



EMPLOYMENT TRIBUNALS

Claimant: Miss K Scudder
Respondent: Lothlorien Community Limited

Heard at: Ashford **On:** 25 November 2019

Before: EMPLOYMENT JUDGE CORRIGAN
Sitting Alone

Representation

Claimant: In person
Respondent: Mr J Wallace, Counsel

RESERVED JUDGMENT

1. The Claimant was not unfairly dismissed and her claim is dismissed.

REASONS

1. The Claimant by her claim dated 2 May 2019 claims unfair dismissal. She confirmed she does not claim for unpaid notice pay.
2. The correct Respondent is as per the title above and the title of proceedings is amended accordingly.
3. The issues were discussed with the parties and agreed to be as follows:

Unfair Dismissal

- 3.1 What was the reason for dismissal?
- 3.2 Was it the potentially fair reason of misconduct?
- 3.3 Did the Respondent have a genuine belief in misconduct, held on reasonable grounds after a reasonable investigation?

- 3.4 Was it within the range of reasonable responses to dismiss?
- 3.5 Should any compensation or basic award be reduced or eliminated due to the Claimant's contributory conduct?
- 3.6 Should any compensation be reduced or eliminated to reflect the chance there would have been a fair dismissal in any event?

Hearing

4. At the request of the parties it was agreed that the witnesses would not be named. They are referred to here by their roles in respect of this case. On behalf of the Respondent the Tribunal heard evidence from the Claimant's Line Manager, the Disciplinary Manager and the Appeal Manager. The Claimant gave evidence on her own behalf and provided a written statement from her colleague who was her companion at her disciplinary meeting.
5. There was a bundle of 291 pages. The Respondent's representative prepared an opening statement and the parties made oral submissions. Based on the evidence heard and the documents before me I found the following facts.

Facts

6. The Claimant began working for the Respondent on 26 September 2016 as a Waking Night Support Worker at a 7-bedded home to service users with learning disabilities. The Respondent is an adult care company.
7. The Respondent has policies in respect of Privacy, Dignity and Personal Choice of service users (pp34-39); Safe Use of Restraint (pp40-46); and Safeguarding Adults (55-72). The Claimant had completed online safeguarding adults training and attended face to face training on 30 July 2018.
8. Examples of gross misconduct are listed at paragraph 5.1, page 52. This includes "abuse, violence or serious threat of such against persons....or ill treatment or discourtesy to colleagues, clients or residents and their relatives...." The Claimant accepted that restraining a service user by the wrist, and pushing the resident whilst her leggings were down would constitute gross misconduct. She accepted that it is clear from the policies that restraint should only be used in exceptional circumstances and that there are a range of alternative actions that should be taken including de-escalation.
9. On 8 August 2018 during a supervision, another support worker, colleague A, raised with the Site Manager (the Claimant's Line Manager) an issue about the Claimant's conduct toward a service user on 3 August 2018. Colleague A was asked to write a statement that day (p113). In essence she said she had come out of the kitchen and seen the Claimant standing behind the service user with both hands on the service user's wrists. The service user's trousers and pants were around her ankles and the Claimant asked Colleague A to pull them up

- while the Claimant held her wrists. While Colleague A pulled them up the Claimant took dirty tissues out of the service user's hands. Colleague A said the Claimant pushed the service user down the hallway whilst swearing "she will be in there all fucking day if you let her" with reference to the toilet. She said that when the Claimant and service user returned later that day from a day trip the Claimant had said "that was a fucking waste of time because all they were interested in was the food and drink and nothing else".
10. Colleague A had said she had been working with Colleague B in the kitchen so the Site Manager then spoke with him. He confirmed that he had seen the incident and broadly confirmed the account. He said the service user had looked distressed throughout. He was also asked to write the statement at page 114.
 11. The Respondent reported the incident to Social Services, the police and the CQC, as required.
 12. The Claimant was suspended on 10 August 2018 (her next shift) as confirmed in a letter of the same date (pp127-128). She was told it was in respect of allegations of verbal and physical abuse to a service user.
 13. The Respondent was asked not to conduct an internal investigation until the police had spoken to the Claimant (p116). The Claimant was finally invited to an investigation meeting on 27 November 2018. The Claimant was advised not to attend that meeting by her own lawyer. The meeting finally took place on 11 December 2018, conducted by the Claimant's Line Manager (the Site Manager).
 14. At the meeting (pp153-5) the Claimant made an allegation that her Colleague A had smelled of cannabis on 3 August 2018. She said the service user was in the toilet for 30-40 minutes. She said she had a habit of putting hands down the toilet so she kept checking on her. When she finished she had her leggings down and the Claimant had a bad shoulder so she could not pull them up. She said they were quite tight. She said she tried to get her to her room but the Service User refused to go so the Claimant called for Colleague A to help her pull up the service user's leggings. She said the Service User had remained covered by her dress and that she had checked no one was round the corner. She opened up the service user's hand to get the kitchen roll from it. She denied physically handling the service user or holding her by the wrists, or saying anything to her. She said the reason her colleagues had reported the incident was that they did not like her.
 15. She said she did guide the service user out holding her shoulders. She demonstrated this with the Line Manager. She did agree that the service user usually goes to the toilet on her own. She agreed she could see that it could be considered a breach of the service user's right to privacy and dignity (on her own account of the service user leaving the toilet not fully dressed). She said it was her colleague (Colleague C) who had sworn and said the day trip was a waste of time.

16. The Claimants' Line Manager met with Colleague C on 20 December 2018 to investigate the Claimant's account. Colleague C and the Claimant had taken the service user and another on a trip on 3 August 2018, just after the alleged incident.
17. Colleague C said she had been sitting in the car with the other service user and the Claimant had gone to get the service user concerned from the toilet. The Claimant was gone quite a while. When the service user concerned arrived she did not seem happy. Colleague C said that was all she knew until she found out a week after the incident what had happened. She said the service user had not been her normal self, and once she found out what had happened that put it in perspective (pp161-162).
18. There was a further investigation meeting with Colleague A to address aspects of the Claimant's account. She could not remember if the service user's waist was covered during the incident. She said she could not remember how long the service user's top was but suggested that perhaps it was just past her hips. She said she could not remember whether anything was said to the service user as time had passed. She said she did not want to get anyone into trouble. She said she felt bad for "her" (presumably the Claimant) but "would not like it to have it [done] to my own" (pp 166-167). There was also a further meeting with Colleague B. He altered his account to say the Claimant "guided" the service user, with her hands on her lower back, towards the back door at the end of the incident. He could not say whether or not the service user's waist was covered. He said the Claimant spoke to the service user aggressively when telling her to let go of the tissues but apart from that he did not hear anything else. He said the service user was red in the face and very distressed. He corroborated the comment on the return from the day trip that it had been a "fucking waste of time". He did not expressly specify who had said it, but the context is that he was describing the Claimant's conduct and he did not say anyone else had said it (pp 171-172).
19. The Claimant's Line Manager then produced the report dated 24 December 2018 at pages 177-182. The allegations set out were that on 3 August 2018 the Claimant had restrained the service user by both wrists, used inappropriate language, used physical force to remove her from the building, failed to follow the Privacy, Dignity and Personal Choice policy (by not allowing the service user sufficient time to make use of the bathroom and failing to ensure she was fully dressed before she left the bathroom, which led to her being exposed and improperly dressed in a communal area) and failed to report the incident.
20. The Line Manager added further matters taken into account at pages 179-180. She said that Colleague A and the Claimant had a good relationship and the Claimant had assisted Colleague A to complete her training. The service user's daily report did not have a full written account and there was no incident report until 8 August 2018 when the matter was reported to the Line Manager. The service user attends to her own toileting needs and usually comes out of the bathroom when she has finished, no matter how long it takes. There would have been no reason for the Claimant to assist her. No one had mentioned her calling for assistance. She concluded that the Claimant's motivation had been

- to hurry the service user in order to leave for their trip. She noted where colleague B's account did not support colleague A's. This appears to have been done with the guidance of HR, who pointed out not every allegation was corroborated by both accounts. She said the Claimant had not taken responsibility or reflected on what might have been done differently. The Claimant had attended her GP in July for depression but had said she did not need adjustments at work. She said there was no evidence of prior issues in the relationships with the Claimant and her three colleagues that day. It had not been noted that the service user had ever previously left the bathroom in a state of undress.
21. The Line Manager stated in evidence that no one had written up the incidents in the log that day and that was unusual. The log has a section headed incidents/accidents. The actions even on the Claimant's case were not in accordance with the plan, which was to verbally prompt the resident. She also said in evidence that during the investigation meeting the Claimant had demonstrated putting her hands on the Line Manager's shoulders and had done this without difficulty.
 22. It was recommended that the case proceed to disciplinary. The Claimant was invited to a disciplinary hearing on 8 January 2019 to address the same allegations. The letter warned that the conduct was potentially gross misconduct and that she could be dismissed.
 23. The disciplinary meeting was conducted by the Disciplinary Manager, a Registered Manager of another home. The Disciplinary Manager knew the Line Manager due to attending monthly manager's meetings but had no day to day involvement with her or the Claimant's place of work. She did not know the Claimant prior to conducting the disciplinary. The Claimant repeated her account. She said that she could not lift her arms above waist height (because of her injury). The minutes record that she demonstrated how she had guided the service user using her employee companion and in doing so placed both hands on her shoulders. I was told in evidence the service user is shorter than the Claimant's companion. She agreed the service user can pull her own trousers up and mentioned that on this occasion the service user's leggings were tight. She said she would check on the service user when she was in the toilet.
 24. At the end of the meeting she became distressed and wanted to hand in her notice. She was told that the proceedings would still continue so then she said she would not hand in her notice as she wanted to clear her name. In the meeting the Claimant mentioned text messages between herself and colleague C. The Disciplinary Manager considered that from the texts the Claimant appeared to be friends with colleague C. She mentioned issues with the Line Manager and other colleagues, but not Colleague A or B. The minutes record that she mentioned wider concerns including a colleague smelling of cannabis.
 25. The Claimant says she thought she would have a second disciplinary when she could bring additional text messages and medical evidence. The Disciplinary

Manager says she was asked to send in the text messages if she wanted them considered and she did not do this.

26. The Disciplinary Manager conducted her own additional investigation. She met with Colleague A on 15 January 2019. She was asked further how the Claimant was holding the service user's hands. She said they were in line with the service user's chest, and her elbows were bent. She said the Claimant's arms were not high as the service user is shorter than the Claimant. The Claimant's hands were near the service user's chest. She spoke with a fourth employee about the service user's need for support on the toilet. He confirmed she did not need support. This additional information was not shown to the Claimant.
27. The decision was communicated to the Claimant in writing in a five page letter on 16 January 2019 (pp203-207).
28. The Disciplinary Manager said that she preferred the accounts of colleagues A, B and C because of the "constant inconsistencies in the Claimant's interviews and disciplinary hearing" though she only specifically commented on the Claimant demonstrating she could lift her arms higher having said she could not lift above her waist. She also considered this inconsistent with what the Claimant had said about not being able to lift her arm above her head in a supervision on 21 March 2018 (not a matter she had discussed with the Claimant). She took into account the further information from colleague A (which had not been put to the Claimant but was set out in the letter) that the allegation was in respect of a height the Claimant can reach (see paragraph 26 above) and the description Colleague A gave of the Claimant holding the service user's wrists with her elbows bent. The Disciplinary Manager said that to achieve this must have involved force due to the distress the service user was showing. She also concluded that if the service user did not want to give her the tissue then taking it must have involved force. She considered that the service user usually attends her own toileting needs and comes out of the bathroom when finished no matter how long it takes. There was no reason for the Claimant to assist her. She concluded it was to hurry her because of the trip. She said that the Claimant had said that she could not assist the service user with her leggings because of her bad shoulder but according to the service user's daily report she had helped the service user with her personal care that morning (the daily report had not been discussed with the Claimant in the disciplinary meeting though this point is referenced in the investigation report).
29. The Claimant had said there was insufficient room in the bathroom which was why she was trying to get the service user to her bedroom. The Disciplinary Manager had visited the room and considered it to be sufficiently large to easily accommodate two people. She took into account there had been no previously logged incidents of the service user not being able to pull up her own trousers, she does not require support with this or in the bathroom generally and there had been no previous reports of her leaving the bathroom partly dressed. She said that the Claimant had been unable to account for why the service user had pulled up her own trousers in the morning and on her return from the activity (though this was not discussed in the meeting).

30. She also took into account that the Claimant had not documented the incident, when there had been an incident that required reporting even on the Claimant's account. She took into account the evidence given by Colleague C that the Service User was not her usual self and was more withdrawn than usual on the trip.
31. She felt that the actions constituted physical and emotional abuse and that returning the Claimant to the service would place the service user at risk. She found that the fact that the Claimant failed to recognize the incident as a cause for concern meant she was not reassured that there would be no further concern in respect of the Claimant's conduct to service users. She decided the conduct amounted to gross misconduct and the Claimant should be summarily dismissed.
32. In evidence, the Disciplinary Manager said the evidence she relied on was Colleague A's statement and the support plan. In her witness statement she better explained her thought processes. She preferred the evidence of the Claimant's colleagues as she felt it was backed up by the wider circumstances of the service user's abilities, the impending trip and the daily record. These are set out in detail in paragraphs a) to e) of her statement.
33. The Claimant was given the right to appeal which she exercised on 22 January 2019. She said she did not wish her job back but made a number of points. She said she could only move her arm from the elbow. She said she had not realised she was not allowed to put hands on service users' shoulders to guide them and she was not the only one who did this. She took issue with whether colleague B had even been there, as he had been in the kitchen. She queried the delay in reporting. She said she had been told that she could have another disciplinary hearing where she could produce further medical evidence and text messages but this had not taken place. She said she had not seen the minutes of the meeting and she had not signed them. She said she had been bullied at work. She queried the independence of the appeal officer. She said the statements of Colleague C to the police and to the Respondent were inconsistent.
34. The matter was referred to the Disclosure and Barring Service on 1 February 2019.
35. The Claimant was invited to an appeal meeting with the Appeal Manager, another Registered Manager. It took place on 25 February 2019. Each point the Claimant had raised was covered at least briefly. In the appeal the Claimant accepted looking back she should have written the incident up in the resident's log but had not. The minutes suggest she admitted that she had tried to remove the tissue roll from the service user's hands by holding her wrists. She disputes that this was said but I accept the record in the minutes and the evidence of the Appeal Manager that it was said. There was a note taker (although the original hand written minutes were not provided, only a subsequent typed version) so he had not been the person taking notes. The Appeal Manager said it would be extraordinary for him to make it up and I agree.

It is not simply one line in the minutes but a half page, and the answers recorded are otherwise consistent with the Claimant's case.

36. The Claimant disputed that she had demonstrated lifting her hands up to the alleged height in the disciplinary. She was not asked what further evidence she had wanted to present at another disciplinary meeting. She did however show copies of texts in the meeting (pp243-246) and provided further information as set out below.
37. On 26 February 2019 the Disclosure and Barring Service decided that it was not appropriate to place the Claimant on their barred lists and the Claimant would not be prevented from carrying out a regulated activity including working and volunteering with vulnerable adults.
38. The Appeal Manager conducted his own investigations with the Line Manager and Disciplinary Manager. The Claimant also provided medical evidence about her arm injury and that she could not lift her arm above shoulder level. She also provided a copy of her solicitor's letter (page 139). The Appeal Manager checked with the Disciplinary Manager what height the Claimant was able to raise her arms in the disciplinary and the size of the toilet. He confirmed with the Line Manager the service user's needs and that she was able to dress and use the toilet herself. He also discussed de-escalation strategies and she confirmed that it would be verbal prompting.
39. The appeal outcome was not communicated until 6 May 2019. The decision to dismiss was upheld. He did not comment on the point about Colleague B being present. In respect of the additional evidence of the Claimant he said "the disciplinary chair was confident based on all evidence observed at the hearing to make her decision and substantiate the allegation". He said the doctor's letter would not have changed the outcome. He agreed that the minutes of the disciplinary had not been provided but said this had no bearing on the outcome. Although the letter says the minutes were attached, in his evidence he said it was the appeal minutes that were attached. He considered the other matters raised to be irrelevant.
40. He expanded further in evidence. He considered the account of Colleague A in the solicitor's letter but that it was not the police's account but the solicitor's account of what the police had said. The letter said that the Respondent would not take into account the police investigation and that witness evidence in the disciplinary proceedings had been consistent. He explained in evidence that any restraint outside the care plan is an unapproved intervention especially when it was also not written up in the notes. He said the Claimant's case was colleagues had made it up, but he had established she held the resident's hands outside protocol and the relevant reporting was not followed. He would have expected the incident to be written up and discussed with the Line Manager.
41. No action was ultimately taken against the Claimant by the police/CPS.

42. In her witness statement the Claimant said that she had actually challenged Colleague A about smoking cannabis that day and in submissions suggested that was why colleagues had made up the allegations. However this was not recorded as having been said in the disciplinary process. I accept the evidence of the Site Manager and the Disciplinary Manager that she had not said this to them. In her witness statement she said she could not lift her arm above her head. When giving evidence she said her own doctor's evidence was inaccurate as at the time (prior to more recent surgery) she could only lift her arm 45 degrees but she could move it from the elbow. She also pointed out an identical phrase in colleague A and B's statement which she suggested meant they had colluded, but that point was not made in the disciplinary proceedings. Similarly she pointed out specific inconsistencies with where it was said she was holding the Service User's wrists but this was not said during the disciplinary. She also made points in respect of Colleague C's statement that had not been made during the process. The Claimant also provided a statement from the colleague who accompanied her in the disciplinary meeting. The statement was not part of the disciplinary process and queries the view about how high the Claimant had demonstrated lifting her arms, although unfortunately does not give specific distances in respect of what she witnessed the Claimant could and could not do.

Relevant law

Unfair dismissal

43. The test in relation to ordinary unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and**
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**

(2) A reason falls within this subsection if it-

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
- (b) relates to the conduct of the employee,**
- (c) is that the employee was redundant, or**
- (d) is that the employee could not continue to work in the position**

which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) . . .

- (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case.
44. In considering reasonableness in cases of dismissal for suspected misconduct the relevant test is that set out in *British Home Stores Ltd v Burchell* 1978 IRLR 379, namely whether the employer had a genuine belief in the employee's guilt, held on reasonable grounds after carrying out as much investigation into the matter as was reasonable in all the circumstances of the case.
45. In applying section 98(4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer's decision to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances. The range of reasonable responses test applies as much to the investigation as to the substantive decision to dismiss *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23.

Conclusions

What was the reason for dismissal? Was it the potentially fair reason of misconduct?

46. I am satisfied that the reason for dismissal was misconduct, namely the incident on 3 August 2018, which was sufficiently serious to be investigated by the police and reported to the relevant bodies. The Claimant herself accepts she was involved in an incident on 3 August 2018, though she does not agree with aspects of the conduct alleged.

Did the Respondent have a genuine belief in misconduct, held on reasonable grounds after a reasonable investigation? Was it within the range of reasonable responses to dismiss?

47. I accept the Respondent's witnesses all held a genuine belief that the Claimant had restrained the Service User; had used inappropriate language; had used physical force; had failed to follow the Privacy, Dignity and Personal

- Choice Policy by rushing her out of the toilet without being fully dressed; and failed to report the incident.
48. Turning to whether there were reasonable grounds after a reasonable investigation. I note that the dismissal letter, although lengthy, does not explain the reasoning for preferring the Claimant's Colleagues' accounts well, referring repeatedly to "constant inconsistencies" in the Claimant's answers without substantiating the comment. In my view the Claimant's accounts were consistent so it is not obvious what is referred to here. The Disciplinary Manager explained her thought processes much better in her witness statement and oral evidence.
 49. The Respondent conducted an investigation and then there was a Disciplinary meeting and an appeal, each of which were dealt with by different managers who did not have day to day involvement with the home. However there are some issues with the detail of the process followed. It is good practice to provide the minutes of a meeting promptly so that any comments that an employee has as to accuracy can be noted when the matter is still fresh in their mind. This is especially important where concessions or other statements made by the employee are relied upon. The Claimant never received the minutes of the disciplinary meeting during the process. However, although the Claimant had not had the disciplinary meeting notes the issue she raises in respect of whether she demonstrated lifting her arms to her companion's shoulders was raised and explored on appeal. She has not raised any other dispute about the content of the minutes.
 50. There were also a number of matters considered by the Disciplinary Manager which were part of her further investigation after the disciplinary meeting and were not discussed with the Claimant, though they were referenced in the outcome letter or the investigation report and she therefore had opportunity to raise them in her appeal. Similarly, she was able to provide the medical evidence, solicitor's letter and texts on appeal, even if she was not able to do so prior to the disciplinary outcome.
 51. The Respondent had statements from three colleagues which together supported the belief that the Claimant had rushed the service user to leave the toilet because she wanted to leave for the trip and Colleague C and the other service user were waiting; that this led to the service user leaving the toilet only partially dressed; that inappropriate language was used; that she did restrain the service user's wrists and pushed her down the hallway. All three gave accounts which supported the view that the service user had been distressed by the incident. The Claimant herself accepted their accounts in part. She accepted that she had gone into the toilet before the service user had finished and had brought her out of the toilet partially dressed. She accepted she had physically intervened with her hands on her shoulders to move her along the hall. She accepted that she was trying to get the service user to give her tissues and move to her bedroom, which the service user was not doing voluntarily.
 52. The Claimant's explanation for the differing accounts was that her colleagues did not like her. She did not at the time say that she had accused Colleague A

- of smelling of cannabis that morning. Both her Line Manager and the Disciplinary Manager considered the suggestion that the colleagues did not like the Claimant but did not find it backed up by the evidence. The Line Manager considered from her own experience that the Claimant and Colleague A had a good relationship. The Disciplinary Manager considered the Claimant's own text messages evidenced a good relationship with Colleague C.
53. The Respondent also considered the service user's plan and her normal needs in respect of getting dressed and going to the toilet and whether there had ever been any other documented incident of her coming out of the toilet partially dressed. It also considered the normal intervention which was de-escalation. The service user was normally able to go to the toilet without assistance and get herself dressed. There was no evidence to support the Claimant's explanation for why she went into the toilet, or took the service user out of the toilet before she was dressed. Instead the Respondent considered the wider evidence supported the view that the reason was the fact the others were waiting to leave for the day trip. The Disciplinary Manager took account that although the daily record for the service user, mostly written by the Claimant, did not contain any mention of the incident, it did say that the service users had not been interested in the day trip after lunch, which was consistent with the comment the Claimant had allegedly said.
 54. Although the Claimant denied she could have held the service user's wrists because of her arm injury, she did accept she had held her shoulders. By the appeal she had accepted that she had held the wrists too. From the outset she had accepted breach of the Privacy, Dignity and Personal Choice Policy and that she had not written in the incident report.
 55. Overall, the Respondent had reasonable grounds to prefer the accounts of the Claimant's colleagues and that she had done as they alleged, after a reasonable investigation. The accounts were not simply accepted but they, and the Claimant's account, were considered in the wider context including the service user's usual abilities and needs. Overall the Claimant had a reasonable opportunity to state her case and it was reasonably explored by the Respondent. I do not consider that the failure to provide the minutes renders the investigation unreasonable. I also consider that although it would have been better to make the Claimant aware of further investigations prior to making a decision, she was given a reasonable opportunity to address those points on appeal.
 56. There are further matters that the Claimant raised in this hearing (paragraph 42 above) which she did not raise in the disciplinary process. The Respondent cannot be expected to take account of matters that were not raised at the time.
 57. It was well within the range of reasonable responses open to the Respondent to dismiss in these circumstances. The Claimant accepted that the offence her colleagues described was serious enough to warrant dismissal. She simply challenged that she had done as they described. It was also reasonable for the

Respondent to take into account that the Claimant had not shown that she took responsibility or would learn from the incident.

Should any compensation be reduced or eliminated to reflect the chance there would have been a fair dismissal in any event? Should any compensation or basic award be reduced or eliminated due to the Claimant's contributory conduct?

58. It was not necessary to consider these issues as the dismissal was fair. However, for the avoidance of doubt, even if the dismissal was procedurally unfair due to the failure to provide the disciplinary meeting minutes and/or the failure to inform the Claimant and give her an opportunity to comment on the further investigations at the disciplinary stage, then I consider there would have been a fair dismissal in any event. Had the Claimant been provided with the minutes and further investigation, I find the Respondent would have reached the same substantive conclusions on the evidence. The Respondent would still have preferred the Claimants' colleagues' evidence for the same reasons.
59. Moreover, the Claimant would still have accepted breach of the Privacy, Dignity and Personal Choice Policy by bringing the service user out of the toilet in a state of partial undress, and that she failed to log the incident. By the appeal she would still have accepted holding the service user by the wrists. Therefore even if the dismissal was procedurally unfair for the above reasons, the Claimant contributed substantially to the dismissal.

Employment Judge Corrigan
6 March 2020