



EMPLOYMENT TRIBUNALS

Claimants: 1. Mrs S Ridge
2. Mrs R Grainger

Respondent: Avery of Loxley Park (Homecare) Ltd

Heard at: Leeds Employment Tribunal (via CVP)

On: 22 February 2021

Before: Employment Judge K Armstrong

Representation

Claimant 1 (Mrs S Ridge): In person

Claimant 2 (Mrs R Grainger): Mr S Walton, lay representative

Respondent: Mr M Carroll, respondent's employee relations advisor

RESERVED JUDGMENT

1. The correct legal identity of the respondent is Avery of Loxley Park (Homecare) Ltd, and the claim forms are amended accordingly.
2. The first claimant, Mrs S Ridge, was unfairly dismissed.
3. The second claimant, Mrs R Grainger, was unfairly dismissed.
4. The compensatory awards shall be reduced by 60% on the grounds that it is just and equitable to do so because there was a 60% chance each claimant would have been dismissed had there been a fair hearing.
5. The compensatory awards shall be reduced by a further 20% as it is just and equitable to do so as a consequence of conduct of each claimant which contributed to their dismissals.
6. A separate hearing shall be held to deal with the question of remedy.

REASONS

Claims

1. Both claimants bring claims for unfair dismissal, arising out of related circumstances. Both were dismissed by the respondent on 7 August 2020 after disciplinary proceedings which took place following anonymous reports of misconduct from colleagues. Mrs S Ridge brought a claim for unfair dismissal on 18 October 2020 and Mrs R Grainger brought a claim for unfair dismissal on 19 October 2020. The claims were listed to be considered together at the direction of REJ Robertson dated 11 February 2021.

Conduct of the hearing

2. The claim was heard via video hearing (namely CVP) due to COVID-19 restrictions. All parties were able to connect to the hearing and participate fully.
3. Mrs Ridge represented herself at the hearing. Mrs Grainger was represented by Mr Walton. The respondent was represented by Mr Carroll, who is employed by the respondent as employee relations advisor.

Preliminary Issues

4. Mr Walton applied on behalf of Mrs Grainger to postpone the hearing today, on the basis that the bundle was received later than directed. The respondent accepted that the bundle was served approximately a month later than directed. Mrs Grainger accepted that she had previously seen all the documents contained in the bundle which related to her claim, other than the ET3 response form, prior to the 13 February 2021. Mr Walton submitted that the late receipt of the ET3 put her at a disadvantage because it contained an allegation that similar complaints had been made to a previous manager but not dealt with. Had Mrs Grainger been aware of this allegation before, she would have obtained anonymous witness statements from colleagues to rebut it. Mr Carroll acknowledged that the respondent had not adduced any direct witness or documentary evidence to substantiate this allegation. The respondent did not seek to rely on it in proving their case. In the circumstances, I decided that it would not be proportionate to postpone the hearing to allow Mrs Grainger to obtain further evidence. The Tribunal would not in any event admit statements from anonymous witnesses without exceptional circumstances. There was no evidence from the respondent which she would need to rebut, and as the respondent do not rely on this allegation, I do not need to make any findings on it.
5. As a preliminary issue, I had to determine whether to permit Mrs Grainger's claim to proceed as the name of the respondent on her ACAS certificate (*'Avery Healthcare Group'*) is not the same as the name given on her ET1 claim form (*'Avery Health Care'*). I have a discretion to permit the claim to proceed if I consider that this is a minor error and it would not be in the interests of justice to reject the claim. The respondent did not object to the claim being permitted to continue. I was satisfied that this is a minor error.

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'*Heathcare*' is clearly a typographical error and I do not find that the addition of 'Group' is a substantial difference. The respondent is clearly aware of these proceedings and has been able to prepare for them appropriately.

6. The name given for the respondent also differed between both claimants' ET1s ('*Avery Health Care*') and the respondent's ET3 ('*Avery of Loxley Park (Homecare) Ltd*'). The respondent informed the Tribunal that Avery Health Care is an overarching organization which 'manages' two companies: Avery of Loxley Park (Homecare) Ltd and Avery of Loxley Park (Operations) Ltd. The claimants were employed by the first of these, and it was agreed that this is the correct legal identity of the respondent.

Issues for the tribunal to decide

7. At the outset of the hearing I discussed with the parties the issues for me to decide. The parties agreed that the reason for both claimants' dismissal was conduct.
8. Following discussion, the following issues were identified and copies of this list were sent to the parties by email:
 - (1) Did the respondent act reasonably or unreasonably in all the circumstances (including the size and administrative resources of the undertaking) in treating the claimants' conduct as sufficient reason for dismissing each of them?
 - (2) In relation to each claimant:
 - (i) did the respondent believe that the claimant was guilty of misconduct;
 - (ii) did the respondent have in mind reasonable grounds on which to sustain that belief; and
 - (iii) had the respondent carried out as much investigation as was reasonable in the circumstances?
 - (3) Did the respondent's action fall within the band (or range) of reasonable responses open to an employer?
 - (4) In particular, was the disciplinary process reasonably fair having regard to the following issues raised by the claimants:
 - (i) The amount of information provided to the claimants about the alleged incidents including the anonymity of the complainants, and when and where they took place. The Tribunal will consider the guidelines set out in *Linford Cash and Carry v Thompson* [1989] IRLR 235 (EAT);
 - (ii) The change of the disciplinary charge during the disciplinary hearing;
 - (iii) The fact that the appeal was undertaken on paper only;
 - (iv) Did the respondent take into consideration the claimants' length of service and previous work record?
 - (v) Was suspension prior to the investigatory meeting fair?
 - (vi) Were sufficient minutes of the investigation meetings provided? And were they accurate?

- (vii) Was the investigation sufficiently impartial?
 - (viii) Did the claimants have sufficient notice of the disciplinary hearing in order to prepare?
 - (ix) Severity of the sanction in light of previous service and character references?
9. At the end of the hearing, I raised with the parties that if my decision were that the dismissals were unfair due to the procedure followed, I would need to consider whether I should reduce their awards due to the likelihood that they would have been dismissed had a fair procedure been followed ('a *Polkey* reduction'), and I would also need to consider whether it would be just and equitable to reduce any compensatory award due to the claimant's contributory conduct (s.123(5) Employment Rights Act 1996 (ERA 1996)).

Evidence

10. I have considered a bundle of documents prepared by the respondent, consisting of 109 pages. This has been converted by me into a single pdf document and page references refer to the electronic pagination of this document. I was also provided with witness statements from Mrs Grainger, Ms Maria Booth (Reginal Manager, disciplinary officer) and Ms Emma Miles (Regional Manager, appeal officer).
11. Mrs Ridge did not provide a witness statement. I permitted her to rely on the statement of her claim in her ET1 as her witness evidence. The respondent did not object to this. Mrs Ridge also referred to a number of other documents which she said she had sent to the Tribunal in December. These could not be located by the Tribunal and I asked Mrs Ridge to send them again. On the date of the hearing the Tribunal received from Mrs Ridge three references from previous employers. These were forwarded to the respondent and admitted in evidence.
12. The day after the hearing, on 23 February 2021, Mrs Ridge provided a further set of documentation, consisting of character references from colleagues at the respondent, which were not produced to the respondent during the disciplinary process. She requested that the identity of these colleagues be kept confidential. She also submitted what appeared to be an email confirming that these had been sent to the Tribunal on 10 December 2020. That email had not been located by the Tribunal following a request from me at the hearing date on 22 February 2021. This late evidence was not admitted as it was submitted after the close of the hearing. Furthermore, the Tribunal will not admit anonymous evidence other than in exceptional circumstances. Mrs Ridge had an opportunity to submit any evidence which may have been missed by the Tribunal at the outset of the hearing on 22 February 2021 and she did so by providing other references. In any event, evidence regarding the claimant's good character which was not provided to the respondent during the course of the disciplinary procedure would not have assisted me in reaching my decision.
13. Mrs Grainger provided a number of documents to the respondent prior to the production of the bundle which the respondent accepted it had not included in the bundle, consisting of records of her formal supervision

meetings. There was no objection to the Tribunal admitting those documents, which I labelled 'supplementary bundle pages 1-29'.

14. I heard oral evidence from Maria Booth, Emma Miles, Mrs Ridge and Mrs Grainger. All parties had the opportunity to ask questions of each witness.

15. The parties provided written submissions on 1 March 2021.

Background

16. The respondent operates a home at Loxley Park, Sheffield. The home is described as not being like a 'traditional' care or residential home. The residents are referred to as 'members' and that is the terminology I adopt in this judgment. Not all members require care. The running of the premises is divided between two separate entities – homecare and operations. The operations side employs 34 staff including catering, maintenance and well-being / activities staff. The care side employs 16 domiciliary staff, which included the claimants. Loxley Park is managed by a General Manager. A short time before the pandemic crisis started in early 2020 the previous General Manager left and Sue Ravenhall was appointed to the post.

17. Mrs Ridge commenced employment with the respondent as a care team leader on 29 May 2017. Mrs Grainger commenced employment as a care assistant on 28 May 2012. Both were dismissed for gross misconduct on 7 August 2020.

18. At some point after her appointment as general manager, Mrs Ravenhall became aware of some issues relating to the claimants and one other employee. There is a dispute as to how this came about. Ms Booth's evidence is that there were '*a number of unhappy staff in the home who had significant concerns about certain other staff*' and who came forward with complaints. The claimants dispute this account. Mrs Grainger's evidence was that she believed Mrs Ravenhall initiated the investigation by calling members of staff in to her office and asking them about the claimants, before writing down what they told her and asking them to sign it. There is therefore not a dispute that the statements were actually made by members of staff.

19. Mrs Grainger also stated that she felt Mrs Ravenhall was not impartial because '*For some reason she wanted me out. I really don't know what the reason was.*' This is not accepted on behalf of the respondent.

20. Mrs Ravenhall took a number of statements from employees who remain anonymous. The statements appear in the bundle at **49-64**. I do not have direct evidence from Mrs Ravenhall as to the reasons that these individuals requested anonymity. In her witness statement Ms Booth says '*many would only share information on the condition that they remained anonymous.*' In oral evidence she expanded on this to explain that they were scared of '*retribution..being bullied*'. Ms Booth was provided with the full statements and she redacted the names of staff members before the statements were sent to the claimants.

21. The claimants were aware of the names of the members (i.e. residents) involved, but I have adopted the letters A-D for the purposes of this judgment in order to protect confidentiality.

22. There are five reports relating to Mrs Ridge, as follows. Each paragraph number is a separate document, apparently from a different witness although all are anonymised:

(i) *'Susan Ridge discusses members in training, this leads her to personal experiences of members. She has brought up A and how A can be abrupt with people. SR has said "I will remember that!"' Undated. (52)*

(ii) *'I XXXX witnessed Susan Ridge Team Leader speaking to A in a horrible abrupt manner. SR told her to go in her apartment, she was not nice to A at all. I then witnessed SR say "I will save that one for later" I do not think that is acceptable behaviour from a member of staff.*

I was very worried about A and nearly called her son, I have been constantly worried about this and feel I should have done more. I have reported this as it is the right thing to do and I want to work with caring people in a safe place' dated 28.07.2020 (55)

(iii) *'On the 29.07.2020 Susan Ridge team Leader answered the emergency call phone, B member apartment X had activated her emergency call pendant. On answering the phone SR said "I cannot hear her" and disconnected the call. At no point did she go and check on B but XXXX did to find B was safe and well' dated 29.07.20 (56)*

(iv) *'I find Susan Ridge quite offhand with member A, there was an incident where A wanted a photograph taking with some flowers. SR was completing her MCM. XXXX asked SR but SR replied and said she has already asked me you are to soft Brenda.*

I have also been informed by one of my team XXXX, well being assistant of an incident, SR allegedly said to XXXX if you pick on one of us in care then you pick on us all.' Dated 29.08.20 (63)

(v) *'I have found Susan Ridge TEAM leader off hand with members and smart with her attitude towards them.*

It also depends what mood SR is in on what reaction / answer you get. There are times when members who do not have care need assistance / information, SR replies and says "they do not have care".

There are times when a particular member A has needed assistance and SR has replied "she is crying wolf". Dated 29.07.20 (64)

23. There are eight reports relating to Mrs Grainger. The reports are slightly longer and therefore I do not propose to recite each document in full, and have summarised the key points below. Again, each paragraph number is a separate document, apparently from a different witness although all are anonymised:

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- (i) During a care call to C, RG had her music on. She was abrupt when asked why she had the music on. She said C *'had been difficult that morning.'* Undated. (49)
- (ii) *'I have witnessed R Grainger raise her voice to C she has shouted and said "you will have to wait" after having had an extended break.*
RG doesn't help other carers when she is on a break, and then takes a longer break.
RG said: *"its better when there is no management on at the weekends"*
Undated (53)
- (iii) RG is *'very abrupt with the members at Loxley Park, she is not nice to them and has no time for them, especially members who have memory problems.*
I feel very uncomfortable at the weekends as RG does what she likes and when she is with her work mate. ...
RG has no patience at all with C a member at Loxley...
RG does not make it easy for anyone who she does not like, she is not part of the team at all. I hate having to come to work when she is on especially at a weekend when Sue Ravenhall is not here.
RG raises her voice to member C to, I no she is deaf but the manner is appalling.
I am also afraid of the repercussions if my name is made public, my life will be horrible at work. But it is not right members should be protected.'
Dated 25.07.2020 (54)
- (iv) *'There was an incident when D member at Loxley park came out of her apartment in her nightwear, D appeared to be dizzy and fell to the floor. Rachel Grainger carer said "D was attention seeking".'* Dated 29.07.2020 (57)
- (v) RG is very abrupt with some members, *'she raises her voice / shouts when speaking to them...*
There are times when I feel some of the members are put to bed far to early also when she is on duty.
The members with memory problems get the harshest treatment not the members who are mentally alright.
I have also seen her very off hand with a member of the care team.
I have also seen RG sat when another one of the care team is running about, she is also with a certain member of staff when they are on shift together.' Dated 29/07/2020. (58)
- (vi) During a care call at C apartment RG put on her own music. She said *"she put the music on so that she does not have to listen to J going on."*
XXXX finds it difficult working with RG and *'feels she is always belittling her and telling her how to do her job...*
RG is also abrupt with members and dismissive who have memory problems...
RG and another individual were on a shift and neither had an emergency call phone on them. They sat in the IT room listening to music. XXXX has found the emergency call phone on mute after RG has been on shift.

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RG on numerous occasions has not assisted XXXX with her care calls after RG has completed hers.

She is *'always on her mobile phone'* during work time.

Dated 29.07.2020 (59).

- (vii) RG is *'very abrupt towards members'* and shows little patience. Member C is a different person with other staff. RG played music on her own mobile phone during a call with A. *'RG told me she has to play her music in difficult calls as it relaxes me'*. XXXX has also been told by another member of staff that RG plays music in NA's care calls. *'I do not like working with RG I feel very awkward. At no time would she help or support me.'* *'RG has also sent me to do her calls.'* Dated 29.07.20 (60).
- (viii) During a call with A, RG had her own mobile phone on playing music. *'At no point did she ask A if it was alright to play music.'* During the call the deputy manager came in and RG was *'rude and not nice'* towards her. *'I find RG very negative and always rushes.'* Dated 19.07.2020 (61).

24. Both claimants were suspended with effect from the end of their shifts on 28 July 2020 (67-68). Mrs Grainger in particular says that this suspension was unfair as it took place before the investigation was complete. The respondent had some of the statements above but not all. There had been no investigatory meeting with the claimants. The respondent says that it was entitled to suspend the claimants pending completion of the investigation.

25. On 30 July 2020, Sue Ravenhall conducted investigatory interviews with both claimants.

26. The minutes of the meeting with Mrs Ridge are at 69-70. Mrs Ridge denied being abrupt with members. She accepted having a couple of *'run-ins'* with member A, including incidents when Mrs Ridge had *'walked out'*. She denied saying *'I'll save that one for later'*. She said she knows A has mental health issues, and said *'I know I'm never going to win with her'*. She accepted she had on occasion turned off the emergency buzzer when B called but said she always checked on her within 5-10 minutes, but denied that she would ever turn it off and not respond.

27. The minutes of the investigatory meeting with Mrs Grainger are at 71-72. She accepted that she had played music during a call with C. She said she had documented this, she had asked C before doing it, and she felt that it was acceptable. She volunteered that she also played music in another member's room. She accepted saying that she liked to play music in difficult calls. She said C's call *'is really difficult'*. She said *'you have to talk loudly as she is deaf.'* She denied changing another carer's call for someone she preferred to work with. She said she supports the team, although *'don't always agree as we are all individuals'*. In terms of members she said *'My tone may be a bit harsh but it is always in their best interest.'* When asked if she was abrupt when challenged about playing music she responded *'Maybe but people sometimes think that'*. She was asked whether she felt other staff stood back because she was straight to the point. She

responded *'It's my personality. I can't change'*. By way of closing remarks she said *'If I'm going to be terminated can you ask the members what care I provide. I'm not always good with my wording. That's just me.'*

28. There is a dispute as to when the minutes were provided to Mrs Grainger. Mrs Grainger says she did not receive hers until after the commencement of these proceedings. She accepts that she did not raise this at the disciplinary hearing, but says that this is because she was so distressed she didn't think to do so. The respondent says they were sent with the documentation for the disciplinary hearing, and points to the minutes of the disciplinary hearing in which Mrs Grainger says that she has received all documentation. Ms Booth's oral evidence was that she relied on Ms Mace (HR manager) to send all the relevant documents and believed that she had done so.
29. The following day, 31 July 2020, letters were drafted inviting both claimants to disciplinary hearings to be held on 5 August 2020 (**73-74**). The letters are identical and set out the disciplinary charge as *'allegations of verbal abuse towards members of Loxley Park.'* The letters inform the claimants that the charges could constitute gross misconduct which could result in summary dismissal. The letter states that copies of all relevant documents will be posted on Monday 3 August.
30. There is an issue as to how much notice was given of the disciplinary hearings. Mrs Grainger states that she received the relevant documents the day before the hearing. Ms Booth was unable to give conclusive evidence, and had relied on Ms Mace to send the documentation.
31. The hearings both took place on 5 August 2020. The meetings were chaired by Maria Booth, and Jane Mace, HR Manager, was present as note-taker. There are handwritten minutes in the bundle at **75-79**. These are very brief notes and are not especially helpful in understanding what was said during those meetings.
32. It is recorded that Mrs Ridge said that A had *'mercurial episodes of wanting to have a go at me'*. She denied not answering the buzzer. She said she had no recollection of the alleged incident involving a photograph. She accepted saying *'if you pick on one of us in care you pick on us all'* but that this was said in jest. She denied responding to requests from some members by saying *'they do not have care'*.
33. Mrs Ridge denied changing rotas. This allegation does not appear in the statements produced in the hearing bundle. In oral evidence, Ms Booth accepted that this had not been raised with Mrs Ridge before the hearing. Mrs Ridge stated that she had seen a statement making this allegation before the meeting, and that Ms Booth had not had it. In her witness statement, Ms Booth says that she discussed two rotas at **65-66** with Mrs Ridge in the meeting. However, in her oral evidence she stated that in fact she had looked at these rotas after the meeting. This is in accordance with the dismissal letter (see below).
34. There was some further discussion regarding A, and it is not clear from the minutes exactly what was said but it is recorded that Mrs Ridge had *'a heated conversation'* with somebody that day, and that *'she might just be*

trying to be nasty'. Mrs Ridge said she was very upset that this had happened, and it felt like a *'witch hunt'*.

35. It was accepted in evidence that one of the statements was produced to Mrs Ridge for the first time during the disciplinary meeting, and that this was in error. Both Mrs Ridge and Ms Booth were unclear in their recollections as to which statement this was.
36. At the outset of Mrs Grainger's meeting she produced some personal statements. I assume that these are the ones in the bundle, as I have not been provided with any others.
37. The minutes of the meeting with Mrs Grainger appear at **77-78**. Mrs Grainger accepted playing music during difficult calls, but said that the deputy manager was aware of this and had not told her not to. She accepted that she does *'seem to be abrupt'*, but not with members. She again denied changing care calls, and accepted that her tone could be *'harsh'*. She denied rushing and said *'I like to do things right'*.
38. Mrs Grainger discussed that she felt another carer had an issue with her and never speaks to her. She said that sometimes she is tarred by association with a particular colleague, accepting that they could be loud but they never intentionally make anyone uncomfortable.
39. Mrs Grainger denied saying that D was *'attention seeking'*. She denied being dismissive of members with memory problems, or clicking the phone off and not attending to a call. I note that this allegation is not contained within the documents produced to the Tribunal. She accepted having her mobile phone on her in case her son needed to contact her. In her final remarks, Mrs Grainger said *'A witch hunt. It's not about members – it is about the way I am. No filter. I don't think I deserve to be sacked.'*
40. After the disciplinary, Ms Booth went back to speak to Brenda Ridgeway and 'Paul' (**50 -51**) regarding the allegations against Mrs Ridge. Mrs Ridge had said that Paul was present during the conversation when she said *'if you pick on one of us in care you pick on us all'* in jest and was not offended. He had no recollection of this conversation. Brenda Ridgeway was asked for more information regarding the incident where Mrs Ridge allegedly refused to take a photograph of some flowers for a member. She said that Mrs Ridge had pulled a face *'like "she saw you coming" or "soft touch"'*.
41. Ms Booth also obtained copies of rotas (**65-66**), which she concluded contained amendments in Mrs Ridge's handwriting. Mrs Ridge denies that it is her writing.
42. She also looked at the *'MCM'*, an electronic case record, for the call to C in which Mrs Grainger accepted playing music.
43. Ms Booth did not inform the claimants that she had obtained this further evidence, it was not sent to the claimants and they were not given an opportunity to comment on it.
44. Both claimants were dismissed by letters dated 7 August 2020.

45. In the letter to Mrs Ridge (81-82), Ms Booth sets out that in addition to allegations of verbal abuse towards members (as per the invitation to disciplinary), *'I informed you at the hearing that having reviewed all the statements presented it was particularly evidence that there were also concerns with regard to your conduct and attitude with members of staff of Loxley Park.'* This is not recorded in the minutes of the disciplinary meeting.
46. Ms Booth sets out some of the content of the disciplinary meeting, as recorded in the minutes, and the further evidence she obtained. Having set out the evidence, Ms Booth concludes:
- 'I conclude from your responses to my questions, the information provided to me in the statements and the further questions I have asked, it clearly indicates that you are insensitive to people's needs and made the witnesses feel very uncomfortable.'*
47. Ms Booth sets out that she checked a sample of rotas and found 5 changes *'in your handwriting'*. She accepted Mrs Ridge's evidence that she had not turned off a buzzer without responding to a call.
48. She then sets out her decision:
- 'The statements are all consistent in that your actions do make people feel insecure and fearful. I therefore conclude that your responses to the allegations are unacceptable. This is tantamount to bullying and harassment. Avery Healthcare do not tolerate bullying or harassment in any shape or form.*
- My decision is therefore to summarily dismiss you from your employment with effect from today's date.'*
49. Ms Booth also wrote to Mrs Grainger (83-86). In similar terms she states that the disciplinary charge now included her conduct and attitude towards members of staff.
50. She sets out the evidence regarding playing music on a care call. She concludes as follows: *'I fail to see how the music could be beneficial for the member as this would not be heard by the member as she has hearing difficulties, and the fact that you said the music was playing in the kitchen area, which is some distance from the bedroom. I conclude therefore that you played the music for your own benefit.'*
51. In terms of the allegation of being harsh with members, Ms Booth states: *'You gave me examples of when you needed to be firm to get compliance for instance "Come on stand up for me". The statements submitted all refer to you being harsh and the people referred to within the statements have dementia. I discussed how a persons vibes could have a negative impact on another's behaviour and that is how your actions and behaviours are impacting on members and staff alike. This is indicative of you using your authority over people who are unable to fully voice their opinions. I conclude therefore the statements are substantiated.'*
52. In terms of allegations of not answering buzzers, Ms Booth spoke to Sue Ravenhall after the disciplinary hearing who confirmed the explanation that

Mrs Grainger had given that if someone else picked up the buzzer, all buzzers would turn off. She observes *'however the various statements indicate that you refuse to answer the calls.'*

53. In terms of use of mobile phones, Ms Booth indicates that Mrs Grainger accepted her son could have contacted her using the landline, and that the policy prohibits mobile phones in the home.
54. Ms Booth sets out that Mrs Grainger denied changing staff allocations on care rounds. However, *'the statements submitted claim that this is the case. I therefore conclude that you do play an active part in doing this.'* She does not give a reason why she prefers the statements to Mrs Grainger's account.
55. Ms Booth sets out two examples that Mrs Grainger gave of where she felt that other staff hadn't treated her well. Ms Booth implies that this should have been dealt with by Mrs Grainger *'talking through to reach amicable solutions.'* She also sets out another example given by Mrs Grainger of an occasion when she was previously *'up on a charge'* and had been told to apologise to a colleague after saying to a housekeeper *'well go and get her then'* in relation to a member who had left the premises. Ms Booth sets out that *'your response should have been different and supportive.'* Ms Booth sets out a fourth example that Mrs Grainger put forward in her disciplinary meeting of saying about members on occasion *'God who got him/her up today, look at the state of them.'*
56. Ms Booth's decision is as follows:

'I have carefully considered all the facts and I can see from the statements provided and from examples that you voluntarily informed me of as listed above, that you do not in fact treat your colleagues fairly or with respect. This is tantamount to bullying and harassment. Avery Healthcare does not tolerate bullying and harassment in any shape or form.

The statements are all consistent in that your actions do make people feel insecure and fearful. I therefore conclude that your responses to the allegations are totally unacceptable.

My decision is therefore to summarily dismiss you from your employment with effect from today's date.'

57. Both letters set out the claimants' right of appeal. The claimants both appealed against their dismissal.
58. Mrs Ridge's appeal letter has not been produced to the Tribunal. Her grounds of appeal are set out in the appeal outcome letter, in which it is stated that the appeal was received on 17 August 2020 (89):

*'(1) You felt you gave satisfactory responses in your investigation meeting, suspended for protection only and had not expected it to go further;
(2) Not enough time to prepare for the disciplinary meeting;
(3) Statements did not contain any real details or actual facts;
(4) Asked about things I was not aware of and statements did not tally;
(5) Minutes from investigation hearing did not make sense;*

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- (6) Allegation was for verbal abuse but dismissal is for harassment and bullying of staff;*
- (7) Clean record, decision is unfounded and positive testimonies collected and sent;*
- (8) Final dismissal letter was not sent out'*

59. Mrs Grainger's appeal letter is at **86**. It is undated but is stated by the respondent to have been received on 12 August 2020. She sets out her reasons for appeal as follows:

- '(1) Time frame: 28th July, verbally suspended by SR before an investigation meeting had taken place (breach of procedure);*
- (2) Failure to send notes from investigation meeting, still not received;*
- (3) Misrepresentation during disciplinary meeting, including comments in other colleagues hearing, page 2 paragraph 2 of my dismissal letter, also page 2 paragraph 7: these comments were made by LS after the disciplinary (breach of ACAS code of conduct), page 2 paragraph 6: comments that were said after the hearing had been concluded;*
- (4) Lack of impartiality, another manager should have been brought in to carry out the investigation, tried to prove guilt, fait accompli;*
- (5) Not enough time to prepare a case, just 24 hours;*
- (6) Severity of the punishment unjust, I feel like I have been picked on;*
- (7) Uncorroborated evidence, new evidence;*
- (8) Clean disciplinary record.'*

60. On 17 August 2020 Ms Booth wrote to both claimants acknowledging their appeals and informing them a 'desktop exercise' appeal would be carried out by Emma Miles, regional manager (**87**).

61. Ms Miles did not speak to the claimants as part of her consideration of their appeals. She did speak to Mrs Ravenhall and Ms Booth. There are no records of these discussions.

62. The outcome of Mrs Ridge's appeal was dated 1 September 2020 (**89-90**). Her dismissal was upheld. Ms Miles adopted the same numbering as in Mrs Ridge's appeal and concluded as follows (I have summarized her conclusions):

- 1) The respondent's policy permitted suspension pending investigation at times. Suspension itself is not a disciplinary sanction. Mrs Ridge's answers in the investigation were weighed alongside all the evidence.
- 2) The policy does not state a timeline for the meeting. It should be as soon as reasonably practicable.
- 3) She looked at the statements and can see evidence of details and facts.
- 4) She acknowledged that there was 'confusion' regarding statements, but Mrs Ridge did not request an adjournment and it did not make a difference to the outcome in any event.
- 5) The investigation minutes are not a word for word account. The disciplinary officer acted correctly in seeking clarification from the investigating officer.
- 6) The full investigation raised further concerns and these were set out during the disciplinary meeting.
- 7) The offences constituted gross misconduct under the respondent's procedure and therefore instant dismissal was warranted.

8) The dismissal letter was posted on 8 August, postal delays were beyond the respondent's control and it would not have made a difference.

63. The outcome of Mrs Grainger's appeal is dated 4 September 2020 (**91-93**). Ms Miles upheld the decision to dismiss. Again, she adopted the same numbering as in Mrs Grainger's appeal and responded as follows (I have summarised her conclusions):

- 1) The policy permits suspension before an investigation has taken place. There was no breach of procedure.
- 2) She accepts that a copy of the notes was not received by Mrs Grainger before the disciplinary meeting, this was an oversight. Mrs Grainger was present at the investigatory meeting and aware of her answers therefore this did not affect the outcome.
- 3) Another employee's case was not involved with Mrs Grainger's. Her name was mentioned to remind Mrs Grainger of an incident. In relation to comments made after the hearing - she has spoken to the disciplinary officer, the comments were noted as part of the meeting and Mrs Grainger signed the minutes.
- 4) The policy is that the home manager conducts investigations within the home unless they relate to themselves. This was not the case here. A regional manager was appointed to hear the disciplinary as per policy.
- 5) The policy does not state a timeline for disciplinary hearing. It will be as soon as reasonably practicable.
- 6) The allegations relate to gross misconduct which can lead to instant dismissal.
- 7) Having reviewed the '*statements and investigation reports*' she could not find uncorroborated or new evidence.
- 8) The offences were gross misconduct and therefore justified dismissal. The character references provided were anonymous and so Ms Miles was unable to corroborate them.

64. There is a dispute as to which references were provided by Mrs Grainger. In the bundle I have sight of six references (**104-109**), which Mrs Grainger says are the ones she provided to the respondent. None are anonymous. Ms Miles in evidence said that these were not the references which were provided to her, and that the ones she received were anonymous. These references are from colleagues she worked with in her employment with the respondent, and are generally positive, describing Mrs Grainger as '*a trusted and loyal friend and work colleague*', '*kind, caring*' '*hardworking*' '*polite, funny and very respectful*' '*ensures that the members are cared for to the highest standard,*' '*can do attitude*', '*one of the best carers that I have worked with.*'

65. I also considered the supplementary bundle of supervision notes provided by Mrs Grainger. These set out several positives of her work over the years, as well as recording occasions when there have been tensions between her and colleagues, none of which resulted in any formal action.

66. I considered the references provided by Mrs Ridge which are from employers she worked for prior to the respondent and are entirely positive.

Findings of fact

Reserved Judgment

Case Nos: 1806275/2020 & 1806284/2020 - V

67. I am satisfied that the investigatory minutes were not provided to Mrs Grainger within the disciplinary process. There is no evidence from Ms Mace as to what documentation she sent on 3 August 2020. Ms Booth stated she assumed it had been sent out. There is no list of documents on the invitation to disciplinary hearing. I accept Mrs Grainger's account that she was distressed in the disciplinary meeting and therefore did not raise it at that stage. The minutes of the investigatory meeting are not signed by Mrs Grainger. I also note that on appeal Ms Miles accepted that they had not been sent.

68. I accept that the claimants were given very little notice of the disciplinary hearing. If the invitation was sent on the Friday, it may have arrived on Saturday, leaving them two working days. I accept that the relevant documents (i.e. the anonymous allegations) were received only the day before the hearing. The evidence was to be sent out on Monday 3 August according to the invitation letter, so the earliest it could have arrived was Tuesday 4 August, the day before the hearing. This would have afforded the claimants approximately 24 hours to prepare, as Mrs Grainger says.

69. I am satisfied that Mrs Grainger provided the references contained in the bundle to the respondent. There is no evidence of the existence of anonymous references as Ms Miles refers to. It would have been straightforward for the respondent to produce these to the Tribunal but they have not done so. Mrs Grainger denies ever producing anonymous references and for this reason I accept her evidence.

Relevant law and conclusions

What was the reason for the claimants' dismissal?

70. Section 98 ERA 1996 (in so far as relevant) 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 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 –*
- ...
- (c) relates to the conduct of the employee ...'*

71. At the outset of the hearing, the claimants both agreed that the reason for dismissal was conduct. They also both agreed this in cross-examination.

72. However, in their submissions, both invite me to find it was something else. On behalf of Mrs Grainger, Mr Walton submits: *'the decision to dismiss was taken before this process had even begun and that Avery was looking for any spurious reason to do so'*. Mrs Ridge submits *'My position as Team Leader no longer exists at Loxley Park as I was never replaced, my additional roles and responsibilities that were over and above that of the care team are now part of Rachel Wardley's job role*

suggesting that a reason for my dismissal was that I could easily be replaced by a lower salaried Care Assistant. ‘

73. No evidence has been produced which would substantiate these claims. I heard no evidence regarding the non-replacement of Mrs Ridge’s role. The respondent’s witnesses were not challenged on the basis that Mrs Grainger was dismissed for a spurious or false reason.

74. The burden of proof is on the respondent to show the reason for the dismissal. I am satisfied that the documentary and witness evidence produced by the respondent demonstrates that the reason for dismissal was the claimants’ conduct.

Did the respondent act reasonably or unreasonably in all the circumstances (including the size and administrative resources of the undertaking) in treating the claimants’ conduct as sufficient reason for dismissing each of them? (s.98(4)(a) ERA 1996)

75. I have considered the issues identified at the start of the hearing as set out above at paragraph 8.

Nature of the allegations

76. I am satisfied that the allegations, if proven, were capable of amounting to gross misconduct. The claimants accepted this in cross-examination. They included serious allegations regarding the care provided to members, and relationships with colleagues, which amounted to a serious breach of expected standards. I accept that it was within the band of reasonable responses to treat the nature of the allegations as gross misconduct.

Suspension

77. I find that the decision to suspend the claimants pending investigation was reasonable. Suspension is not a disciplinary sanction in itself and the claimants were suspended on full pay pending the investigation and disciplinary proceedings.

Anonymous witnesses

78. I find that the manner in which the respondent dealt with the anonymous allegations was not reasonable. I have considered the guidance given by the EAT in the case of *Linfood Cash and Carry v Thomson* [1989] IRLR 235 as follows:

‘1. The information given by the informant should be reduced into writing in one or more statements. Initially these statements should be taken without regard to the fact that in those cases where anonymity is to be preserved, it may subsequently prove to be necessary to omit or erase certain parts of the statements before submission to others – in order to prevent identification.

2. In taking statements the following seem important:

- (a) date, time and place of each or any observation or incident;*
- (b) the opportunity and ability to observe clearly and with accuracy;*

(c) the circumstantial evidence such as knowledge of a system or arrangement, or the reason for the presence of the informer and why certain small details are memorable;

(d) whether the informant has suffered at the hands of the accused or has any other reason to fabricate, whether from personal grudge or any other reason or principle.

3. Further investigation can then take place either to confirm or undermine the information given. Corroboration is clearly desirable.

4. Tactful inquiries may well be thought suitable and advisable into the character and background of the informant or any other information which may tend to add or detract from the value of the information.

5. If the informant is prepared to attend a disciplinary hearing, no problem will arise, but if, as in the present case, the employer is satisfied that the fear is genuine then a decision will need to be made whether or not to continue with the disciplinary process.

6. If it is to continue, then it seems to us desirable that at each stage of those procedures the member of management responsible for that hearing should himself interview the informant and satisfy himself what weight is to be given to the information.

7. The written statement of the informant – if necessary with omissions to avoid identification – should be made available to the employee and his representatives.

8. If the employee or his representative raises any particular and relevant issue which should be put to the informant, then it may be desirable to adjourn for the chairman to make further inquiries of that informant.

9. Although it is always desirable for notes to be taken during disciplinary procedures, it seems to us to be particularly important that full and careful notes should be taken in these cases.

10. Although not peculiar to cases where informants have been the cause for the initiation of an investigation, it seems to us important that if evidence from an investigating officer is to be taken at a hearing it should, where possible, be prepared in a written form'

79. I remind myself that these are guidelines which may indicate whether or not a procedure was fair, not strict requirements, and that the failure to comply with them will not necessarily render a dismissal unfair. On the facts of this case, the process followed by the respondent with regards to the anonymous evidence was unreasonable, for the following reasons.

80. Firstly, the statements are not sufficiently specific in the detail, time and place of the allegations made. In relation to a large number of the allegations, there was not enough detail to enable the claimants properly to respond. More detail could have been provided without necessarily identifying the complainant. For example, allegations that the claimants were 'abrupt' or that certain individuals did not want to work with them, without the claimants being told why this was the case, or what was alleged

to have been said when, were almost impossible to respond to. Without seeing which shifts or care allocations on which dates were alleged to have been changed, it was very difficult for the claimants properly to respond.

81. Secondly, there is no evidence that the respondent investigated whether any of the complainants had a grudge or a reason to fabricate allegations. There is no evidence that they looked into the background or character of the informants, or sought information which might add to or detract from the credibility of the accounts. This was done to some extent in that there were a number of individuals spoken to, but at there is no evidence that the respondent sought to check the credibility of the complaints e.g. by speaking to members or checking written records. There was no investigation of the concerns raised by Mrs Grainger that one staff member had 'a problem' with her, or that she was being tarred by association.
82. Thirdly, there is no evidence from Mrs Ravenhall as to what was said to her by the individuals concerned as to why they wished to be anonymous. There is no evidence that any requests for anonymity were challenged by Mrs Ravenhall or Ms Booth or other options explored. There is no evidence that each and every one of the witnesses requested to be anonymous, in fact Ms Booth's evidence is that '*many*' did.
83. Fourthly, the guidance suggests that at each stage the decision maker should themselves interview the complainants and satisfy themselves of the weight to be given to the statements. This did not take place. Ms Booth and Ms Miles both simply preferred the written evidence of the witnesses to the claimants' version of events, without testing the anonymous evidence or giving any reason as to why it was preferred.
84. Finally, the guidance emphasises the importance of accurate records in these cases. I have found that the Mrs Grainger's investigation minutes were not provided to her. The records of the complaints were provided one day before the disciplinary hearing, and one was given to Mrs Ridge in the course of her hearing. The notes of the disciplinary meetings themselves are handwritten, very brief and difficult to follow. There is no record at all of the conversations Ms Miles had with Ms Booth and Mrs Ravenhall as part of the appeal process. The result of this is that the claimants were at a significant disadvantage in responding to the allegations made against them.

Impartiality of the investigation

85. Although I am satisfied that the procedure was unfair, I am not satisfied on the balance of probabilities that this was due to impartiality on the part of Mrs Ravenhall. Beyond the claimants' bare assertions which were made in their evidence, there is no corroborating evidence to suggest that Mrs Ravenhall was deliberately impartial in her investigation.

Lack of time to prepare for the disciplinary hearing

86. I find that providing the documents on Tuesday 4 August 2020 so that the claimants had one day to prepare for the disciplinary hearing was not within the band of reasonable actions. There are a large number of different allegations and the claimants would have needed longer than 24

hours to prepare. I find that it was unreasonable for the respondent to fail to provide Mrs Grainger with the minutes of her investigatory meeting. In what would have been a stressful process for her, it was important for her to have a record of what she had previously said, in order to be on an equal footing with the respondent.

Further investigation after disciplinary hearing

87. Carrying out further investigation after the disciplinary hearing and not reverting to the claimants to provide them with the opportunity to comment on the further evidence was not the action of a reasonable employer. Ms Booth looked at rotas and formed a view as to Mrs Ridge's handwriting, and spoke to two further witnesses regarding Mrs Ridge's alleged comments. She looked at the MCM record of one of Mrs Grainger's care calls. The claimants did not have the opportunity to comment on any of this evidence. The right to respond to the evidence against the claimants is a fundamental element of natural justice.

Amendment of the charges

88. That an employee must know the nature of the misconduct alleged is a central requirement of the ACAS code of practice on disciplinary and grievance procedures ('the ACAS code'), to which I must have regard. At paragraph 9 the code provides:

'9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.'

89. The change from the original charge of verbal abuse of members to the addition of '*concerns with regard to your conduct and attitude with members of staff of Loxley Park*' was a significant one. I am satisfied that the respondent acted unreasonably in not giving the claimants more notice of this change, particularly as the claimants had only had possession of the statements the day before.
90. Ultimately, the claimants were dismissed for bullying and harassment of colleagues. This is a further different allegation and one which the claimants had no opportunity to respond to. Although it was largely based on information which was discussed in the course of the disciplinary hearings, it was not framed as 'bullying and harassment' in the course of those meetings. Again, this is not in compliance with the ACAS code, or the principles of natural justice.
91. It is also unclear in the case of Mrs Grainger exactly what conduct was the basis of her dismissal. The dismissal letter sets out in some detail her admissions of playing music during care calls and use of her mobile phone whilst at work, but ultimately the dismissal is framed as the result of bullying and harassment. It would therefore have been unclear to Mrs Grainger what the exact charges were that led to her dismissal.

Consideration of length of service and character?

92. I am not satisfied that Ms Booth and Ms Miles gave consideration to Mrs Grainger's length of service and the character references she provided. Although it is recorded in the minutes of the disciplinary meeting that Mrs Grainger provided character references, this is not referred to in her dismissal letter. At the appeal stage, these were discounted as being 'anonymous'. I have found that they were not anonymous and therefore it was unreasonable for Ms Miles not to take them into consideration.
93. Mrs Ridge confirmed in evidence that she had not submitted references in the course of her disciplinary process.

Appeal process

94. When considering the fairness of an appeal against dismissal, the Tribunal should not focus on whether the appeal was a review or a re-hearing, but whether the process as a whole, including the appeal, was a fair one (*Taylor v OCS Group Ltd* [2006] IRLR 613)
95. In this case, Ms Miles decided to conduct a review of the decision to dismiss, and the claimants were informed that this would be conducted as a paper exercise. In my view, the manner in which the appeal was conducted was unreasonable because Ms Miles did speak to Mrs Ravenhall and Ms Booth, but she did not speak to the claimants to make further enquiries as to their reasons for appeal. No good reason in my view was provided as to why a telephone call or video call could not be conducted with the claimants. Telephone calls were conducted with Ms Miles' colleagues. In her evidence, Ms Miles stated that she did not need to speak to the claimants as their cases were clearly set out in their letters. In my view, this is clearly not the case. Mrs Grainger's letter is very brief and contains bare allegations of unfairness. I have not been provided with Mrs Ridge's letter of appeal but on the basis of the summary I have been provided with, this was also brief and warranted further exploration.
96. I am not satisfied from the appeal outcome letters or from her own evidence that Ms Miles gave proper consideration to the issues raised by the claimants in their appeal letters. Her decision was focused on what was permitted by the respondent's internal procedure (a copy of which has not been produced to the Tribunal), rather than whether the concerns raised by the claimants had any substance. For example, in relation to the amount of notice for the disciplinary hearing, she states that the policy does not specify a minimum time rather than considering whether the claimants themselves had sufficient time to prepare for their hearings.

Conclusion

97. Procedural fairness is integral to the question of whether a dismissal was fair under s.98(4) ERA 1996 (*Polkey v AE Dayton Services Ltd* [1988] ICR 142)
98. I find that the dismissals of the claimants were unfair because the procedure which the respondent followed was outside the band of

reasonable responses – it was flawed at several stages, to the extent that it was not a procedure which a reasonable employer would have applied. Throughout, the claimants have faced lack of clarity as to the charges against them, late provision of documents, anonymous witnesses in the absence of appropriate safeguards, and the lack of opportunity to respond to evidence relied upon against them. The appeal process was insufficient to remedy those issues.

99. I now turn to consider the question of whether any reductions should be made to the claimants' compensation. I am not determining remedy at this stage but I indicated to the parties that I would consider *Polkey* reduction and contributory conduct at this stage as they are linked to the evidence in relation to the substantive dismissal as opposed to the evidence regarding the quantum of any award.

Polkey - compensatory award

100. Section 123(1) ERA 1996 (insofar as relevant) provides as follows:

'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 complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.'

101. I must consider whether the claimants ultimately suffered an injustice as a result of the procedural irregularities in this case, and whether and to what extent compensation should be reduced as a result (*Polkey v AE Dayton Services Ltd [1988] ICR 142*). I have to consider whether the failures were of a kind which make it *'possible to say with more or less confidence, that the failure makes no difference, or whether the failure was such that one cannot sensibly reconstruct the world as it might have been.'* (*King and Ors v Eaton Ltd (No.2) [1998] IRLR 686*). The Tribunal can either limit compensation to a particular time period, order a percentage reduction to reflect the chance of a fair dismissal had a fair procedure been followed, or a combination of both (*Williams v Amey Services Ltd EAT 0287/14*)

102. I find that a fair procedure would have required a further two weeks. This is as follows: (i) a further two working days to explore with the complainants the reasons for making their complaints and reasons for seeking anonymity, and to elicit more detail regarding their allegations; (ii) a full five working days between the provision of the evidence to the claimants and their disciplinary hearings; (iii) a further three working days should have been allowed for the claimants to consider the further evidence which was adduced by Ms Booth following the disciplinary hearing. Therefore in respect of two weeks, I find that the claimants should receive full compensation.

103. Thereafter, I am satisfied that there was a chance of a fair dismissal of both claimants had a fair procedure been followed. There were in existence anonymous statements, which the claimants accept were actually made by individuals even if they don't accept the context in which they came about. There is no suggestion that the contents of the statements was entirely

fabricated by members of management. They contain allegations which do amount to misconduct and which could have justified dismissal.

104. Furthermore, the claimants both admitted to misconduct in the course of their disciplinary and investigatory meetings. For example, Mrs Ridge admitted walking out of care calls with A, and described her approach as *'I'm never going to win with her.'* She also accepted making the comment *'If you pick on one of us in care you pick on all of us.'* Mrs Grainger admitted carrying her own mobile phone during working hours and playing music during care calls. She also accepted that some colleagues found her manner to be abrupt. These admissions, together with the anonymous statements, could have justified a fair dismissal had a fair procedure been followed.
105. It is difficult to assess the chances of a fair dismissal had there been more exploration with the complainants of their reasons for making the allegations, for wanting anonymity, and had more detail been provided to the claimants, because I have no evidence as to what the outcome of those enquiries would have been. However, I am satisfied that there is a measurable chance that the claimants would still have been fairly dismissed had this exercise been undertaken
106. Taking into account all the above, I am satisfied that had a fair procedure been followed, taking a further two weeks, there was a 60% chance that the claimants would have been fairly dismissed. Therefore compensation after two weeks shall be reduced by 60%.

Contributory conduct – compensatory award

107. Section 123(6) ERA 1996 provides as follows:
'(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.'
108. This is a different consideration from the *Polkey* reduction, but in my determination of what reduction to make for contributory conduct, I must take into account that I have already applied a *Polkey* reduction and must stand back and consider whether the overall reduction is a fair one. I must consider whether any conduct of the claimants is 'culpable or blameworthy'.
109. I do not make any finding as to whether the claimants in fact committed all of the gross misconduct alleged. On the balance of probabilities, I am not satisfied on the basis of the anonymous statements alone that they committed the alleged misconduct, save to the extent that they make admissions. As set out above, both claimants made admissions of misconduct in the course of their disciplinary procedures. Both also showed little understanding of the seriousness of the allegations against them in the course of the disciplinary process, and were in no way apologetic for how the comments they had made could have come across. I am satisfied that these admissions, and lack of apology were culpable, and contributed to their dismissal. I am satisfied that it is just and equitable to reduce the compensatory awards of both claimants by 20% in this respect.

110. The case shall be listed for a further hearing to consider remedy and a separate directions order is provided with this judgment. The issue of conduct which arose prior to dismissal may also be raised in relation to the basic award and the parties may make representations in relation to this at the remedy hearing.

Employment Judge **Kate Armstrong**

Date 18 March 2021