 48.1.1.4 Remove the Claimant's point of contact in the disciplinary process, Ms Kaye Board;
- 48.1.1.5 Cause a delay to the disciplinary process from start to finish;
- 48.1.1.6 Breach data protection;
- 48.1.1.7 Send the disciplinary pack intended for the Claimant to the wrong address;
- 48.1.1.8 In the first investigatory interview did Gill Foulkes tell the Claimant that he was asking too many questions?

48.2 If so, was that unwanted conduct?

48.3 Did it relate to disability?

48.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

48.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. The Claimant says that the effects on him were that he was unable to sleep, that he withdrew by remaining at home, that his anxiety levels increased and that his personal relationships were affected.

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**Findings of Fact**

The Complaint & Investigation

20. At all material times, SL was a resident at The Moorlands, described by its manager, Audrey West, as “*supported accommodation for individuals with learning difficulties/vulnerable people aged 16+ to gain the skills to move on to independent living*” (at [60] of the Bundle). Towards the end of June 2020, SL told Ms West about an evening she had spent with the Claimant and his girlfriend. Given the nature of a number of the allegations made by SL, a safeguarding referral was made and a complaint against the Claimant lodged with the Respondent on or around 2 July 2020.
21. On 6 July 2020, the Respondent’s Head of Disability Service (Shelia Finnigan-Jones) spoke with the Claimant by telephone and suspended him on full-pay pending investigation into SL’s allegations. This was confirmed to the Claimant in a letter dated 7 July 2020 (at [134] – [136] of the Bundle). The Claimant was told that the allegations had been made but he was not told at that time that they had been made by SL. That letter included the following (emphasis added):

During suspension, you must not contact your colleagues to discuss this matter. This is not to prevent social interaction with colleagues; however, you should ensure that any contact does not lead to discussions on this matter. In addition, you should not contact service users or their families....

You are expected to comply with any investigation and to make yourself available for interview as necessary.
22. On 20 July 2020, the Respondent appointed Gillian Foulkes as investigating officer. Ms Foulkes is a retired social worker and was chosen from a list retained by the Respondent of appropriate professionals able to undertake such investigations. Ms Faulks formally began her investigation on 29 July 2020.
23. In the course of that investigation, Ms Foulkes obtained evidence from a dozen witnesses, including SL, SL’s family and friends, staff at The Moorlands, the Claimant and the Claimant’s girlfriend. Ms Foulkes had meetings with the Claimant on 6 August and 21 October 2020. Ms Foulkes completed and published her investigation report on 9 December 2020, to which was annexed all the evidence obtained (at [45] – [370]). In the course of the investigation process, the Claimant was informed that the allegations had been made by SL.
24. Ms Foulkes’s conclusions are worth setting out in full, as they both served to record the allegations made against the Claimant, make clear those allegations which were not corroborated by the evidence and those which were upheld. Specific references were included to the Care Council for Wales Code of Professional Practice for Social Care (cited as ‘CC for WC

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of PP for SC') and the Respondent's own Disciplinary and Procedure Policy (cited as 'DP and P'). Both documents were also annexed to the investigation report. The conclusions were as follows (at [57] – [58] of the Bundle):

- It is alleged [the Claimant] engaged in sexual intercourse with a vulnerable adult on two occasions – **there is no evidence to corroborate this allegation**
- On one of the alleged occasions, it is alleged that [the Claimant] took the vulnerable adult out in his vehicle and they had sex in the rear of the vehicle - **there is no evidence to corroborate this allegation**
- It is alleged that the other sexual act involved another person – **there is no evidence to corroborate this allegation**
- It is alleged [the Claimant] took the vulnerable adult to his partner's home where the second sexual act took place between the three adults present - **partially upheld in that there is no evidence to corroborate the allegation that a sexual act took place however there is evidence that [the Claimant] took the vulnerable adult to his girlfriend's house contrary to 2.1, 5.3 & 5.8 (CC for WC of PP for SC) & Sect 5.11.17, 5.11.37 & 5.11.43 (DP and P)**
- It is alleged that [the Claimant] gave cannabis to the vulnerable adult – **there is no evidence to corroborate this allegation**
- It is alleged that [the Claimant] had contact with the vulnerable adult outside of work following the allegations having been made - **upheld contrary to 2.1, 3.4 & 5.8 (CC for WC of PP for SC) & Sect 5.11.17, 5.11.37 & 5.11.43 (DP and P)**
- It is alleged there has exchanges via Social Media, between [the Claimant] and the vulnerable adult via texts and telephone calls - **upheld contrary to 2.1, 3.4 & 5.8 (CC for WC of PP for SC) & Sect 5.11.17, 5.11.37 & 5.11.43 (DP and P)**
- It is alleged that [the Claimant] discussed the allegations made by the vulnerable adult with another vulnerable adult - **upheld contrary to 2.4, 3.4 5.3 & 5.8 (CC for WC of PP for SC) & Sect 5.11.17, 5.11.37 & 5.11.43 (DP and P)**
- [The Respondent] is concerned that the behaviours and actions outlined above are contrary to the Code of Conduct for people working with vulnerable adults and are behaviours and actions that [the Respondent] would consider to be inappropriate and outside of expected professional boundaries – **upheld contrary to 2.1, 2.4, 3.4 5.3 & 5.8 (CC for WC of PP for SC) & Sect 5.11.17, 5.11.37 & 5.11.43 (DP and P)**
- The allegations are that [the Claimant's] conduct and behaviour with a vulnerable adult was inappropriate due to his employment as a Support Worker for [the Respondent] - **upheld contrary to 2.1, 2.4, 3.4 5.3 & 5.8**



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**(CC for WC of PP for SC) & Sect 5.11.17, 5.11.37 & 5.11.43 (DP and P)**

25. It is important to stress that the most serious allegations made against the Claimant (regarding sexual conduct and the supply of drugs) were not upheld by Ms Foulkes investigation and were, quite properly, not pursued any further by the Respondent.
26. Of those allegations which were upheld, it was never denied by the Claimant that SL spent an evening with him and his girlfriend or that the Claimant and SL communicated with each other via social media or that the Claimant met with SL after being made aware of the allegations against him or that he discussed the allegations made by SL with LG, a resident of a different supported living facility who knew SL. However, the Claimant did deny that he had done anything in breach of his employment contract or the associated policies and guidance.
27. A key aspect of the Claimant's case, both then and now, is that SL was not a vulnerable adult or, if she was, he could not have reasonably known that to be the case. This view was, to some degree, because the Claimant did not consider SL to be a service user (that is, to be in receipt of any support services from the Respondent or any other support provider).
28. Based upon the evidence presented to the Tribunal, we found the Claimant's assertion in this regard untenable, for the following principle reasons:
  - 28.1. SL was, at the material time, in a supported living project. The Claimant said that he was not aware of that fact until the investigation into the complaints she had made. He confirmed in his oral evidence that by the first investigation meeting he attended on 6 August 2020, he was aware that SL resided at The Moorlands (although at the time that he took her to his girlfriend's house, he claimed to believe that SL lived with her boyfriend). However, he later accepted, having regard to his witness statement, that SL had told him that she was living at The Moorlands during the evening she spent with the Claimant and his girlfriend.
  - 28.2. Whatever the Claimant's awareness might have been, it was not in issue that SL, at all material times, was in a supported living facility.
  - 28.3. The Claimant had met SL previously in the course of his work at the Cunliffe Centre, a day centre operated by the Respondent, where she attended as a volunteer. At the time (which was approximately 2014), the Claimant had been concerned about SL's behaviour towards him, which he considered to be inappropriate (it was felt that SL had a crush on the Claimant). Such was his concern, that he had raised the matter with a manager (Russell Jones) and was advised not to put himself in a vulnerable position with SL (see [165] of the Bundle).

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- 28.4. The Claimant also relied upon a document which became known as 'Appendix 5'. We address that fully further on in these reasons but concluded that it in fact supported a finding that SL was vulnerable, contrary to the view advanced by the Claimant.
29. In our judgment, there was ample evidence that SL had support needs, had been receiving various forms of support, of which the Claimant was aware and was, in any reasonable understanding of the phrase, a vulnerable adult.
30. It was not in dispute that, sometime after being advised to avoid unnecessary contact with SL, the Claimant accepted a Facebook friend request from SL and began exchanging messages with her. This culminated in the arrangements being made for SL and the Claimant to meet up and for them to spend the evening with the Claimant's girlfriend at her home. This occurred on a Friday evening (see, for example, the information provided by the Claimant to Ms Foulkes in the course of his second investigatory interview on 21 October 2020, at [174] – [176] of the Bundle).
31. It was also not in dispute that after he was told about the allegations but before being formally informed that SL was the source of the allegations, the Claimant contacted SL and arranged to meet her at a local burger restaurant.
32. The Claimant also engaged in an exchange of messages with LG regarding SL. The contents of those messages were communicated to the Claimant by Ms Foulkes in the course of their investigation meeting on 6 August 2020. The following is particularly noteworthy (taken from Ms Foulkes note of the meeting with the Claimant, at [149] of the Bundle):
50. [Ms Foulkes] read another message that was sent by [the Claimant] at 1517hrs on the 28<sup>th</sup> July 2020 — *What has she been saying now?? She is gonna get everything she deserves. Make sure she knows I'm gunna talk about her being a prostitute and advertising online. Also her being warned about smoking weed in her flat and her drug dealer John who she showed me a pic of.* [The Claimant] said that he said this because he was angry. [Ms Foulkes] read the next two messages sent at 1520 and 1524hrs — *'There's only gonna be 1 winner pal' and 'Don't tell her I said that just say to her what if I did. Remind her I know everything about her including the naked vids she sends to random men playing with herself. She not only told me but showed me dozens of random men she sent them all to. She is not gonna look good trust me'.* [The Claimant] said that he didn't want to say what he knew about her so he wanted LG to let her know that it would all come out in the wash.
51. [The Claimant] again stated that he did not see the relevance of me reading the texts, that it was not a crime to be friends with LG and that he knew all the information anyway.

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33. Neither at the time he was confronted with these messages nor since has the Claimant denied sending them to LG. The Tribunal found force in Mr Ali's submission that the Claimant's messages to LG were particularly sinister, using LG as a means to intimidate and threaten SL.

34. In respect of his decision to meet SL following his suspension and whilst the allegations she had made were being investigated, the Claimant alleged that he was not aware at the time that those allegations had come from SL. However, that was at odds with what he told Ms Foulkes in October 2020, the relevant exchange between them being recorded as follows (at [176] of the Bundle):

[Ms Foulkes] - ok — also afterwards - after this evening had happened — obviously you were advised by the local authority that the allegations had been made — you said in your statement that you suspected it was [SL]

[Claimant] – yes

[Ms Foulkes] - and then you arranged to meet — you met her at Burger king

[Claimant] – yea

[Ms Foulkes] — do you think that was a good idea

[Claimant] — well at the time I wasn't being told by my manager what any accusations were, who had made them. If they'd have said to me that accusation by this person but it wasn't — it was nothing so in my mind it could have been anybody although I suspected somebody I didn't know it was her so that's why I wanted to speak to her to try and confirm whether it was her and what she had said because I wasn't getting nothing from my managers - they weren't telling me anything — so yea I was like

[Ms Foulkes] — well I think — you had had a letter by then that was telling you that an allegation had been made and you had a conversation with Sheila [Finnigan-Jones]

[Claimant] — it was very vague about an inappropriate relationship and that was it — that's all it said — no claims nothing about up bums, about drugs, it didn't say anything – mention

[Ms Foulkes] — and you had a conversation with Sheila then

[Claimant] — she still hadn't said anything

[Ms Foulkes] — you said to Sheila that you probably thought it would be a certain person because she been contacting you

[Claimant] - yes but I didn't reveal her name. I just said I think I know who it is. She had just literally phoned me the day before — phoned me threatening so I assumed it would be her — even though there was nothing actually said of who it was — looking back yea maybe I should have done

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that but if they had just told me who made the accusation it would have made things a lot easier and that wouldn't have happened

35. It was abundantly clear from the above exchange that the Claimant suspected that SL had made the allegations against him and, as he stated, he decided to contact SL to find out if she was in fact the source of the allegations.
36. We reiterate that much of what we have found above was not and has never been disputed by the Claimant. He had raised concerns about SL in the past and was aware that she had had a crush on him. Those concerns had arisen in the course of his role as a care worker and, quite properly, he raised them with his then manager. He was, equally correctly, advised to avoid putting himself in a vulnerable position with SL. Despite that, the Claimant wilfully acceded to a friend request from SL on Facebook and arranged for her to spend the evening with him and his girlfriend.
37. After being suspended pending investigation into serious allegations against him, the Claimant wilfully contacted SL, who he suspected (correctly) had made the allegations. He met her at Burger King and engaged in a wholly private and thoroughly inappropriate interaction, given the on-going investigation. This was wholly in contravention of the very clear direction given by the Respondent when he was suspended not to contact any service users. It was plainly inappropriate for the Claimant to contact SL, irrespective of his alleged view that she was neither vulnerable nor a service user. She was the complainant, her complaints were against the Claimant and there was a investigation in process.
38. Thereafter, the Claimant wilfully tried to interfere with the investigation process by seeking to intimidate and threaten SL, through another vulnerable adult, LD. Not only did the Claimant aim to silence SL, he also sought to manipulate LD, telling him at one point not to reveal the Claimant's role (*'Don't tell her I said that just say to her what if I did. Remind her I know everything about her including the naked vids she sends to random men playing with herself...'*).
39. However distressing the Claimant understandably found the allegations and the ensuing investigatory process (especially the allegations of sexual conduct and drug supply), that plainly did not justify the actions taken by him to try and interfere with the investigatory process in the way he did. It was that conduct which the Tribunal found most disturbing, such that we had to remind ourselves that the Claimant was employed as a care worker, had been in that post for many years and was at this time seconded into a senior role.
40. Not surprisingly, the investigation report concluded with the following recommendation by Ms Foulkes (at [59] of the Bundle):

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Based on the findings of my investigation I recommend that there is evidence that suggests there is a case to answer regarding gross misconduct and misconduct.

The Disciplinary & Appeal Hearings

41. Based upon Ms Foulkes' report, the Respondent commenced formal disciplinary proceedings against the Claimant.

42. By a letter dated 15 December 2020, the Respondent informed the Claimant that the investigation had concluded and that there was a case for the Claimant to answer. The letter included the following (at [411] of the Bundle):

...It is alleged that there are concerns over your conduct with a vulnerable adult. The allegations are of you having an inappropriate relationship with this adult. I am advised the specific allegations have been outlined to you and the details are in the report I have received, which you will receive a copy of.

43. The letter went on to inform the Claimant that a disciplinary hearing would take place on 14 January 2021.

44. It was clear from subsequent correspondence that the Respondent had regard to the Claimant's health and well-being during this process. A referral was made to occupational health but, at least initially, the Claimant refused to engage with them. He also informed the Respondent that he would not be attending the disciplinary hearing scheduled for 14 January 2021. Despite the Claimant's non-engagement, the Respondent decided to postpone the hearing of 14 January 2021. In addition, the Claimant was advised of the Care First support service available to employees (all of which was confirmed in writing to the Claimant by the Respondent's letter of 11 January 2021, at [413] – [414] of the Bundle).

45. The disciplinary hearing was re-scheduled for 22 February 2021. The Claimant was notified of the new hearing date in a letter dated 1 February 2021 from Alwyn Jones, the Respondent's Chief Officer, Social Care who was conducting the disciplinary hearing (at [415] – [417] of the Bundle). The allegations against the Claimant were set out, as were the Respondent's definitions of gross misconduct and misconduct (per its disciplinary policy). The Claimant was also invited to submit any evidence that he wished to rely upon in advance of the hearing.

46. That letter included the following:

The documentary evidence upon which the case against you relies will be available for you should you require it at any time. However, I understand that you have requested that nothing be sent to you in connection with this case other than the outcome of my decision of the case after I have heard it. We have adhered to this request as a reasonable adjustment in view of your current health, and how you [sic] the impact you outline sending any

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documentation could have on your health. I understand you did attend the 2 Investigation Interviews. Your 2nd interview, was recorded with your permission and I will hear this full recording at this hearing, as part of the evidence.

47. The hearing proceeded on 22 February 2021 in the Claimant's absence. By a letter dated 24 February 2021, Mr Jones informed the Claimant of the outcome of the hearing and his reasons for making the findings which he did (at [418] – [422] of the Bundle).
48. However, it subsequently transpired that the Claimant had, in fact, indicated that, on reflection, he did want the disciplinary pack and did not want the hearing to proceed whilst he felt too unwell to attend. This had been communicated by the Claimant to Kay Board, Interim Team manager, Adult Social Care. Ms Board had then passed on the Claimant's requested in an email to Ms Griffiths on 11 February 2021 (at [467] – [468] of the Bundle). The email included the following:

I have spoken to [the Claimant] today, he is ok but he is not well (as well as his mental health he is unwell with his teeth and ears and is taking antibiotics), he is currently signed off until 15/2/2021 and will be getting another fit note/ not fit for work. He said he has not received a notification of the rescheduled hearing at his address .... I told him it was rescheduled to the 22nd Feb and he asked if it was right for it to go ahead if he was off sick and couldn't defend himself. Although he has previously said he will not attend the hearing and did not want the pack, he now says he does want the pack and the hearing should not take place whilst he is not well enough to attend or defend himself.

49. Ms Griffiths candidly accepted that she missed that email and did not, as a result, action its contents. After being contacted by the Claimant on 2 March 2021, Ms Griffiths' realised her error and the decision contained within Mr Jones' letter of 24 February 2021 was rescinded. The Claimant's continuing employment was confirmed, he was provided with the disciplinary pack and a new disciplinary hearing was scheduled for 28 April 2021. The Claimant was again sent notice of the new hearing date, details of the allegations he as facing, references to the Respondent's disciplinary policy and given an opportunity to submit any evidence he wanted to rely upon. The Claimant was also informed of his right to be accompanied ([per the letter of 19 March 2021 from Mr Jones, at [423] – [425] of the Bundle).
50. There was an issue with the disciplinary pack received by the Claimant. It contained a document which should not have disclosed, as to do so was in breach of data protection regulations. The document became known as 'Appendix 5' throughout these proceedings. It was the safeguarding referral in respect of SL, which was created in response to her original allegations against the Claimant. For the purposes of these proceedings, a copy was provided (at [70] of the Bundle). The original pack was retrieved from the Claimant and second pack, minus Appendix 5, was re-

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issued to him. Ms Griffiths explained this to the Claimant in the course of an email exchange on 19 April 2021 (at [530] – [532] of the Bundle).

51. The Claimant maintained that the removal of Appendix 5 was prejudicial to the whole disciplinary process. He also relied upon it support his claim that SL was not a vulnerable adult. Neither argument withstands even the most cursory scrutiny.
52. In respect of the removal of Appendix 5 from the disciplinary pack, the Claimant self-evidently could not be prejudiced for not having sight of something to which he had never been entitled to see. What was taken from him was a document to which he never had a right of access. At the most fundamental level, there could be no prejudice to him. In addition, the information contained in Appendix 5 was of no relevance in explaining or determining the Claimant's decision to invite SL to his girlfriend's home, to contact SL in the course of the investigation process or to try and interfere with SL's evidence and intimidate her through LD.
53. In any event, as detailed below, Appendix 5 was considered by Mr Jones in the course of the disciplinary proceedings.
54. Did Appendix 5 support the Claimant's assertion that SL was neither vulnerable nor a service user, such that his social interaction with her should not be considered to fall within the employment sphere? It did not. First of all, it was a safeguarding referral which, by definition, would only be made in respect of an adult who required safeguarding. That alone was highly supportive of the generally held view of those professionals working with and supporting SL of her vulnerabilities.
55. Appendix 5 included the option of indicating whether SL "*is or is likely to be an Adult at Risk*" and if she is, to "*[E]nsure any immediate risk has been managed and continue with S126 Enquiries.*" The box to indicate that SL was considered an adult at risk was not ticked. However, the alternate box (indicating that SL was not considered to be an adult at risk) was also left unticked.
56. The absence of a tick in the 'Yes' box was repeatedly relied upon by the Claimant to demonstrate that SL was neither at risk nor vulnerable. But, of course, that logic could have equally been applied to the absence of a tick in the 'No' box. Rather, the Tribunal considered the document as a whole. As explained above, if the author of the referral was of the view that SL was an adult at risk, there was a requirement, amongst other things, to "*continue with S126 Enquiries.*" We understood this to be a reference to section 126 of the Social Services and Well-being (Wales) Act 2014, which places a duty on social services to make enquiries, if there is reasonable case to suspect that a person within its area (whether or not ordinarily resident there) is an adult at risk.
57. What follows in Appendix 5 is a table setting out the enquiries to be made and the time scale for those enquiries. The first action point specifically

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records that “S126 required – to determine if AAR”, along with other action points arising from the complaints raised by SL. The purpose of those action points is set out below the table:

Where there has been reasonable cause to suspect a person is an Adult at Risk, this form is to be used to record the information required to make an initial evaluation.

58. Far from Appendix 5 supporting the Claimant’s contention, it in fact was far more suggestive of there being, at the very least, a reasonable suspicion that SL was an adult at risk.
59. For all those reasons, there was no prejudice caused to the Claimant of the Respondent’s quite proper decision to remove Appendix 5 from the second disciplinary pack, still less any meaningful evidence that the document undermined the Respondent’s view that SL was a vulnerable adult.
60. The Claimant attended the disciplinary hearing on 28 April 2021. He was permitted to be accompanied and supported by his girlfriend. The Claimant had submitted evidence in support of his case in advance, which Mr Jones confirmed that he read. Mr Jones also read Appendix 5, even though the same had been removed from the disciplinary documents. The Claimant was given the opportunity to question the Respondent’s witnesses. The disciplinary outcome decision and confirmation of all the above were set out in Mr Jones’ letter of 5 May 2021 (at [426] – [431] of the Bundle).
61. Mr Jones set out in some detail his findings and conclusions in that letter. Each material finding was clearly reasoned. Of the nine allegations presented by the Respondent, four were found to have been proven, as follows:
  - 61.1. The Claimant had an inappropriate relationship with a vulnerable adult (SL) due to the Claimant’s employment as a Support Worker for the Respondent
  - 61.2. The Claimant had contact with the vulnerable adult (SL) outside of work following the allegations having been made.
  - 61.3. There had been exchanges via Social Media, between the Claimant and the vulnerable adult (SL) via texts and telephone calls.
  - 61.4. The Claimant discussed the allegations made by the vulnerable adult (SL) with another vulnerable adult (LD).
62. As set out above, much of what Mr Jones found proven was not in fact in dispute. The Claimant did not deny inviting SL to his girlfriend’s home, did not deny contacting and meeting with SL after being made aware of the



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allegations she had made, did not deny contacting her via social media and did not deny discussing her and her allegations with LD.

63. In addition, and for the reasons explored above, Mr Jones was quite entitled to consider SL to be a vulnerable adult and to find that the Claimant's relationship with her had been inappropriate.
64. The allegations of sexual conduct and drug supply were found not proven.
65. Having regard to the allegations which were found to be proven, Mr Jones went on to consider the Respondent's disciplinary policy and the Care Council for Wales's Code of Conduct. He concluded his findings as follows (at [430] – [431] of the Bundle):

On the basis of what I heard during the hearing I consider the allegations that were proven, to be Gross Misconduct and Misconduct. This is as I consider your behaviour to be a serious breach of trust and confidence, that your relationship with SL, a vulnerable person, was inappropriate, and for failure to observe agreed working procedures, safety regulations and codes of practice.

In view of the seriousness of the allegations and the evidence provided, I have no trust and confidence in you as Social Care Worker. I have to inform you that I took the decision to dismiss you with immediate effect on 28 April 2021.

66. The Claimant was informed that he had a right of appeal against the decision to dismiss. On 12 May 2021, the Claimant exercised that right of appeal.
67. The appeal hearing took place on 23 June 2021 and was presided over by Mr Isted, Chief Officer, Planning and Regulatory. The Claimant attended, again with the support of his girlfriend and was given the opportunity to put forward his case. By a letter dated 28 June 2021, Mr Isted set out the Claimant's areas of concern, before recording in detail his decision and reasons. In summary, Mr Isted found that there had been no procedural unfairness in the disciplinary process, that any new information being relied upon by the Claimant now would not have altered the ultimate decision to dismiss on grounds of gross misconduct and that, based upon the allegations that had been proven, dismissal was within the band of reasonable responses available to Mr Jones.
68. In the circumstances, Mr Isted did not uphold the Claimant's appeal against the decision to dismiss him on grounds of gross misconduct.

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**Application of the Findings of Fact to the Law**

Unfair Dismissal

69. It was not in dispute that the Respondent dismissed the Claimant by reason of conduct or that the Claimant had been continuously employed for almost 20 years by the time of his dismissal.
70. Conduct is a potentially fair reason for dismissal pursuant to section 98 Employment Rights Act 1996 ('the ERA Act 1996'). What was in issue was whether the decision to dismiss the Claimant was substantively & procedurally fair.

Substantive Fairness

71. As this was a conduct dismissal, the following principles required determination, as follows:
- 71.1. Whether the Respondent genuinely believed that the Claimant had engaged in conduct for which he was dismissed;
  - 71.2. Whether the Respondent held that belief on reasonable grounds;
  - 71.3. Whether in forming that belief, the Respondent carried out proper and adequate investigations; and
  - 71.4. Thereafter, whether the Claimant's dismissal was a fair and proportionate sanction to the conclusions reached by the Respondent.
72. Given our findings, the Tribunal was of the view that the Respondent did genuinely believe that the Claimant had engaged in the conduct for which he was dismissed. To a large degree, as explained above, that came from the Claimant's own admissions. That genuine belief was reasonably held and arose from proper and adequate investigations. The investigation was comprehensive, as it should have been given the seriousness of the allegations that had been made. The evidence was properly weighed and considered by the investigating officer, the disciplinary officer and the appeal officer. It was tested throughout and did not falter.
73. The Respondent concluded that the Claimant engaged in inappropriate behaviour toward a vulnerable adult and that it constituted gross misconduct. It is worth reiterating what that conduct was. The Claimant invited a vulnerable adult to spend the evening with him and his girlfriend, despite such conduct being contrary to professional standards and contrary to advice provided to him in respect of SL in the past. In many ways, that conduct alone could have been mitigated if the Claimant had accepted that it constituted a professional lapse of judgment, from which he was prepared to learn and develop. However, what followed was, on any interpretation, utterly inexcusable. He sought to interfere with the

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investigation into serious allegations made against him by SL, first by arranging to meet with SL alone, in complete breach of the instruction given to him by the Respondent at the time of his suspension from work. Second, he sought to intimidate and threaten SL, by taking advantage of another vulnerable adult, LD.

74. In our judgment, having reached a conclusion of inappropriate behaviour, based upon a genuine belief, reasonably held and following a thorough investigation, dismissal was undoubtedly a fair and proportionate sanction. It was squarely within the range of reasonable responses available to the Respondent.
75. As such, the Claimant's dismissal was substantively fair.
76. The Tribunal was reminded time and again by the Claimant that he did not consider SL to be vulnerable, at risk or a service user. For the reasons set out in this decision, it was plainly open to the Respondent to conclude that the opposite was true. SL was clearly a vulnerable adult, a service user and someone who was suspected of being an adult at risk. We were left with the impression that the Claimant's continual denial of SL's needs was simply expedient, a way of seeking to minimise or excuse his own conduct.
77. The Claimant may be tempted to conclude that the only reason the Respondent dismissed him and that the Tribunal has found against him is because of a difference of opinion as to whether or not SL is vulnerable. It is, in our judgment, important to stress that the Claimant would be wrong to hold that view, should it arise. Interfering in a disciplinary investigation and seeking to intimidate, threaten and silence a complainant would be grounds for a finding of gross misconduct and dismissal irrespective of the needs or personality of the complainant. Such actions go to the heart of the requirement for mutual trust and confidence between employer and employee. On the facts of this case, SL's vulnerabilities add to the existing seriousness of the Claimant's actions. They are an aggravating factor. But those vulnerabilities are not, in any sense, a pre-requisite to the reasonableness of the Respondent's decision to dismiss.

Procedural Fairness

78. As we have found, there was a thorough investigation by an independent officer. The Claimant was invited to meetings at the investigatory, disciplinary and appeal stages of the process. He was provided with all the relevant information and evidence in the Respondent's possession. He was afforded the opportunity to present his own evidence and test the evidence obtained by the Respondent. He was made aware that dismissal was a possible sanction. He was given notice of the disciplinary and appeal hearings. Both hearings were chaired by officers not previously involved in the process and each tested the evidence in an even-handed and robust way.

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79. As found above, there was no unfairness or prejudice to the Claimant regarding the exclusion or otherwise of the document known as Appendix 5. Similarly, the Respondent acted immediately, fairly and appropriately when it transpired that Ms Griffiths had missed the Claimant's email in February 2020 indicating that he wished to take an active role in the disciplinary process. The Respondent referred the Claimant to occupational health and made him aware of other support measures available to him during the investigatory and disciplinary process.
80. The decision letters issued by Mr Jones and Mr Isted were clear, cogent and properly reasoned. The Claimant could reasonably understand the basis for each decision and how the evidence had been weighed and considered. Whilst he undoubtedly disagreed with those conclusions, we found that the procedure followed by the Respondent, from the initial investigation to the appeal outcome, was fair.
81. As we found the decision to dismiss to be both substantively and procedurally fair, the claim of unfair dismissal was not made out and is dismissed.

Wrongful Dismissal

82. Section 86 of the ERA 1996 affords rights of notice to employees, the length of which is determined by their period of continuous employment with their employer. Any failure by the employer to give correct notice constitutes a breach of the employee's contract of employment, save where either the employee waives his rights to, or accepts payments in lieu of, notice. In addition, an employer is entitled to dismiss an employee without notice where satisfied that the employee's conduct amounted to a repudiatory breach of the employment contract and discloses a deliberate intent to disregard the essential requirements of that contract. The employer faced with such a breach by an employee can either affirm the contract and treat it as continuing or accept the repudiation, which results in immediate dismissal.
83. It was the Respondent's case that the latter applied to the Claimant – that his conduct constituted a fundamental breach of his employment contract. The Tribunal found that the Claimant did engage in inappropriate behaviour with SL (by inviting her to his girlfriend's home and engaging in social messaging with her). However, of far greater concern was the Claimant's actions once he had been made aware of the allegations against him. He deliberately made contact with SL, suspecting that she was the source of the allegations and against the express instruction of his employer not to contact any service user (still less the very person he suspected). If that were not serious enough, the Claimant then tried to use another vulnerable adult to send messages to SL which were, on any objective level, intimidating and threatening, with the clear intent to warn her off continuing with her complaints.

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84. The Claimant's behaviour went to heart of the implied term of mutual trust and confidence between employer and employee. In our judgment, the Respondent was quite entitled to consider such behaviour to be gross misconduct and a fundamental breach of the Claimant's employment contract. As such, the Respondent was entitled to dismiss the Claimant without notice and the claim for wrongful dismissal fails.

Harassment Discrimination

85. As set out by Judge Frazer in the CMO (and reprinted above), the Claimant identified eight separate alleged actions by the Respondent which were claimed to constitute unwanted conduct, related to the Claimant's disability and were undertaken by the Respondent with the purpose of violating the Claimant's dignity, creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant or, if not for those purposes, had those effects on the Claimant.

86. We set out our findings and conclusions regarding the alleged actions below. However, and for the avoidance of doubt, we make clear that whatever the alleged actions were, the evidence failed to support a finding that any of them were related to the Claimant's disability. Those actions which did occur, whether they constituted unwanted conduct or not, were in no way whatsoever linked to or informed by the Claimant's health.

87. In addition, and equally clearly, the evidence failed to come anywhere close to supporting a finding that actions taken by the Respondent were undertaken with the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. Given the allegations made by SL, the disciplinary process was always going to engage with sensitive issues and require careful handling. In our judgment, the approach taken by the Respondent, including the support offered to the Claimant and the adjustments made to ensure that he was treated fairly within the process, was appropriate, professional and sensitive.

88. In addition, it was understandable that the allegations and the subsequent disciplinary process would have an adverse impact upon the Claimant. However, that was because of the nature of the allegations and could not reasonably be attributable to the actions taken by the Respondent in how it investigated those allegations or conducted and managed the subsequent disciplinary proceedings, still less the specific actions relied upon by the Claimant.

89. Based upon the evidence we saw and heard, the Tribunal found that six of those eight alleged actions did not occur as claimed, as follows:

89.1. The Respondent did not fail to respond to the Claimant's requests for information as to why it believed SL: to be vulnerable. This was clearly and consistently set out throughout the disciplinary process and also confirmed in his oral evidence to the Tribunal by Mr

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Jones. The fact that the Claimant did not agree with those explanations is not the same as a failure to provide information. As correctly submitted by Mr Ali, the Claimant's real issue was that no medical evidence had been produced as to the SL's mental health or overall vulnerabilities. But quite properly, such information was confidential to SL and the Respondent had no power to disclose such information. It was not, in any event, necessary. The Respondent was quite entitled to conclude that SL was vulnerable, based on the information available to it and the Claimant.

89.2. The Respondent did not withhold the recording of the Claimant's disciplinary hearing. In his oral evidence, the Claimant accepted that the audio recording had been sent to him with the first disciplinary pack. That pack had to be returned because of the Appendix 5 data breach. The Claimant alleged that the second pack did not contain the audio recording (which he also raised at the outset of his appeal hearing). The Tribunal determined that, at its highest, if the audio recording was not with the second pack, it was an oversight by the Respondent. There was no evidence that it had been deliberately withheld. Indeed, there was no evidence of the Claimant raising the absence of the audio recording with the Respondent prior to the appeal hearing or, importantly, the Respondent refusing to accede to any request for a further copy of it.

89.3. The Respondent did not remove the Claimant's point of contact in the disciplinary process. As was set out in the evidence and explored in the Claimant's cross-examination, Kay Board was the Claimant's welfare contact. She was never removed from that position. Ms Griffiths was also a point of contact for the Claimant but only as regards the disciplinary process itself. She too remained in that role throughout.

89.4. There was no delay to the disciplinary process from start to finish. SL's complaints against the Claimant were received in July 2020. A detailed and comprehensive investigation was undertaken, with many people being interviewed and the Claimant being interviewed twice. The complaints included very serious allegations. It was imperative that a thorough investigation were undertaken. To have done otherwise would, amongst other things, have been extremely prejudicial to the Claimant. The time taken from July to December 2020 was reasonable, understandable and appropriate. The disciplinary hearing was affected by postponements but again these were reasonable and appropriate. The time taken was not unduly excessive, especially given the reasons for the postponements and the seriousness of the allegations. Finally, the appeal was undertaken within eight weeks of the disciplinary outcome, which again was not, in our judgment, unreasonable or excessive.

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- 89.5. The Claimant alleged that the disciplinary pack as sent to the wrong address. In support, he claimed in his oral evidence that his ex-wife and ex-housemate knew all the details of the allegations against him. In contrast, the Respondent provided clear evidence, which was not challenged by the Claimant, that he collected the first pack in person from the Respondent's offices and received the second pack via a courier. The Claimant failed to show on balance that a further pack had been sent to an incorrect address (there was, for example, no evidence from the former housemate supporting that contention). Indeed, the Tribunal was left wondering why a further pack would have been sent in the post at all, given that the Respondent had gone to the lengths of arranging in-person collection of the first pack and used a courier for the second.
- 89.6. At the first investigatory meeting, Ms Foulkes did not tell the Claimant that he was asking too many questions. On considering the evidence, this was in fact an allegation regarding the second investigatory meeting. Having regard to the transcript of that meeting (at [170] – [184] of the Bundle), the allegation was simply not made out. The transcript recorded a number of interruptions and questions by the Claimant, often whilst Ms Foulkes was talking. What Ms Foulkes appears to have said was that the Claimant was asking a lot of questions, not that he was asking too many. That was confirmed by the Claimant in his own witness statement and was consistent with the transcript. It was also clear that Ms Foulkes was doing her best to explain the evidence she had gathered and afford the Claimant a chance to respond. It was also understandable that the Claimant was anxious and concerned about that evidence. That did cause some disruption and confusion in the course of the meeting. That was the context for Ms Foulkes comment. It was not said in a way aimed at shutting down the Claimant's questions, perhaps best illustrated by the rest of the transcript which recorded the Claimant asking, and Ms Foulkes attempting to answer, numerous further questions.
90. Of the remaining alleged actions relied upon by the Claimant, it was not in dispute that Appendix 5 was removed from the disciplinary bundle and the reasons for that are set out earlier in these reasons. As the Claimant was never entitled to see Appendix 5, its removal from the disciplinary pack could not constitute unwanted conduct. In the alternative, the removal of Appendix 5 had nothing to do with the Claimant's disability and everything to do with the protection of confidential information regarding SL.
91. Similarly, it was not disputed by the Respondent that including Appendix 5 in the first disciplinary pack was a breach of data protection but not one which affected the Claimant (i.e. it was not his data which was disclosed in breach of the applicable regulations). As such, and again, disclosing Appendix 5 was not unwanted conduct in respect of the Claimant and its erroneous disclosure had nothing to do with the Claimant's disability.

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92. For all those reasons, the claims of disability-related harassment were not made out and are dismissed.

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**EMPLOYMENT JUDGE S POVEY**

Order posted to the parties on  
24 May 2022

**Dated: 19 May 2022**

For Secretary of the Tribunals  
Mr N Roche