EMPLOYMENT TRIBUNALS

Claimant: **Miss G Nwezeh**

Respondent: **118 Limited T/A Conduit Global & Others**

HEARD AT: **Bedford** **ON**: 27th February 2017
28th February 2017
1st March 2017
2nd March 2017

BEFORE: **Employment Judge Bloom**

MEMBERS: **Mr H Smith**
Mr R Eyre

REPRESENTATION

For the Claimant: **Mr Adrian Barnes, Employment Consultant**

For the Respondents: **Mr G Anderson, Counsel**

JUDGMENT

1. The unanimous judgment of the Employment Tribunal is that the Claimant's claim of unfair dismissal succeeds but there was a 100% chance that the Claimant would have been dismissed in any event and further that the Claimant wholly caused or contributed towards her own dismissal and thus is not entitled to a compensatory award. The Claimant is awarded a Basic Award in the sum of £1,095.00. The Claimant's claims of discrimination arising from a disability and a failure by the Respondent to make reasonable adjustments both fail and are therefore dismissed.

REASONS

1. At the commencement of the Hearing and by consent the name of the Respondent was amended to 118 Limited Trading as Conduit Global. That was the correct name of the Claimant's employer.

2. The Claimant brings to the Employment Tribunal claims of unfair dismissal; discrimination arising from a disability and an alleged failure by the Respondent to make reasonable adjustments.

3. The Claimant throughout the hearing was represented by an Employment Consultant, Mr Barnes and the Respondent's by Mr Anderson of Counsel. We heard evidence from the Claimant herself and on her behalf from one additional witness, Loran Beckford. We heard evidence on behalf of the Respondent's from three witnesses, Mr Tim Boyes-Hill (Team Manager), Errol Lee (Team Manager) and from a member of their Human Resources Department, Paul Fitzpatrick. Throughout the hearing we were referred to documents contained in a joint bundle consisting of some 127 pages of documentation. At the conclusion of the hearing we heard helpful closing submissions on behalf of each representative. Each representative also submitted to us written closing submissions.

<u>The Law</u>

4. The Claimant's claim of unfair dismissal is brought to the Employment Tribunal pursuant to the Provisions of S:111 Employment Rights Act 1996. S:111(1) of the 1996 Act allows a claim to be presented to an Employment Tribunal against an employer alleging that the employee was unfairly dismissed by the employer. There is no dispute in this case that the Claimant was dismissed by her former employer, namely the Respondent and that the effective date of termination of her employment was 2nd April 2015.

5. S:98 of the 1996 Act states that it is for the employer to show that the reason or principal reason for the dismissal is one that falls within a reason set out either in S:98(1)(b) or more commonly in S:98(2) of the 1996 Act. In this case the Respondents submit that the reason for the Claimant's dismissal was one relating to her conduct. If we are satisfied that conduct was the reason, or at least the principal reason for the claim's dismissal, we must then go on to consider whether or not the Respondent acted fairly or unfairly in deciding to dismiss the Claimant for that reason. In a conduct dismissal we agree that the Law is set out in the well established case of *British Home Stores Ltd -v- Burchell 1980 ICR 303 EAT* , which provides that in a case where an employee is dismissed because the employer suspects or believes that she has committed an act of misconduct in determining whether that dismissal is fair, an Employment Tribunal has to decide whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of

the employee at that time. That test involves three elements. First that the employer had a belief that the employee had committed the alleged act of misconduct; secondly that that belief was held on reasonable grounds; and thirdly that those reasonable grounds followed a fair investigation. In deciding whether or not the employer held a reasonable belief, does not require an investigation of proof to the level of criminal courts. In determining this case we remind ourselves that it is not for us to decide whether or not we would or would not have dismissed the Claimant, nor is it necessary for us to decide whether the Claimant did or did not do the alleged act of misconduct. If we are satisfied that the Respondent was entitled to come to the conclusion that it did, we must still consider whether the dismissal for that act of misconduct falls within the range of reasonable responses open to a reasonable employer.

6. In a case such as this where there are allegations that the Respondents acted inappropriately in respect of the way that it conducted its disciplinary procedure, we must also go on to determine whether or not the dismissal was substantively unfair or whether or not the dismissal was "procedurally" unfair in accordance with the well established authority of *Polkey -v- EA Dayton Services Limited 1998 ICR 142.* There is, in our Judgment, support for this submission that the determination of the any "*Polkey reduction'* applies equally to cases of substantive unfair dismissal rather than its approach being limited only to procedural unfairness. The issue of any *Polkey* reduction will not apply to the fairness or unfairness of the discipline itself but will be wholly relevant to the issue of compensation.

7. Further, in respect of any compensation that may be awarded in the event of a finding of unfair dismissal we must go on to consider whether or not, pursuant to the Provisions of S:122(2) of the 1996 Act whether or not the Claimant was engaged in conduct before her dismissal which was such that it would be just and equitable to reduce the amount of the basic award to any extent and further in relation to any entitlement to a compensatory award whether or not, pursuant to the Provisions of S:123(6) of the 1996 Act, whether or not the Claimant's dismissal was to any extent caused or contributed to by any action of her.

8. In so far as the claimant's claim of discrimination arising from a disability, that claims is brought pursuant to the Provisions of S:15 Equality Act 2010. That sections states – *a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of a achieving a legitimate aim. That provision does not apply if A can show that it did not know, and could reasonably have been expected to know that B had the disability.*

9. In bringing a claim or discrimination arising from a disability it is for the Claimant to establish any detrimental action relied upon in support of such a claim. In this case the Claimant alleges that the detrimental action was the dismissal itself on 2nd April 2015. If we go on to find that

the Respondent has treated the Claimant unfavourably because of something arising in consequence of her disability and the Respondent cannot show that the treatment is a proportionate means of achieving a legitimate aim then the Claimant's claim will succeed.

10. The Claimant also brings a claim pursuant to the provisions of section 20 Equality Act 2010 alleging that the Respondent was in breach of its statutory duty to make reasonable adjustments for a disabled person. A failure to comply with a duty to make reasonable adjustments is a failure to comply with one, two or three requirements set out in section 20 Equality Act 2010. The Claimant in this case relies upon either or both of the first or second requirements, namely that she alleges that the Respondents applied a provision, criterion or practice that puts her at a substantial disadvantage in comparison with a non-disabled employee or that a physical feature of the premise is occupied by the Respondent puts the Claimant at a substantial disadvantage, again, in comparison with any non-disabled employee. In either or both cases, the employer is required to take such steps as it is reasonable to have to take to avoid the disadvantage. An employer is not subject to the duty to make reasonable adjustments if it does not know and could not reasonably be expected to know that the Claimant has a disability and is likely to be placed at the disadvantage referred to.

11. In this case prior to the commencement of the substantive Hearing the Respondents had conceded that the Claimant was a disabled person within the statutory definition set out in section 6 of the Equality Act 2010. Section 6(1) of the Equality Act states that a person has a disability if that person has a physical or mental impairment and the impairment has a substantial and long term adverse effect on that person's ability to carry out normal day to day activities. In this case the medical condition relied upon by the Claimant was one of vertigo. She alleges that she first began suffering from that condition back in 2014 and that the effects of that condition continued throughout 2015, a period which included her dismissal on 2nd April 2015. She says that as a result of her medical condition she was required to take certain medication and the effects of that medication would on occasions cause her to feel drowsy and dizzy. As we have said, the Respondents had prior to our hearing, conceded that the Claimant had a disability and for that reason we were not required to investigate the Claimant's medical condition further in order to determine whether or not she fell within the statutory definition.

The Facts

12. Some of the background facts are not disputed. The Respondent runs a call centre which undertakes a number of activities. The relevant activity for the purposes of this case is the service that they undertake to provide on behalf of the National Health Service – the service commonly known as "The 111 Telephone Advisory Service". The Respondents undertake that service on behalf of two clients, namely South Central Ambulance Services and Care UK.

13. To deliver the 111 service the call handlers, also known as health advisors who respond to 111 calls from members of the public. In providing this service they use both a computer system and more relevant for the purposes of this case a telephone system. They wear headsets. When wearing the headset they hear a bleep and from that moment on the member of the public will be connected to the health advisor. The health advisors then engage in a scripted salutation which is then followed by asking and requiring answers to a number of standard questions before the member of the public is advised as to how to proceed. Understandably, these calls can be of an extremely serious nature which may involve, from time to time, calls dependent upon a life or death situation. For that reason it is essential the calls are responded to both quickly and efficiently. The service is operated on a 24 hours, 7 day week basis. The health advisors can either work day shifts, night shifts or a combination between the two.

14. The Claimant commenced her employment on 1st May 2011. The Claimant's employment was subject to written terms and conditions of employment. The Respondents had in place "corrective action policy" otherwise known as a dismissal and disciplinary policy. Prior to the events leading up to the Claimant's dismissal she had an exemplary record of service.

15. In so far as those events are concerned we heard, in particular, detailed evidence from Mr Boyes-Hill which was contained in a length witness statement. He was subjected to length cross examination by Mr Barnes on behalf of the Claimant. The Claimant also gave to us long evidence concerning those particular events. We have to say at this stage that Mr Boyes-Hill's recollection of the events was consistent throughout both in terms of a report he wrote within hours of the relevant events taking place and up to and including the evidence he gave before this Employment Tribunal. It is unfortunate, to say the least, that the Claimant's evidence as to what had factually happened on the day in question changed considerably over a period of time. She gave a version of events when spoken to by Mr Boyes-Hill on 30th March 2015 which was the day of the alleged misconduct. She then gave a different version of events when spoken to by Mr Lee at a disciplinary hearing on 2nd April 2015. She gave a third version of the events at an appeal hearing that took place on 21st April 2015. She gave a different version of events both in her ET1 claim form and in her witness statement. To compound the matter even further, she gave a different version of events to us during the course of her evidence. Where there is any conflict in the evidence given by the Claimant and on behalf of the Respondent we, as a result, have no hesitation in concluding that we prefer the evidence of the Respondents and in particular that of Mr Boyes-Hill as being more reliable than the evidence given by the Claimant.

16. Having made the above observation we come to the following findings of fact as far as the relevant events are concerned that took place during the early hours of 30th March 2015.

17. The Claimant was working a night shift which had commenced during the evening of 29th March 2015. She was one of about five health advisors undertaking the 111 service that night. The Claimant was supervised on that shift by Mr Boyes-Hill, a Team Leader. We have been shown a diagram of the office plan and also some photographs showing the layout of working "pods" where the Claimant and her colleagues worked. We find from the position where Mr Boyes-Hill was sitting he had direct access only a few feet away to the workstation occupied by the Claimant. We accept his evidence that he had a clear and unobstructed view of her activities at the time in question. That unobstructed view was directly accessible from the chair he was occupying or, at the very least, by him adjusting his body position very slightly to obtain an unobstructed view. We do not accept the Claimant's contention that his view was obstructed by a pillar.

18. Health advisors are able to take pre-arranged breaks during their working shift. They are allowed to take 1 half hour "lunch" break, a 15 minute break and another 10 minute break. Until 4.38 am on 30th March 2015 the Claimant had not taken a break. There was no dispute between the parties and we so find that the Claimant subsequently took her "lunch" break between the hours of 4.38 am and 5.09 am. The records at page 68 of the bundle confirm that fact. At about 5 am, Mr Boyes-Hill was returning to his workstation having himself, taken a short break. As he approached his own workstation he noticed that the Claimant was sitting in a very awkward position with her eyes closed and her head resting backwards. He did not think at the time that she was asleep although he did consider to himself that the Claimant was sitting in an uncomfortable position. As he got nearer to the workstation he had a better view of the Claimant and her area and noticed that she did not have her headset on. As we have said, a health advisor would have to wear a headset in order to know whether or not a call from a member of the public was coming through. When he got back to his own workstation Mr Boyes-Hill undertook some further enquiries using his own computer system to see whether or not the Claimant was available to take incoming calls having completed her break. As the relevant system came into view he saw that a call was active on the Claimant's line. The time was 5.09 hours. The caller disconnected after about 30 seconds. The call was not answered by the Claimant. After that call was disconnected the system showed the Claimant as not being in a ready state. As we understand the evidence, if a health advisor is able to engage in taking a call, they have to press a button on their telephone set which indicates a "ready state". If they are not in a position to take a call e.g. they are going on a break, then they have to press another button which indicates that they are "not ready". At 5.09 am the Claimant's system was

highlighted as “ready” i.e. she was ready to take a call. Despite that, she did not take the unanswered call that came through at that time.

19. As part of her case prior to the hearing, the Claimant had said that in fact she had taken an extended 15 minute break after her 30 minute break had concluded but we do not accept that to be the position as it happened and indeed that was not the position put to us by the Claimant herself in the evidence before us.

20. A second call came through at 5.18 am. When that call came through we accept the evidence of Mr Boyes-Hill that the Claimant was not wearing her headset. It is beyond question that she failed to answer that call. The caller hung on for some time, page 105 of the bundle records that the second call at 5.18 lasted some 61 seconds. The member of the public is heard to have said after 61 seconds “I reckon they’ve cut me off”. At no time did the Claimant respond to that call. As we have said there are transcripts within the bundle recording those conversations. Mr Boyes-Hill himself had listened to them and we are satisfied his evidence is accurate in that regard.

21. The third call in question came through at 5.38 am. That call was responded to by the Claimant but only after 57 seconds of the member of the public being put through. That is unacceptable as far as the Respondent’s procedures are concerned. As we have stated 111 calls can be a matter of life and death and it is essential that calls are answered immediately by the health advisor first giving the scripted salutation and then going straight into asking relevant questions. That did not take place in relation to this call. It was only after 55 seconds did the Claimant speak to the member of the public concerned. The required salutation was not given. The Claimant’s first words were to inform the member of the public that she was apparently having problems with her computer. We have heard evidence that the telephone system concerned and the computer system are completely separate systems. Whether or not there was a problem with the Claimant’s computer would not have prevented her from answering the call promptly as she was required to do. Eventually the member of the public was advised to hang up and ring back in.

22. All of these matters were observed by Mr Boyes-Hill at the time.

23. The explanation given to us during the course of her evidence by the Claimant was that she had taken some medication that made her drowsy at about 4.20 am. She felt drowsy although she was not asleep during her 30 minute lunch break and having gone on to “ready” at 5.09 she continued to feel drowsy and hence was unable to answer at least the first two calls at 5.09 and 5.18 am. She accepted that she had failed to answer the 5.38 am call promptly and admitted before us in evidence that that was a serious error on her behalf and one to which she had no plausible excuse. As we have already commented that a version of events given to us during the course of the hearing was at

least the fifth or sixth different version given by the Claimant throughout the matter.

24. Mr Boyes-Hill was so concerned about these matters that immediately after they had taken place he made some notes which were later transcribed into a typed investigation statement (pages 69 – 70 of the bundle). We are satisfied that these notes and statement were prepared within a short period of time following the events themselves and that they form an accurate record of what had taken place.

25. At about 6.30 am on 30th March 2015 Mr Boyes-Hill spoke to the Claimant. She was asked about the three telephone calls. In respect of the first one at 5.09 she denied that she had been asleep. She said that she could not answer the call due to a problem with the computer. She again said that she was unable to answer the 5.18 call due to a computer problem and again denied being asleep. Insofar and the third call at 5.38 was concerned she again denied being asleep and said that the calls for the delay were attributable to problems she had connecting with the system during the course of actually speaking to Mr Boyes-Hill himself. We should also comment at this stage that at 5.38 am or thereabouts Mr Boyes-Hill had approached the Claimant at her workstation. He reports that fact that she appeared to "wake up" in a jolt and screamed out in some discomfort. That supports his view that the Claimant was asleep.

26. Before proceeding any further the Claimant also spoke with Eileen Purcell, another health advisor who was working that night in the same location. This conversation was subsequently recorded in a statement take from Ms Purcell. She reports seeing the Claimant sitting at her workstation with her head down although she was unable to say whether or not she thought the Claimant was asleep or otherwise. She did, however, express "an opinion" towards the end of her brief statement by saying that upon reflection she thought the Claimant was asleep. As we have said after these events came to the attention of Mr Boyes-Hill he spoke to the Claimant. He did so at 6.30 am on 30th March 2015. The Claimant was called into a meeting. Another Team Leader was there who acted as a note taker. We have read those notes (page 71 of the bundle). The Claimant denied that she had missed any calls. We do not accept that and we accept the evidence of Mr Boyes-Hill that three calls namely at 5.09, 5.18 and 5.38 had been missed, certainly in relation to the first two and delayed in relation to the third one. At no time during that conversation or at any other time prior to the hearing before us did the Claimant contend that the reason she had missed certainly the first two calls was because she was feeling drowsy having taken medication at about 4.30 am. That was simply not an explanation put forward by her. Having spoken to the Claimant, Ms Purcell and having written up his own notes Mr Boyes-Hill considered the matter was serious enough to pass it over to management to deal with pursuant to their disciplinary procedures.

27. We are also satisfied that at this stage Mr Boyes-Hill had no knowledge of the Claimant's medical conditions namely he did not know that she suffered from vertigo and did not know that she was taking medication that may have caused her to feel drowsy. He certainly would not know that the Claimant had a medical condition that would result in her being defined as a "disabled" person.

28. The Respondent's procedures, in accordance with the relevant ACAS code of practice, require that a minimum of 48 hours notice is given to an employee prior to a disciplinary hearing. Written notice (pages 76 and 77 of the bundle) was hand delivered to the Claimant on 30th March 2015 requiring her to attend a disciplinary hearing on 2nd April 2015. The relevant written notice highlighted the allegation of gross misconduct and highlighted the fact that a possible finding could lead to summary dismissal. The allegations set out in that written notice stated that "sleeping on active duty whilst in a ready state subsequently missed at least three live calls which terminated without triage being performed – directly affecting patient safety and the reputation of the NHS 111 service that of our client Care UK and conduit". The relevant written notice advised the Claimant that she had the right to be accompanied by a work colleague or trade union representative.

29. Before going on to our findings of fact as far as the disciplinary hearing itself is concerned, we note that the Claimant had raised a written grievance on or around 28th March 2015 relating to one of her fellow health advisors, a man called Colin Thompson. We make no findings of fact as far as that grievance is concerned because they are, in our judgment, irrelevant and play no part at all in the subsequent dismissal of the Claimant.

30. The Claimant duly attended the disciplinary hearing known as a "corrective action meeting" at about 3 pm on 2nd April 2015. The Claimant was there with a colleague, Mr John Rooney. For the Respondent the matter was conducted by Mr Lee, another Team Leader and he was accompanied by another employee, Helen Steel, who took the notes. We have read those notes which are in the bundle at pages 81 – 88. The Claimant denied that she had been asleep in respect of the events of 30th March. She was asked by Mr Lee if she wanted to have the opportunity of listening to the calls again but she declined that opportunity. The Claimant made reference to the fact that she believed the failure to answer the 5.09 call was as a result of a technical problem. She certainly did not say it was because she was feeling drowsy having taken some medication. The Claimant before us did not argue that any failure to answer the 5.09 call was as a result of any technical problem. That highlights again the inconsistency between different versions of events given by her. The Claimant stated that she had not answered at least one of the calls because she did not want to appear to be frustrated as a result of the alleged technical problems and in particular did not want to be heard swearing when a member of the public was attempting to make an urgent call. We

comment at this stage that the Claimant's contentions even during the course of the disciplinary hearing are not well founded. As we have already made clear the computer system is an entirely different system to the telephone system and whether or not there were any problems on the computer system (which we make no finding upon) were irrelevant to the Claimant's ability to answer the telephone. The Claimant continued to deny during the course of the disciplinary hearing that she had been asleep. Almost towards the end of the disciplinary hearing Mr Rooney, on the Claimant's behalf, for the first time, made reference to medication taken by the Claimant. The notes/minutes of the hearing indicate that Mr Rooney made reference to – "medication/possible side effects". The Claimant went on to make the comment that the medication "makes me dizzy". The Claimant then said that she would bring in the medication to enable the Respondent (represented by Mr Lee at this stage) to consider before reaching a decision. The minutes record the fact that Mr Lee agreed to adjourn the disciplinary hearing for between 12 and 48 hours to enable the Claimant to bring in her medication and for it then obviously to be considered by the Respondent before they made any determination as far as the disciplinary process was concerned.

31. Mr Lee was an honest witness and gave us a frank account of what thereafter happened. The Claimant left the meeting room. He immediately went to see one of his more senior colleagues, Victoria Kane. He discussed the case with her. Ms Kane had obviously not been involved in either the investigation and was not present during the course of the disciplinary hearing. He discussed the case with Ms Kane and sought her advice. Ms Kane advised Mr Lee that she thought the correct outcome of the disciplinary proceedings should be the Claimant's summary dismissal on the basis that she had committed offences of gross misconduct by not responding to the three calls in question. Mr Lee agreed with that decision and therefore the decision taken to summarily dismiss the Claimant was, at very best, a "joint decision" between himself and Ms Kane. The opportunity given to the Claimant towards the end of the disciplinary hearing, namely an adjournment for at least 12 hours to enable her to bring in any medical information was obviously not given. Ms Kane arranged to draft the letter confirming the Claimant's dismissal. That was handed over shortly afterwards to Mr Lee who went to the Claimant and handed to her the letter confirming her summary dismissal. There was no further disciplinary hearing.

32. The Claimant had continued to work in fact for the Respondent between the events of 5.38 am on 30th March and the time of her dismissal although she was placed on other duties which did not involve 111 calls. She had not been suspended and we find no fault against the Respondent as far as that is concerned.

33. The Claimant appealed against her dismissal. The appeal notice was acknowledged and an appeal hearing set up and took place on 21st

April 2015. It was heard by Ms Kane who, as we have already stated, had made at least the joint decision to terminate the Claimant's employment. She was therefore not an employee who had previously been uninvolved in the matter. In fact her involvement was central to the decision taken by the Respondent to terminate the Claimant's employment. In so finding it is quite clear that the Respondents breached their own internal disciplinary procedures. The appeal was not considered by an independent person and of course, that means that the ACAS code of practice was also breached. Ms Kane does, however, appear to have taken some time in listening to the Claimant's various explanations although, again we must state, the explanations given by the Claimant during the course of the appeal were entirely different to those provided earlier by her and subsequently in either the pleadings to this Tribunal or in her actual evidence. After due consideration Ms Kane dismissed the Claimant's appeal. Ms Kane did not give evidence to the Tribunal. She had subsequently left the Respondent's employment although we did hear from Mr Fitzpatrick who was able to listen to the appeal hearing on the telephone. The appeal hearing took place at the Respondent's offices at Milton Keynes although Mr Fitzpatrick was on the telephone in his offices in Cardiff. Mr Fitzpatrick we accept was not party to any decision taken to dismiss the appeal. The Claimant subsequently received written notification that her appeal had not been successful.

34. At the commencement of the hearing we were able to address both parties' representatives to ensure that we were able to identify the relevant issues and to ensure that during the course of the evidence and subsequently when considering our judgment we were able to concentrate on the identifiable issues. Mr Barnes in particular confirmed that the list of issues were set out in an "agreed list of issues" (pages 43 – 45 of the bundle). He did not at any stage attempt to expand upon those issues. On that basis we have, in particular, addressed our minds insofar as the discrimination claims are concerned solely on the issues as identified therein.

35. Insofar as the discrimination arising from a disability claim is concerned the issue to be determined was whether or not the Claimant was subjected to unfavourable treatment by the Respondent. The Claimant, in particular, stated that the unfavourable treatment was dismissal. We have therefore only considered that. If the unfavourable treatment was the dismissal we must go on to determine whether or not that unfavourable treatment, i.e. her dismissal, was because of something arising in consequence of her alleged disability which, in the circumstances of this case, could only be put as far as the Claimant was concerned on the basis that she had been dismissed as a result of failing to answer the calls because she was feeling drowsy having taken medication for her disability, namely vertigo. If that was not the reason for the dismissal i.e. the Respondents dismissed the Claimant because she had simply neglected to answer the calls and it had not been put to them that the Claimant's failure was as a result of feeling

drowsy due to taking medication, then the claim for discrimination arising from a disability must in itself ?????

36. As far as the allegation of failing to make reasonable adjustments is concerned the adjustment pleaded by the Claimant is one relating to her request to be able to open a window alongside her work station so that she is able to obtain fresh air in the event of her feeling drowsy at any stage. This would involve the Claimant being able to sit at her workstation close to a window. We find that all the workstations in the offices are within feet of windows in any events. Obviously workstations closer to the window are nearer but even those in the centre of the room are only a short distance away and if a window is open then anyone sitting at any workstation within the offices approximate to the window or not would benefit from the flow of fresh air. There is no dispute that for the vast majority of her working shifts the Claimant was able to occupy a desk on a "first come first served basis". She obviously would choose a workstation close to a window. There were two occasions she alleges some time at the end of February, beginning of March 2015 (she is not sure of the exact date) when she asked to sit close to a window but was told by a colleague called Tina and another unnamed colleague that she was not able to do so and would have to sit at a workstation in the middle of the floor. She made no complaint about that at the time and those complaints only followed her dismissal. She alleges that the Respondent's practice of allowing employees to sit at a workstation on a "first come first served basis" amounts to a provision, criterion or practice which placed her at a substantial disadvantage.

Our Findings

37. We find that the Respondents have satisfied the relevant burden of proof and have shown to us on the balance of probabilities that the reason let alone the principal reason for the Claimant's dismissal was one relating to conduct. Namely her failure to answer 3 calls from members of the public on the 111 service at 5.09, 5.18 and 5.38 am on 30th March 2015. Due to the nature of the 111 service it was essential that these calls were answered and answered promptly in accordance with agreed and strict criteria. A failure to respond to those calls could be, without exaggeration, possibly fatal. We do not find that the Claimant was subjected to unfavourable treatment insofar as discrimination arising from a disability is concerned on the basis relied upon by the Claimant namely the dismissal. As we have stated, the reason for her dismissal was the commission of acts of misconduct. These did not relate to the Claimant's disability or the effect of any medication taken by her as a result of that disability. We find that the Respondents namely through Mr Boyes-Hill on 30th March 2015 were entitled to conclude upon his observations of the Claimant and the fact that the first two calls were not answered and that there was a substantial delay in relation to the third call, that in fact the Claimant had certainly been asleep for some time between 5.09 am and 5.38 am

and as a result the calls were not answered. That constitutes an offence of misconduct and in the circumstances of the provision of the services offered by this Respondent we are also satisfied constitute offences of gross misconduct.

38. We are however, concerned over the way that the Respondents subsequently dealt with the disciplinary process. The Claimant has told us that she was not given "an investigation pack" prior to the disciplinary hearing. There is nothing in the documentation which says that although the invitation to the disciplinary hearing does say that information would be provided but there is no documentary proof that it actually was. This is one occasion where we accept the evidence of the Claimant namely that she was not given the information pack prior to the disciplinary hearing which included Mr Boyes-Hills investigation statement, the record of the calls, and Eileen Purcell's witness statement. Any person facing a disciplinary hearing is entitled to see the evidence considered by their employer at the time they are making a decision as to whether or not to discipline them and particularly to dismiss them. Reference is certainly made to the documents being produced by Mr Lee during the course of the disciplinary hearing but we are satisfied that the Claimant was not shown those documents in advance as she should have been. A more aggravating feature is the fact that the decision taken to dismiss the Claimant was certainly not taken by Mr Lee himself. He sought the advice of a senior manager and although he said the decision to dismiss the Claimant was a joint one taken by Ms Kane it is quite clear in our judgment that Ms Kane being more senior to Mr Lee contributed more to that decision than he did. She was not present at the disciplinary hearing and it was wrong that she should have participated in any shape or form in that decision. That matter is aggravated by the fact that she subsequently undertook an appeal against the dismissal – a dismissal that she had played a significant part in. That certainly renders the Claimant's dismissal as being "procedurally" unfair. It cannot be right and we so find that a senior manager has influenced a more junior manager in deciding whether or not to dismiss an employee and the senior manager in question did not even participate in the disciplinary hearing. As we have also found, the disciplinary hearing was originally adjourned to enable the Claimant to produce medical evidence and the Respondents subsequently denied her that opportunity by deciding to dismiss her before she had such an opportunity. It is also clearly wrong that Ms Kane should hear the appeal subsequently herself. As we have said that certainly renders the Claimant's dismissal procedurally unfair and we find these errors and omissions conducted by the Respondents were so manifestly unfair that the Claimant's dismissal was substantively unfair rather than there being some procedural hiccup along the way. The errors and omissions conducted by the Respondents during the disciplinary process and continued into the appeal process were so basic as to render the Claimant's dismissal as substantively unfair and we so find.

39. However, that is not an end to the matter as we have identified at the beginning of our judgment. We must go on to consider whether or not there was any percentage chance of the Claimant being fairly dismissed within the principals set out in “Polkey”. In giving this aspect of the case the detailed consideration it deserves we conclude that there was, notwithstanding the errors and omissions set out above, a 100% chance that the Claimant would have been fairly dismissed had the Respondents engaged in not involving Ms Kane in the disciplinary process and not involving Ms Kane in the appeal process. Taking into account the different explanations giving throughout by the Claimant we also find that even if the Respondents had permitted the Claimant the opportunity in producing medical evidence it would have made no difference to the one that they took namely that the Claimant had committed acts of gross misconduct by not responding to the three calls in question. In particular we remind ourselves that during the course of the evidence before us, the Claimant admitted that she had acted wrongly in not responding without the substantial delay to the third call at 5.38 am and that she was “wrong” (in her words) in not doing so. We are satisfied that even if Mr Lee had been left to his own devices to determine the outcome of the hearing or indeed any other team leader or manager within the Respondent’s organisation that the decision taken to dismiss the Claimant for the commission of offences of gross misconduct would have been the same and would have been taken at the same period in time.

40. We also consider, again as we have set out at the beginning of this judgment, the provisions of section 122(2) and 123(6) Employment Rights Act 1996. In determining the issue of whether or not the Claimant is entitled to any compensatory award not only do we find that she contributed 100% towards her own dismissal, we find in addition that the Claimant’s dismissal was wholly caused by her, namely her failure to answer the three telephone calls on 30th March 2015 and that as a result there should be no compensatory award in favour of the Claimant.

41. The Claimant’s entitlement to a basic award is not affected by any percentage reduction under “Polkey” although it can be affected by the provisions of section 122(2) of the 1996 Act. Although as we have found the Claimant’s conduct wholly caused her dismissal we are not satisfied that this should result in her not being entitled to receive any basic award and therefore no deduction shall be made from the amount of any basic award to be given in the Claimant’s favour.

42. Turning lastly to the discrimination claims. First, as we have already found, we do not find that the Claimant was subjected to unfavourable treatment, namely her dismissal because of something arising in consequence of her disability. The simple fact was that the Claimant was dismissed due to the commission of offences of gross misconduct – nothing more and nothing less. We do not find that the Claimant succeeds in her reasonable adjustment claim. We find that although

there was a “first come first served” basis for employees sitting at particular workstations the Claimant was never placed at a “substantial disadvantage” when compared to any non-disabled person. For the vast majority of her shifts she was able to sit at a work station of her choice against a window which could open if she wished to do so. Even on the two occasions when she was asked to move into the central area of the office that was not to her “substantial” disadvantage because, as she herself admitted to us, she worked those two shifts without difficulty. As a consequence we find that the Claimant’s claim alleging a breach by the Respondent of its statutory duty to make reasonable adjustments also fails.

43. In summary therefore, we find that the Claimant’s claims for discrimination arising from a disability and a failure by the Respondent to make reasonable adjustments both fail and are dismissed.

44. The Claimant’s claim of unfair dismissal succeeds as a result of the errors and omissions conducted by the Respondent during the course of the disciplinary and appeal process, although we go on to find that there was a 100% percent chance had those errors and omissions been rectified she would have been fairly dismissed at that time in any event and further that she wholly caused or contributed to her own dismissal and thus is not entitled to a compensatory award.

45. The Claimant is entitled to a basic award in the sum of £1,095.00. At the time of her dismissal the Claimant was 39 years old. She had been employed for three continuous years. Her gross weekly pay was in the sum of £365.00 per week, thus £365.00 x 3 = £1,095.00.

46. Having given judgment Mr Barnes on behalf of the Claimant made an application that the Respondent should reimburse the Claimant in respect of the issue fee and the hearing fee totaling £1,200.00 paid in respect of bringing these proceedings. That application is made pursuant 76(4) of the Employment Tribunals (Constitutional Rules of Procedure) Regulations 2013. After some examination it became apparent that the Claimant herself had not paid the fee and in fact, even into the future will not be liable to pay the fee. She took out insurance protection with an insurer called Arag pursuant to paragraph 1(a) of the terms of policy in the event of the Claimant losing part of her claim (which of course is the case here). She will not be liable for paying the fees because the insurer will in fact pay them. In our judgment rule 76(4) only enables a party who was paid a fee to pursue a claim and not anyone else, e.g. an insurer who was paid the fee on her behalf and certainly in a case where even after the event, the party themselves will subsequently be liable to repay the fee to the insurer. As a result that application is refused and no order for costs is made.

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Employment Judge Bloom, Bedford

Date: 24th March 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS