EMPLOYMENT TRIBUNALS

Claimant: Ms Ingrid Hunter

Respondent: Just One Health and Social Care Limited

Heard at: Cardiff, by video **On:** 4 & 5 December 2024

Before: Employment Judge S Jenkins

Representation
Claimant: In person
Respondent: Mr R Katz (Senior Litigation Consultant)

JUDGMENT

1. The Claimant's complaint of wrongful dismissal succeeds, and the Respondent is ordered to pay the Claimant the gross sum of £1,523.90 in respect of that.

2. The Claimant's complaint of unfair dismissal succeeds, but deductions from compensation ordered in respect of that are to be made as follows:

    a. 10% from both the basic award and the compensatory award to reflect the Claimant's contributory conduct.

    b. A further 10% from the compensatory award to reflect the Claimant's failure to appeal against her dismissal.

3. Applying those deductions, the Respondent is ordered to pay the Claimant the sum of £2,858.38 in respect of her unfair dismissal complaint.

4. In total, the Respondent is ordered to pay the Claimant the sum of £4,382.28.

REASONS

Background

1. The hearing was to deal with the Claimant's complaints of unfair dismissal and wrongful dismissal, brought by way of a Claim Form issued on 10 July 2024, following a period of early conciliation with ACAS between 29 April 2024 and 10 June 2024. The complaints arose following the Claimant's summary dismissal on 2 April 2024.

2. I heard evidence from Gareth Wallbank, HR Manager, on behalf of the Respondent, and from the Claimant on her own behalf.

3. I also took into account the documents in a hearing bundle spanning 79 pages to which my attention was drawn, and the parties' closing submissions.

Issues and Law

Unfair dismissal

4. The first issue for me to consider was the reason for dismissal, and whether it was a potentially fair reason, i.e. a reason falling within sections 98(1) or (2) of the Employment Rights Act 1996 ("ERA"). In this case, the Respondent contended that the dismissal was by reason of the Claimant's conduct, which falls under section 98(2)(b) ERA, and the Claimant accepted that. In the alternative, the Respondent contended that its reason had been "*some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*", i.e. a reason falling under s98((1)(b).

5. I would then have to consider whether dismissal for that reason was fair in all the circumstances, within the meaning of section 98(4) ERA. That provides that whether a dismissal is fair or unfair. "*… 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 [the reason] as a sufficient reason for dismissing the employee*".

6. In relation to dismissals by reason of conduct, the approach to be taken by an employment tribunal is underpinned by two touchstone Employment Appeal Tribunal ("EAT") decisions of over forty years' vintage; ***British Home Stores v Burchell*** **[1978] IRLR 379**, and ***Iceland Frozen Foods v Jones*** **[1982] IRLR 439**. The guidance provided by those two authorities was combined by the EAT in ***JJ Food Service Limited v Kefil*** **[2013] IRLR 850**, at paragraph 8, as follows:

> "*8. In approaching what was a dismissal purportedly for misconduct, the Tribunal took the familiar four stage analysis. Thus it asked whether the employer had a genuine belief in the misconduct, secondly whether it had reached that belief on reasonable grounds, thirdly whether that was following a reasonable investigation and, fourthly whether the dismissal of the Claimant fell within the range of reasonable responses in the light of that misconduct.*"

7. That range of reasonable responses test was also directed to apply in relation to the consideration of the reasonableness of an investigation by the EAT, in ***Sainsbury's Supermarkets Limited v Hitt*** **[2003] IRLR 23**.

8. The appellate courts have also made clear, in many cases over many years, that an employment tribunal should take care not to substitute its decision for that of the employer, or to "step into the employer's shoes".

9. Finally, with regard to assessing the fairness of the dismissal, I would also need to be satisfied that appropriate procedural steps had been followed, in particular the relevant provisions of the ACAS Code of Practice on Disciplinary and Grievance Procedures.

10. The ACAS Code states that the employer should inform the employee in writing of the charge(s) against him or her and the possible consequences of the disciplinary action. This communication should contain enough information to enable the employee to prepare an answer to the case. It would normally be appropriate to provide copies of any written evidence, including witness statements.

11. It is important that the employee knows the full allegations against him or her. The Court of Appeal has stated, in ***Strouthos v London Underground Limited*** **[2004] IRLR 636**, that disciplinary charges should be precisely framed, and that evidence should be limited to those particulars.

Wrongful dismissal

12. With regard to the wrongful dismissal claim, the Claimant was summarily dismissed i.e. without notice. The question for me therefore was whether the Claimant had committed a repudiatory breach of contract, i.e. an act of gross misconduct, such as to justify the Respondent treating the contract at an end and summarily dismissing her.

13. The EAT in ***Sandwell & West Birmingham Hospitals NHS Trust v Westwood*** **(UKEAT/0032/09)** indicated that the Tribunal must consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct. That is an objective test on the facts of the case considered on the balance of probability.

Remedy

Unfair dismissal

14. As I ultimately decided both complaints in the Claimant's favour, the assessment of remedy came into focus. I then bore the following further legal principles in mind.

15. Section 119 ERA notes that a basic award is to be calculated by determining the period ending with the effective date of termination, during which the employee had been continuously employed, and then by reckoning backwards from the end of that period, the number of years of employment

falling within the period. The section then provides for the calculation of an appropriate amount for each of those years of employment. I noted in this case that there was a broadly agreed position as to the period of continuous employment, which involved a period of seven continuous years of service, all of which were served when the Claimant was over the age of 41. That therefore involved a multiplier of 1.5 weeks' pay for 7 years of service, i.e. of 10.5 weeks' pay in total.

16. What is a "week's pay" is dealt with in Chapter 2 of Part XIV of the ERA. Section 221(2) provides that, if the employee's remuneration does not vary with the amount of work done, the amount of a week's pay will be the amount payable under the contract of employment in force on the calculation date.

17. With regard to the compensatory award, section 123(1) ERA provides that the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.

18. A key element for me to consider for the purposes of my assessment of the compensatory award under section 123(1) was whether the loss sustained by the Claimant in consequence of the dismissal was loss that was attributable to action taken by the employer.

19. With regard to the compensatory award generally, section 123(4) ERA provides that, in ascertaining the loss sustained by a Claimant, the common law duty to mitigate loss applies.

20. The assessment of the compensatory award by reference to the loss sustained by the Claimant in consequence of the dismissal attributable to action taken by the Respondent also involves assessment of potential deductions. The Respondent asserted that any awards should be reduced to reflect contributory conduct on the part of the Claimant

21. With regard to contributory conduct, the ERA includes two similar, albeit not identical, provisions which may potentially lead to deductions from the awards made to a Claimant in light of his or her conduct. With regard to the basic award, section 122(2) states that where the tribunal considers that any conduct of the Claimant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of a basic award to any extent then it shall be reduced accordingly.

22. Section 123(6) then provides, with regard to the compensatory award, that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

23. The Court of Appeal, in ***Nelson v BBC (No. 2)*** **[1979] IRLR 346**, set out three factors which must be present for the compensatory award to be reduced. These were:

    - that the Claimant's conduct must be culpable or blameworthy;

- that it must actually have caused or contributed to the dismissal; and

- that the reduction must be just and equitable.

24. The EAT, in ***Steen v ASP Packaging Limited*** **(UKEAT/23/11)** outlined a very similar approach in relation to the basic award.

25. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 notes that if, in the case of proceedings to which the section applies under any of the jurisdictions listed in Schedule A2 of the Act, it appears to the tribunal that the claim to which the proceedings relate concerns a matter to which a relevant Code of Conduct applies, and if either the employer or employee has unreasonably failed to comply with that Code, then the compensatory award for unfair dismissal can be increased or reduced by up to 25% if considered just and equitable to do so.

26. In that regard, Schedule A2 includes claims for unfair dismissal, and the ACAS Code of Practice on Disciplinary and Grievance Procedures is a relevant code of conduct.

27. In this case, the Respondent contended that the Claimant's failure to appeal its decision to dismiss her amounted to an unreasonable failure to comply with the Code, which should lead to a reduction in the compensatory award.

Wrongful dismissal

28. Compensation for any wrongful dismissal must reflect the earnings the Claimant would have received had she been dismissed with notice, subject to any mitigation by the Claimant.

Findings

29. I set out below my findings relevant to the issues I had to determine, reached on the balance of probability where there was any dispute.

Background

30. The Respondent is a health and social care provider which delivers care and support to adults, children and young people. It acquired a contract in September 2023 to provide care to two vulnerable individuals who are residents in their own joint home in the Wrexham area. The Claimant had worked for the previous provider of services to those individuals, and transferred across to the Respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

31. At the time of transfer, the Claimant was one of two registered managers who oversaw the running of services at the particular location. As well as being the registered manager, the Claimant also worked some shifts as a support worker.

32. In January 2024, the Claimant resigned from her managerial position and took up similar employment with another employer. However, she maintained her employment with the Respondent, working as a support worker from Friday evening into Saturday afternoon each week.

33. Support was provided to the two individual residents, JC and KD, on a round-the-clock basis. Two members of staff were present during day times, with one member of staff then staying overnight on a "sleeping night" basis rather than on an "awake night" basis. No specific evidence was put before me about JC and KD, but it appeared that they were both vulnerable adults with certain learning difficulties.

34. In her revised support worker role, the Claimant worked on a rota which varied slightly from one week to the next. She would always start work on Friday evening at 6:00pm and work a shift, for which she was paid an hourly rate of £10.90, through to 11:00pm. She would then remain on the premises, but be free to sleep between 11:00pm and 8:00am on Saturday morning, for which she was paid a flat sleeping-in rate of £76. She would then work a shift from 8:00am on Saturday morning until 3:00pm, again at the hourly rate of £10.90. In alternate weeks, she would extend her Saturday shift to work until 5:00pm. Overall, therefore, the Claimant worked either 12 or 14 hours each weekend, for which she was paid £10.90 per hour, and worked a sleeping-in night shift, for which she was paid a flat rate of £76.

Disciplinary concerns

35. It appeared that no issues had arisen regarding the Claimant's service in either of her roles, whether for the predecessor employer or for the Respondent. On 7 February 2024 however, Jennifer Hughes, a senior support worker working at the premises, and therefore someone more senior than the Claimant at that time, sent an email to Rhian Dyer, a member of the Respondent's management team, raising some issues regarding the Claimant.

36. The first issue was that one support worker had told another that the Claimant had called her whilst on shift to say that she was bored, and that the two decided that they would go out together in JC's car. It was understood that the two, i.e. the support worker and the Claimant, drove approximately an hour away from Wrexham.

37. A second point of concern raised by Ms Hughes was that she stated that JC had been talking about Charlotte, i.e. Charlotte Tiley, who had taken over as the registered manager, describing Charlotte by reference to her hair colour and the fact that she wore glasses, and saying that she was "*not nice*" to the Claimant and did "*not speak to her*". Ms Hughes reported that JC had told her that it was "*a shame what happened to [the Claimant] in the office*", and that, from what JC had told her, she thought she had felt that the Claimant had left the office due to falling out with people.

38. Ms Hughes then raised a further specific matter which had been brought to her attention by PD, KD's mother, during a meeting on 7 February 2024. She reported that PD had told her that the Claimant had told her during her shift on Saturday (it was not clear as to whether it was the previous Saturday, or an earlier one, but the indications appeared to suggest that it was purported to have happened on the previous Saturday, i.e. 3 February 2024) that she was angry with the state of the house on the evening before, and had informed PD that the house was "*a shithole*", and that the bathroom had been

covered in faeces. Ms Hughes noted that the Claimant had attempted to call her during the Friday evening shift, and, in reply to a text that Ms Hughes had then sent her, had replied saying that Ms Hughes should imagine her face when she walked into the bathroom and found poo all over the wash basin and all over the floor. Ms Hughes noted that the Claimant had attached a picture showing what appeared to be a small speck of faeces on the side of the wash basin, but none on the floor.

39. Ms Hughes concluded her email by noting that PD had made a point of saying that she did not really want to or need to know about things like that from the Claimant, and had commented that the Claimant was clearly struggling with not being the manager any more. She reported that PD had told her that she found the "*whole conversation very unprofessional on [the Claimant's side*", and that the Claimant was trying to pick fault in things at the premises.

40. Subsequently, on 13 February 2024, another support worker sent an email to Ms Tiley reporting that, in a conversation she had had with JC the night before, JC had indicated that she knew where the Claimant lived, and had been there.

Investigation

41. The emails raised alarm within the Respondent organisation about the standard of care being provided to the residents, and Ms Dyer went to the premises and spoke to JC on 23 February 2024. In the notes of that discussion, JC appeared to confirm that she had been to the Claimant's house. However, the notes record the first question from Mr Dyer as "*Who else was involved when Ingrid took you to her house, was it just Ingrid?*", i.e. a leading question. There did not seem to be any discussion as to whether the Claimant had, in fact, taken JC to her house, and the discussion appeared to proceed on the basis that that was accepted as fact. JC provided some detail as to what she considered happened when she went to the Claimant's house, but confirmed that she could not provide any specific date or time frame.

42. As a result of the information provided, Ms Dyer triggered a safeguarding investigation, which was understood to involve an external body, but there was no evidence before me as to what happened in relation to that investigation.

43. Ms Dyer has subsequently left the Respondent organisation, and indeed it appears that she left soon after these events took place, and she did not attend to give evidence before me. Mr Wallbank confirmed however, that Ms Dyer decided not to initiate disciplinary proceedings relating to the comments made by JC because there was no external corroboration of what she had said. Mr Wallbank further noted that it was highly unlikely that a person with JC's capacity issues would make up events like that, but that Ms Dyer had decided to err on the side of caution and to do further investigations before initiating a disciplinary process. Ultimately, no disciplinary proceedings were pursued against the Claimant in relation to that matter.

44. Whilst it was not clear from the documents as to how a disciplinary

investigation commenced, it appears that Ms Dyer did undertake a form of investigation into the other matters of concern that had been raised by Ms Hughes in her email of 7 February 2024.

45. She met with Ms Hughes on 23 February 2024 and there was a note of their discussion. Ms Dyer asked Ms Hughes if she knew specifically what JC had been told by the Claimant about anyone in the office, and Ms Hughes replied that the Claimant may have told JC directly, or JC may only have overheard a conversation the Claimant had had with someone else. She noted that JC would listen in to other people's conversations.

46. In terms of what JC had told Ms Hughes, she reported that JC had said that the Claimant was "*pushed out of the office by the blonde lady with glasses*", and that the Claimant was "*not treated right*".

47. Ms Dyer asked Ms Hughes as to whether there had been any other times where JC had said that the Claimant disclosed information to her that may not be appropriate to share with her, and Ms Hughes responded that she had not, to her knowledge.

48. Ms Dyer then asked Ms Hughes if she was aware of any issues the Claimant had with the office, which I took to be with the Respondent's management, and Ms Hughes confirmed that she was aware of issues, and that the Claimant had disclosed to her issues she had had with the office, and had told her that she did not get on with Ms Tiley. Ms Hughes noted that she knew of previous grievances between the Claimant and Ms Tiley from their previous employer. She reported further that the Claimant had told that she felt she was treated differently, and that she had thought, when the TUPE transfer took place, she would be paid lot more money, that that had not happened, but that Ms Tiley had had a £5000 wage increase.

49. Ms Dyer then discussed the issue over the cleanliness of the bathroom, and Ms Hughes provided largely the information she had provided in her original email. In response to questions from Ms Dyer, Ms Hughes confirmed that PD had never raised concerns about the cleanliness of her daughter's bathroom, or raised any concerns about the service being delivered.

50. Whilst no direct witness evidence was provided, a document in the bundle dated 27 February 2024, confirmed that the Claimant was suspended from that point onwards to allow an investigation to take place into allegations that the Claimant shared personal information with JC regarding issues she had with her employment, and had taken JC to her own home, despite that not being a measure in her care plan or it being in her best interests.

51. Ms Dyer then had a further meeting with Ms Hughes on 27 February 2024. Ms Hughes confirmed that, on her return from annual leave, another member of staff, PM, had approached her to discuss the Claimant. PM had reported that the Claimant had said that Ms Hughes had criticised the staff at the premises, which Ms Hughes was adamant had not happened.

52. It had also been discussed that PM had questioned the Claimant over washing in the washing machine, and that the Claimant had said to PM in

reply. "*That was my washing in the washing machine, and I will continue to do my fucking washing*".

53. Ms Dyer then met with the Claimant, although the notes do not indicate the precise date on which that took place. The notes record that Ms Dyer asked the Claimant if she ever use the washing machine in a client's home for personal washing, and that the Claimant replied that, if working, that was allowed. The Claimant noted, in particular, that staff were allowed to wash their bedding (It appears that staff take their own bedding to the premises), and that she would also wash her clothes from the previous day alongside that bedding.

54. Ms Dyer then asked the Claimant if she had arrived at the premises and found it to be an unsatisfactory condition, and the Claimant replied that, on two occasions, she had arrived and found faeces in different areas of the bathroom. She confirmed that she had reported it to a senior employee.

55. Ms Dyer then put to the Claimant that it had been reported that she had engaged in conversation with PD, and had outlined concerns about the condition of the house. The Claimant replied that she could not recall such a conversation, and that PD did not generally go to the premises on a Friday evening. When Ms Dyer explained that it had been on a Saturday, the Claimant confirmed that she did not recall the conversation taking place. The specific words used were not put to the Claimant, and the remainder of the discussion, then focused on the allegation that the Claimant had taken JC to her own home.

56. Also within the bundle were notes of discussions that Ms Dyer had with three other support workers. In those, the discussion purely focused on the policy of washing clothes at clients' premises. One of the support workers spoken to was PM, and Ms Dyer did not raise what PM had told Ms Hughes that the Claimant had said to her, when challenged about washing being in the washing machine.

57. At this point it appears that Ms Dyer left the Respondent's employment. She did not appear to compile any form of investigation report, and nor did she have any discussion with Mr Wallbank about the allegations that she felt should be taken forward on a disciplinary basis. and the evidence that she felt pointed towards disciplinary offences having been occurred.

<u>Disciplinary hearing</u>

58. Mr Wallbank then wrote to the Claimant on 26 March 2024, inviting her to a disciplinary hearing on 28 March 2024 via teams. Mr Wallbank noted that the hearing would discuss the following matters of concern.

- *It is alleged you have willingly shared personal information to a Resident when providing support thus breaching the company rules and procedures for GDPR and those of professional boundaries.*

- *It is alleged on 03rd February 2024 you falsely told KD's mother about the bathroom not being in good condition and described it as a*

'Shithole' which could have put the company reputation at risk along with showing gross unprofessionalism and gross misconduct.

- *It is alleged that you used inappropriate language in front of a residents family member stating that 'That was my washing in the washing machine, and I will continue to do my fucking washing'. If upheld, this will amount to a Gross Breach in professional boundaries and professional misconduct.*

59. Mr Wallbank noted that if the Claimant was unable to provide a satisfactory explanation for the matters of concern, then a final written warning could be issued, or alternatively her employment could be terminated for gross misconduct. He reminded the Claimant that she could be accompanied by a fellow employee.

60. The meeting took place on 28 March 2024 with the Claimant being unaccompanied. Mr Wallbank was accompanied by a notetaker. Mr World Bank discussed the three allegations in turn.

61. With regard to the first allegation, the Claimant stated that she had not shared information with anyone, whether staff or otherwise, and not with JC or KD. When Mr Wallbank questioned whether information about a pay rise might have been shared, the Claimant enquired whether he was speaking about residents or staff, and confirmed that she would not discuss matters with a resident.

62. Mr Wallbank, then asked the Claimant if she had discussed personal information with staff about her thoughts and feelings of the Respondent, and the Claimant replied that that there had been discussions at the point of the TUPE transfer, and ongoing discussions about social care registrations, pointing out that a lot of the staff were coming to her with questions.

63. Discussion then moved onto the second allegation with Mr Wallbank asking if there was anything the Claimant wished to discuss about that. The Claimant replied that she would never describe the bathroom as a "*shithole*" and did not use words of that type. She confirmed that she could not remember a conversation with PD but confirmed that, on a Friday, she had gone in and seen the floor and raised that that with a senior staff member. She commented that if that was wrong then she held her hands up.

64. With regard to the third allegation, a lot of the discussion focused on whether the Claimant did put clothing in the washing machine as opposed to bedding, and whether it was appropriate or not to do that. With regard to the swearing allegation, the Claimant commented that she did not use swear words.

<u>Disciplinary decision</u>

65. Following the hearing, Mr Wallbank wrote to the Claimant on 2 April 2024. In that, he again set out the allegations and then noted that he considered the Claimant's explanations to be unsatisfactory for the allegations, commenting on them point by point.

66. With regard to allegation one, Mr Wallbank noted that the information provided in the statements from the residents and employees contained information that only the Claimant would have divulged, given her position as a support worker and her previous position as registered manager. He stated that he reasonably believed that the information provided was true.

67. With regard to the second allegation, Mr Wallbank noted that, given that the Claimant had stated that she had raised an issue with the cleanliness of the bathroom, he reasonably believed that the Claimant had made the comment to KD's mother. He commented that KD's mother had never raised any issue with the cleanliness of the bathroom or the service provided, and therefore there was no reason to doubt the statements given.

68. With regard to allegation three, Mr Wallbank noted that, given that the Claimant had admitted to washing her own clothing, and had not stated there was any strain on the relationship between herself and KD's mother, he had a reasonable belief that the Claimant had made that statement, as there was no reason for KD's mother to lie.

69. Mr Wallbank went on to note that, having carefully reviewed the circumstances and considered the Claimant's responses, he had decided that there was a reasonable belief that the allegations were made out, and that the Claimant's conduct had resulted in a fundamental breach of the Claimant's contractual terms which irrevocably destroyed the trust and confidence necessary to continue with the employment relationship. He commented that he had considered whether, in the circumstances, a lesser sanction may be appropriate, but was unable to apply a lesser sanction in this case "*because of the reasons given above*".

70. With regard to that, in his oral evidence Mr Wallbank appeared to suggest that a factor in his dismissal decision was that that he felt that the Claimant had been dishonest in her answers during the disciplinary hearing when denying that matters had taken place, feeling that that called into question the relationship between employer and employee. He agreed however, that that was not something he had referred to within his disciplinary outcome letter.

71. The effect of Mr Wallbank's decision was that the Claimant's employment ended summarily, i.e. without notice, on 2 April 2024. The Respondent then reported the Claimant to Social Care Wales, as it is required to do when dismissing anyone for gross misconduct.

<u>Mitigation</u>

72. The Claimant then commenced work with another employer on 24 June 2024, earning substantially more than she had with the Respondent. She left that employment after about a month, commenting in her statement that, with the ongoing investigation by Social Care Wales, she made the decision to leave the role pending the outcome from Social Care Wales. She confirmed however, that that there had been no pressure on her to resign from that role.

73. The Claimant subsequently got a job with another employer from 31 August

2024, again at a higher level of earnings than she had enjoyed with the Respondent. She noted that that had been before the Social Care Wales outcome, but that she had spoken to Social Care Wales and had been told that the best way forward for her would be to be honest in any job interviews and wait for the outcome.

74. Ultimately, Social Care Wales confirmed, by letter of 8 October 2024 to the Claimant, that they were not taking forward any matter relating to the grounds which had been considered, which were taking supported individuals to the Claimant's own home, where there was stated to be a lack of evidence, inappropriate language, and using supported individuals' appliances.

Conclusions

75. My conclusions in relation to the issues I had to determine were as follows.

Unfair dismissal

76. First, with regard to the unfair dismissal complaint, I was satisfied that conduct was the reason for dismissal, as was accepted by the Claimant in her Claim Form.

77. I then went on to consider whether dismissal for that reason was fair in all the circumstances, taking into account the ***British Home Stores v Burchell*** and ***Iceland Frozen Foods v Jones*** tests as combined by the EAT in ***Kefil***.

78. I was satisfied from Mr Wallbank's evidence that he had a genuine belief in the misconduct. He gave his evidence very fairly, being ready to accept contradictory points when made, and I considered that he genuinely felt that the allegations which he felt had been made out amounted to gross misconduct in that they impacted on the Respondent's reputation and its relationship with its clients and their parents. However, I was concerned that that genuine belief was not based on reasonable grounds, or that any grounds were formed from a sufficient investigation.

79. Fundamentally, I was concerned that the decision that Mr Wallbank reached in relation to the allegations did not reflect the underlying reality of the allegations themselves. As noted by the Court of Appeal in ***Strouthos***, it is fundamental that employees should know the case against them. In this case, that was the three allegations set out in M Wallbank's letter inviting the Claimant to the disciplinary hearing.

80. With regard to the first of those allegations, it was that the Claimant had "*willingly shared personal information to a Resident*" (my emphasis) breaching company rules and data protection rules. The focus of the exchanges in the disciplinary hearing about this allegation however, was on discussions the Claimant may have had with other staff members. Even Ms Hughes, who raised the original concern, had accepted that JC may not have had a direct conversation with the Claimant and may have overheard her speaking to others.

81. Bearing in mind that the allegation was that the Claimant had "*willingly*"

shared personal information to a resident, the conclusion reached that she had in such circumstances was, in my view, fundamentally flawed. There was no reasonable ground on which to conclude that the Claimant had directly shared personal information with JC.

82. Similarly, with regard to the third allegation, that the Claimant had used inappropriate language, which was directly quoted, "*in front of a resident's family member*", the formation of that allegation arose from a fundamental misconstruction of Ms Dyer's meeting with Ms Hughes and her report of what she had been told about the washing machine comment. The allegation was taken forward on the basis that the words used had been used to a family member of a resident, i.e. to PD, when the notes made clear that the words were said to have been used to a member of staff, PM. The discussion between Mr Wallbank and the Claimant during the disciplinary hearing purely focused on whether the Claimant had used such language in front of PD, when, in fact, there was never allegation that she had. Again therefore, I considered that there was no reasonable ground for Mr Wallbank's conclusion in this regard.

83. It was only the second allegation where I was satisfied that Mr Wallbank had reasonable grounds for believing that misconduct had taken place. There, the allegation was clear and, whilst denied, I was satisfied that Mr Wallbank had reasonable grounds on which to base his conclusion.

84. I had further concerns around the adequacy of the investigations. With regard to the first allegation, no information was obtained from JC about any personal information the Claimant may have divulged to her. Whilst the Respondent contended that it would have been inappropriate to have raised such matters with JC on a second occasion, a discussion with her having already been undertaken in relation to the initial allegation that the Claimant had taken her to her home, I noted that that discussion had taken place after all allegations had been raised as matters of concern. Therefore, Ms Dyer could have raised that point with her at that time.

85. In any event, bearing in mind that this was an allegation which ultimately formed part of a decision that the Claimant should be dismissed on the grounds of gross misconduct, I considered that any, perhaps understandable, reluctance on the part of the Respondent to speak to JC on a second occasion should not have overridden the requirement to undertake an appropriate investigation.

86. Similarly, there was no discussion undertaken with PD with regard to the second and third allegations. Again, whilst I could understand a degree of reluctance on the Respondent's part to raise such issues with a member of a resident's family, they were, as I have noted, forming part of serious allegations against the Claimant where she was potentially facing dismissal and where she was ultimately dismissed. It was, in my view, incumbent on the Respondent to have fully ascertained the basis of the allegations. Indeed, had it undertaken a proper investigation with regard to the third allegation it would have become very clear that the alleged inappropriate language had not been used in front of a family member.

87. I was not therefore satisfied that the Respondent had fulfilled the requirements of the ***Burchell*** test. I noted however, that Mr Wallbank in his evidence had confirmed that he felt that the three allegations, both individually and collectively, amounted to gross misconduct. I therefore considered it appropriate to consider the second allegation in isolation, and to assess whether, even though I was concerned about the scope of the investigation into it, the Respondent could nevertheless have reasonably felt the allegation was made out and then decided that dismissal would be appropriate.

88. With regard to the first element of that, notwithstanding the lack of any formal interview of PD, I felt that the Respondent could potentially and legitimately have felt that they had reached a genuine belief of misconduct based on reasonable grounds following a sufficient investigation. In that last regard, I noted that the scope of an investigation is to be considered in the context of the range of reasonable responses test.

89. In this case, I noted that Ms Hughes had fully reported the words that PD had said to her. I also noted that the Claimant clearly had expressed concerns internally about the state of the bathroom, and that it would not have been surprising, had PD attended the premises, that the Claimant would have sought to raise her concerns about the cleanliness of the bathroom, even if only to make it clear that it had not been she who had been the cause of it being in that state, through not fulfilling her cleaning requirements. It would not then have been any particular leap for the Respondent to conclude that the Claimant had described the bathroom as a "*shithole*", that being a very common description of a messy, untidy or unclean location.

90. However, even if I had been satisfied that any investigation deficiencies did not make the conclusions in respect of this allegation unfair, I would nevertheless have concluded that the sanction imposed in respect of it was outside the range of reasonable responses.

91. In that regard, I noted that Mr Wallbank confirmed in his evidence that he felt that highlighting the uncleanliness of premises could have led PD to consider that the Respondent was not an appropriate company to provide care to her daughter, and to have raised issues, presumably via the local authority, which could have led to the contract being withdrawn.

92. However, I did not consider that that was a particularly likely occurrence. To start with, Ms Hughes, in her email to Ms Dyer of 7 February 2024, in which she had reported the original incident, had confirmed that PD had made a point of saying that she did not really want or need to know about that matter. The issues raised by the Claimant did not seem therefore to have led PD to form any particularly adverse view of the Respondent in light of the Claimant's comments.

93. Beyond that, the concern had been raised on 7 February 2024, and therefore, had PD been sufficiently concerned to have raised it in the context of being unhappy that the Respondent was a suitable organisation to provide services to her daughter, then that would have transpired by the time the disciplinary hearing took place at the end of March and Mr Wallbank reached his decision

at the start of April. I did not therefore consider that the concern that Mr Wallbank expressed in his evidence realistically applied at the point he made his decision. I was therefore satisfied that the Claimant had been unfairly dismissed.

Wrongful dismissal

94. I was similarly satisfied that the Claimant had been wrongfully dismissed. As I have noted in relation to the unfair dismissal, the only specific allegation put to the Claimant which could objectively be viewed as having been made out, was the allegation regarding the discussion with PD about the cleanliness of the bathroom, in which the word "*shithole*" was used. I was satisfied objectively; by reference to the fact that the Claimant had raised a concern internally about the cleanliness of the bathroom, that she indicated she had no recollection of the discussion with PD when it is likely that she would have, and the fairly natural comment that would have been likely to have been made in such circumstances; that that the allegation had been made out.

95. However, I did not consider that it could objectively be said that that allegation involved an act of gross misconduct. As I have noted, by the time it was taken forward as a disciplinary action, it was clear that it had no overarching consequences as far as the Respondent's contract was concerned. I did not consider therefore that it could reasonably be said that that the Claimant's conduct in this regard amounted to gross misconduct. The claim of wrongful dismissal therefore also succeeded.

Compensation

96. With regard to compensation, I took into account the guidance regarding a week's pay as set out in section 221(2) of the ERA, and calculated that the Claimant's gross weekly pay at the time her employment ended, i.e. in the support worker role only, was £217.70 per week. That would then have been both a gross and net weekly average, had the relationship continued into the 2024/25 tax year, as the total level of earnings would have been under the personal allowance.

97. With regard to contributory conduct, as I have noted, I considered that the Claimant did commit an act of misconduct as noted in allegation two, although it was not an act of gross misconduct. I considered it would be appropriate to make a deduction in respect of contributory conduct to both the basic and compensatory awards, although I did not consider that that should be a particularly severe deduction, bearing in mind my conclusion that the dismissal was unfair overall. I considered it appropriate to make a deduction in respect of contributory conduct, to both the basic award and the compensatory award, at the level of 10%.

98. I also noted that the Claimant had not appealed the decision to dismiss her and felt that, had she done so, she could have raised some of the concerns that I have concluded led to her dismissal being unfair. It seemed therefore that an appeal under the ACAS code or, indeed the Respondent's own procedures, could have had an impact on what transpired. and therefore, that it would be appropriate to make a reduction in compensation under section

207A(3) of the 1992 Act. Again, I did not consider that it would be appropriate to make a particularly severe deduction, as the main contributor to the Claimant pursuing her complaints was the underlying unfair decision. I again therefore decided that it would be appropriate to make a deduction of 10% from the compensatory award, as section 207A does not apply to basic awards.

99. With regard to the mitigation of the Claimant's losses, I noted that she had fully mitigated her loss by 24 June 2024, and had voluntarily given up the job that she had obtained at that time. I did not consider it appropriate to order compensation beyond that point.

100. That then then led to the following awards:

a. Wrongful dismissal – 7 x £217.70 = £1,523.90

b. Unfair dismissal

i. Basic award – 1.5 x 7 x £217.70 = £2,285.85 – 10% = £2,057.24

ii. Compensatory award – Covering the period between the expiry of notice, 21 May 2024 to the start of the replacement job, 24 June 2024, = 4.6 weeks x £217.70 = £1,001.42 – 20 % = £801.14.

101. The total unfair dismissal award was therefore £2,858.38, and the overall compensation to be paid by the Respondent to the Claimant was £4,382.28.

Employment Judge S Jenkins
Date: 10 December 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

03 January 2025

Katie Dickson
FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

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