



Case Number: 2301108.2016

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mrs V Joseph

and

Respondent

New Century Care Ltd

Held at Ashford on 9 February 2017

Representation

Claimant:

Mr N Roberts, Counsel

Respondent:

Mr Morley, Consultant

Employment Judge Kurrein

JUDGMENT

- 1 The Claimant:-
 - 1.1 was unfairly dismissed, and is entitled to a Basic and a Compensatory Award;
 - 1.2 contributed to her dismissal to the extent of 25%.
- 2 The Claimant was wrongfully dismissed, and is entitled to damages for breach of contract.
- 3 The Claimant's claim for unauthorised deductions in not well founded and is dismissed.
- 4 The Claimant's awards are uplifted 10% pursuant to S.207A TULRCA 1992.

REASONS

The Claim and Response.

- 1 The Claimant started early conciliation on 3 May 2016 and it was completed on 26 May 2016. On 13 June 2016 she presented a claim to the tribunal alleging unfair dismissal, unauthorised deductions and breach of contract. On 11 July 2016 the Respondent presented a response in which it denied those claims.

The Evidence

- 2 I heard the evidence of Miss N Kent, care home manager, for the Respondent. I also took into account the written statement of Ms Belinda Watson, former area manager for the Respondent. I heard the evidence of the Claimant on her own behalf. I considered the documents to which I was referred and the submissions of parties. I make the following findings of fact.

Findings of Fact

- 3 The Claimant, who is of Indian ethnic origin, was born on 18 March 1967 and started her employment with the Respondent on 13 October 2000. She is qualified as a nurse in India. Her employment with the Respondent was as a Night Carer.
- 4 The Respondent is a substantial business that runs a number of care homes. It employs a total of approximately 1500 staff. The Claimant was one of about 50 staff employed at the Leolyn care home in St Leonard's, East Sussex. She was also employed under a separate contract at another of the Respondent's homes, St Leonard's.
- 5 As a night carer the Claimant was well aware that she was not on a "sleep in" or "on-call" shift. She was working what are commonly referred to as "waking" night shifts during which she was expected to be alert to the needs of the residents throughout.
- 6 Shortly before the incident with which I am concerned the Respondent introduced new charts for staff to complete regarding the care of residents. I accepted the Claimant's evidence that these were far from simple, sometimes duplicated existing forms and staff received no training concerning their completion.
- 7 On the night of 20-21 January 2016 the Claimant was working on the top floor of the premises, which was the Dementia floor. I accepted that at about 03:00 am the resident in Room 24 awoke and that the Claimant and the RGN on duty downstairs toileted him, then put him back to bed and made him comfortable. Because of her concern that this resident sometimes gets up and tries to walk unaided she decided to sit in front of his door. She accepts that there was a blanket on the chair she was sitting on, but denied that she was underneath it. I also accepted her evidence that all the corridor lights on the premises are dimmed after midnight.
- 8 At 03:45 am on 21 January 2016 Ms Watson carried out an inspection at Leolyn home. This is common practice in the industry. Ms Watson does not deal in detail with this visit in her statement, but refers to a contemporaneous email. In general terms she found:-
 - 8.1 All staff were awake: two were "fully" awake, the other two were "observed with coats and blankets in armchairs".
 - 8.2 The VMR (Visual Monitoring Record form) and/or DMR (Daily Monitoring Record form) had not been completed, or completed properly, in the case of at least ten residents.
 - 8.3 In many cases records had been completed and/or signed up until the end of the shift at 07:00 am. In some cases, involving rooms 3, 17, 24, 25, 31 and 28 the records had been "falsified" as data had been entered in advance of the time at which the forms were written or checked.
 - 8.4 Many Food and Fluid charts had not been completed since the start of the shift.
 - 8.5 Many call bells and bed tables/drinks were out of reach.

8.6 She thought she should probably send all the staff home but could not because she did not have the cover.

8.7 She concluded by stating,

“Some of the above is due to the ridiculous documentation we use. It is the worst I have ever known and it is open to repetitive failure. That said, there is absolutely zero mitigation for the falsified stuff which I found tonight.”

I noted that there were no records in the email of which members of staff had been responsible for which rooms or areas of the home at the time.

9 It appears that the Claimant was suspended from her duties at Leolyn on about 27 January 2016. There was no evidence of any suspension from her other employment at St Leonard's.

10 Her suspension from Leolyn was confirmed by a letter of 1 February by which she was also invited to an investigatory meeting with Ms Watson on 5 February 2016.

11 I find as a fact that in the course of that meeting the Claimant was entirely honest in her responses to the questions asked of her. In particular:-

11.1 she explained why she was sitting in a chair, on a blanket, outside room 24, and Ms Dawson confirmed that she was not accusing the Claimant of sleeping on duty;

11.2 she told Ms Dawson that she was not feeling well that night due to her period;

11.3 she accepted that she had not made some entries she should have and had made some entries she should not have. In each case she acknowledged her wrongdoing and/or apologised for what had taken place.

11.4 she stated her belief that all the night staff completed the forms in the same way she had, acknowledged it was wrong and said that she would be more careful in the future;

11.5 she concluded by stating, “I will never do it again. You can trust me.”

12 On 8 February 2016 the Respondent wrote to each of the other three staff who had been on duty on the night of 20/21 February to inform them that they had been removed from the “bank list” and sent their P45.

13 By a letter mid-dated as 21 January 2016 the Respondent invited the Claimant to a disciplinary hearing to take place on 19 February 2016 to be chaired by an Interim Home Manager, Mr O Fadipe. The Claimant was told that the charge was of “falsification and/or non-completion of paperwork” and was viewed as potential gross misconduct that could lead to her dismissal. The letter enclosed a copy of the Disciplinary Policy and the investigation meeting minutes and advised the Claimant of her right to be accompanied.

14 The Claimant attended that meeting with a colleague. In the course of it, as she had in the investigation meeting, the Claimant gave a full and honest

account of what had taken place, covering all the above points, and apologised repeatedly for her conduct. She explained that she was not asleep and was entitled to take rest and longer breaks. She again sought to reassure Mr Fadipe it would not recur.

15 Mr Fadipe was not called as a witness by the Respondent, and there was no explanation as to why the letter setting out his decision was not sent to the Claimant until 21 March 2016 save that the letter was signed "pp" Mr Fadipe by a senior member of the Respondent's staff.

16 The letter:-

16.1 Quoted the charge made against the Claimant.

16.2 Set out how she had allegedly responded, but only in respect of her admissions. It failed to record her explanations, apologies or assurances.

16.3 Stated that he considered her responses unsatisfactory because:-

16.3.1 He had a reasonable belief she had been asleep.

16.3.2 She had admitted filling in forms before she should have.

16.3.3 He believed she had not carried out the checks she should have on the residents.

16.3.4 He had lost trust and confidence in her.

The letter concluded by dismissing the Claimant summarily for gross misconduct and advising her of her right of appeal.

17 On the same date the Respondent invited the Claimant to attend a meeting on 30 March 2016 with Ms Watson to discuss her employment at St Leonard's in light of her dismissal from Leolyn. The Claimant was told that if there was no suitable alternative employment she might be dismissed and advised of her right to be accompanied.

18 On 26 March 2016 the Claimant appealed against her dismissal from Leolyn, providing her grounds, in detail, on 29 March 2016. In summary, she made the following principal points:-

18.1 The decision was unreasonably harsh. The matter should have been dealt with by a lesser sanction.

18.2 The alleged conduct was far less serious than the examples of gross misconduct in the Respondent's disciplinary policy.

18.3 She had not been the subject of any previous criticism in her long service.

18.4 No account had been taken of her ill-health.

18.5 Clear evidence that she had performed all her duties appropriately, save for those in question, was not taken into account.

19 In the course of the meeting on 30 March 2016 Ms Watson told the Claimant that in light of her dismissal from Leolyn for Gross Misconduct she could no longer work for the Respondent and would be dismissed from her employment with St Leonards. That decision was confirmed by a letter of 12

- April 2016 which advised the Claimant of right of appeal. The Claimant was paid in lieu of notice.
- 20 On 5 April 2016 the Respondent invited the Claimant to an appeal hearing on 11 April 2016 to be conducted by Miss Kent. The Claimant was advised of her right to be accompanied and that if she did not attend the meeting might proceed in her absence.
- 21 In the course of that hearing the Claimant made the same points as before. She was also honest and apologetic. She made it clear that:-
- 21.1 she had not been, and had not admitted to having been, “asleep in the lounge” as found by Mr Fadipe;
- 21.2 she had only completed the pressure mattress charts and, in respect of one resident, a pain chart, before she should have done;
- 21.3 the records showed that she had carried out all her duties, such as tuning residents, at the appropriate time;
- 21.4 she had not abused any of the residents, to which Miss Kent retorted that the conduct complained of “did not come under abuse”.
- 22 By a letter dated 21 April 2016 Miss Kent wrote to inform the Claimant that her appeal had been unsuccessful. In doing so she set out each ground of appeal and her response to it. In general she thought them to be irrelevant or she contradicted them. She concluded:-
- 22.1 The Claimant had falsified paperwork, so had not completed relevant checks;
- 22.2 She had a reasonable belief that the Claimant did not complete relevant checks and had therefore neglected vulnerable adults and put them at risk.

Submissions

- 23 I considered the Skeleton Argument put in by the Claimant and the oral submissions made on her behalf and those made on behalf of the Respondent. It is neither necessary nor proportionate to set them out here.

The Law

- 24 I considered the terms of S.98 Employment Rights Act 1996 (“the Act”),

98 General

(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)

(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."

25 I also had regard to the guidance provided by the following authorities,

British Home Stores Ltd v. Burchell [1978] IRLR 379

Iceland Frozen Foods v. Jones [1982] IRLR 439

Sainsbury's Supermarkets Ltd v. Hitt [2003] IRLR 23

Taylor v OCS Group Ltd. [2006] IRLR 163

Newbound v. Thames Water Utilities Ltd [2015] IRLR 734

26 I was additionally referred to the following authorities,

Stouthos v. London Underground [2004] IRLR 636

Robinson v. Combat Stress UKEAT/0310/14

A v. B [2003] IRLR 405

Further Findings and Conclusions

Unfair Dismissal

The Reason

27 It was common ground that the Claimant was dismissed for a reason relating to her conduct, and that that was a potentially fair reason.

The Investigation

28 I thought it contrary to good practice for Ms Watson to have conducted the investigation: the Respondent is of a size such it seems highly likely some other suitable Manager might have been appointed.

29 I thought it unfortunate that Ms Watson was not available to assist my understanding of the investigation process. It is clear from my above findings, and her own knowledge:-

29.1 the documentation in issue had only recently been introduced;

29.2 she, as an area manager, had serious concerns about the quality of that documentation;

29.3 all the staff on duty that night had made errors in those documents, or made entries on them in advance of the time when they should have been made;

30 Despite this Ms Watson made no enquiries about:-

- 30.1 the extent to which other staff on other shifts were acting similarly to those on the Claimant's shift
- 30.2 what training, if any, had been given to staff in the manner in which they were expected to complete the relevant documentation
- 30.3 the Respondent's policies, if any, on record keeping.
- 31 Such enquiries may have assisted:-
- 31.1 the Respondent, to learn whether or not there were problems inherent in the nature of the documentation, arising from its policies or the level of training and how it might, if necessary, avoid such problems;
- 31.2 the Claimant, in explaining the reason for her conduct or partly exculpating her.
- 32 It is also clear that the Claimant was adamant that she had carried out the vast majority of her duties entirely properly. I thought Ms Watson might have:-
- 32.1 gathered all the records completed by the Claimant that night so as to gain a clear understanding of the proportion of recordkeeping the alleged failures bore to the whole;
- 32.2 interviewed those residents who were competent and/or other staff concerning their view of the Claimant's standard of work.
- 33 I do not consider the above-suggested steps to amount to a counsel of perfection. Where the consequences for an employee are grave they are entitled to expect a thorough investigation: A v. B. In the circumstances of this case I consider them to be steps that ought reasonably to have been taken by a reasonable employer of the size, and with the resources, of the Respondent. They would not take very long to complete and the cost would be small.

The Hearing

- 34 The Claimant does not appear to have been provided with copies of all the documents relied on by the Respondent at the disciplinary hearing before it took place, potentially contrary to the ACAS Code of Practice. I do not accept that the fact they were shown to her at the investigation hearing is sufficient.
- 35 It appears to me regrettable that the findings made by Mr Fadipe depart so radically from the offence with which the Claimant was actually charged.
- 36 That offence was itself poorly defined, in that it did not identify the specific documents it was alleged the Claimant had falsified, and which she had failed to complete.
- 37 In my view the findings made by Mr Fadipe that the Claimant:-
- 37.1 was sleeping in a chair in the lounge; and
- 37.2 had not completed checks; and
- 37.3 neglected vulnerable adults;

went far beyond what was open to him on the basis of the charge, but also on what might reasonably have been found on the basis of all the (limited) evidence before him.

38 In particular:-

38.1 Ms Watson's evidence, in her email, was to the effect that the Claimant was awake. The Claimant's evidence was the same. There was no evidence to contradict this.

38.2 There was no evidence or charge that the Claimant had not completed checks. She admitted failing to record some, and completing others in advance. In my view no reasonable employer would make a finding that this meant checks had not or would not have been completed without further investigation.

38.3 Again, there was no evidence or charge of neglect of a resident or residents.

39 I have concluded that finding is particularly egregious because these matters were not put to the Claimant fairly and squarely at any time, whether in the investigation or disciplinary hearing. As a consequence she had no opportunity to deny the charges, let alone seek to respond to them in full. That was compounded by the lack of a full and reasonable investigation.

40 Unfortunately these fundamental issues were not corrected on appeal because Miss Keen took the view that the investigatory and disciplinary process had been fair and reasonable.

Honest Belief

41 In light of all my above findings I regret to say that I am quite unable to find that Mr Fadipe held an honest belief based on reasonable grounds that the Claimant was guilty of the offences of gross misconduct he found proved against her.

Sanction

42 I am dealing with this issue on the basis that the only offence that might have been found proved against the Claimant was the one she was charged with. An analysis of the papers in the bundles establishes that at worst:-

42.1 She had completed mattress pressure charts in advance for two residents;

42.2 She had written "no pain" in respect of one resident in advance;

42.3 She had failed to complete forms for two visual checks.

43 Again, on the basis of the evidence before me and available to the Respondent at the time, it appears this was only a very small part of the other work and record keeping she was involved in that night.

44 The Respondent's disciplinary policy gives seventeen examples of acts that may be considered "gross misconduct", and I accept that the list is not exclusive. However, I thought it notable that none of those examples related specifically to recordkeeping or falsification of records, although they did

- include neglect, abuse, discrimination, serious breach of health and safety and matters of similar seriousness.
- 45 I thought a reasonable employer would have concluded that the offences in this case fell well short of “gross misconduct”: they certainly did not appear to me to be of a repudiatory nature.
- 46 There was no evidence that Mr Fadipe took account of any of the many mitigating factors in this case such as:-
- 46.1 the Claimant’s long service;
- 46.2 her clean disciplinary and capability record
- 46.3 the poor standard of the paperwork;
- 46.4 her honesty in admitting to her conduct at the first opportunity, her apologies, contrition and assurances.
- 47 This was not corrected by Miss Kent, who thought them “irrelevant”.
- 48 There was no evidence Mr Fadipe or Miss Kent gave any consideration to a lesser penalty than dismissal.
- 49 Having regard to all my above findings I have concluded that the penalty of dismissal was outside the band of reasonable responses open to an employer in the position of the Respondent in the circumstances of this case.

Conclusion

- 50 In considering my conclusion I have had specific regard to the provision of S.98(4) of the Act and the decision in Newbound v. Thames Water Utilities Ltd. Having regard to all my findings, and in particular equity and the substantial merits of the case, I have determined that this dismissal was unfair.
- 51 For the same reasons, I have reached the same conclusion in respect of the Claimant’s dismissal from her employment at St Leonard’s.
- 52 The Claimant is entitled to a Basic and Compensatory awards.

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- 53 In my view these principles have no application in the circumstances of this case: the offences were such that they could not justify a fair dismissal.

ACAS Uplift

- 54 I thought the only breach of the Code of Practice to be that concerning the documents for the disciplinary hearing. Whilst serious, it was mitigated by the Claimant’s previous sight of them and her admissions as to her conduct.
- 55 Against that background I concluded a 10% uplift was just and equitable.

Contribution

- 56 The Claimant was undoubtedly at fault in the manner in which she conducted herself. But for that no disciplinary process would have been put in motion. I

also take the view that it was likely, on the balance of probabilities, that the Claimant could reasonably have been sanctioned with a warning.

- 57 In all the circumstances of the case I find that she has contributed to her dismissal to the extent of 25%.

Breach of Contract

- 58 The Respondent has failed to establish on the balance of probabilities that the Claimant was guilty of gross misconduct. This dismissal was wrongful, and the Claimant is entitled to damages for breach of contract.

Unauthorised Deductions

- 59 The Claimant gave no evidence to support this claim. it is dismissed.

Employment Judge Kurrein

7 March 2017