EMPLOYMENT TRIBUNALS

Claimant: Miss N Uddin

Respondent: Camden and Islington NHS Foundation Trust

Heard at: London Central

On: 18, 19, 20 December 2017

Before Judge: Employment Judge Davidson

Representation:

Claimant: Mr D Matovu of Counsel
Respondent: Ms R Azib of Counsel

RESERVED JUDGMENT

1. **The Judgment of the Tribunal is that the Claimant's complaint of unfair dismissal succeeds subject to any award being reduced by 50% by reason of her contributory conduct.**

2. **The claimant's complaint of wrongful dismissal succeeds.**

Employment Judge Davidson on 31 January 2018

REASONS

Issues

3. The issues in the case were as follows:

    3.1. Did the respondent have a potentially fair reason to dismiss the claimant?
    3.2. Did the respondent follow a fair procedure in dismissing the claimant?
    3.3. Was dismissal within the band of reasonable responses available to the respondent and was the dismissal fair in all the circumstances?
    3.4. If the dismissal is unfair, should any award be reduced for contributory fault?
    3.5. If the dismissal is unfair for procedural reasons, would the claimant have been dismissed in any event?
    3.6. Was the respondent entitled to terminate the claimant's employment without notice on the grounds of her fundamental breach of contract?

Evidence

4. The tribunal heard evidence from Roger Evans (Service Development Manager), Phil Wisson (Associate Director of Facilities and Estates) and Andy Stopher (Acting Chief Operating Officer) on behalf of the respondent and from the claimant on her own behalf. There was also an agreed bundle of documents of approximately 450 pages.

Facts

5. The tribunal found the following facts on the balance of probability:

    5.1. The respondent is a NHS Foundation Trust which includes St Pancras Hospital. It operates a switchboard on a 24-hour basis which is located at the gatehouse entrance to the hospital. The switchboard provides the first port of call for the public as well as reception, telephonist services and co-ordination of calls. There are two teams of switchboard operators comprising day staff and night staff with four members of staff in each team.

    5.2. On 16 July 2012, the claimant started working in the switchboard team as a night telephonist. She was also studying law at Kingston University. At the relevant time, she was working in a team of four telephonists with Ronnie Rubio, Imran Khalid and Nicholas Goodman. They covered evenings and weekends and generally worked in pairs. The team was managed by John Davis (Conference Centre Manager) and his line manager was Helen Flynn (Head of Facilities Management) but they both worked day shifts and were not generally on the premises when the claimant and her colleagues were at work.

5.3. It was a part of the claimant's terms and conditions that she followed company policies which included the disciplinary policy and the e-rostering policy. The disciplinary policy includes in the non-exhaustive list of potential gross misconduct offences 'unauthorised absence in extreme circumstances'. The 2014 E-Rostering Policy stipulated that staff should be responsible for negotiating their own changes to shifts and these had to be approved by the team manager.

5.4. It had been common for members of the team to swap shifts with each other and these swaps were arranged between team members and written into a diary which was kept in the gatehouse.

5.5. In September 2014 a query was raised in relation to the claimant's failure to attend shifts, taking leave without authorisation and claiming pay fraudulently. After an investigation, it was concluded that misconduct had taken place but the claimant's mitigation arguments were accepted and the outcome was that she was issued with an improvement notice. This clarified that all leave had to be requested and authorised in advance by management.

5.6. In the summer of 2015, the respondent introduced a new e-roster system and required management permission for shifts to be swapped or for any other changes to shift patterns. The original intention had been for all staff to have 'write' access but this proved unworkable and the system moved to 'read' access only. This meant that any changes had to be sent to the manager who would amend the system.

5.7. The staff were told about the new system and told that they could no longer arrange shift swaps between themselves but would have to inform management so that the e-roster could be updated.

5.8. I find that there was a change in culture after September 2015 when the e-rostering system was introduced in that the custom and practice of arranging swaps between team members came to an end. While there was still some swapping taking place, which was not of itself forbidden as long as management was informed, the frequency of shift swapping reduced considerably such that it could no longer be regarded as a custom and practice.

5.9. In September 2015, one of the security guards noticed that the claimant was not always in attendance on her rostered shift days and that she left early from her shift on occasions. He brought this to the attention of the respondent's management, who took the decision to instruct their fraud investigators, KPMG, to look into this.

5.10. KMPG surveyed the CCTV footage of the days the claimant was due to be at work. They secretly monitored this from September 2015 to January 2016 and compiled a report for the respondent showing that

there were 159 hours where the claimant had not been at work when she should have been and for which she had been paid. The claimant was then suspended.

5.11. The claimant was interviewed under caution by KPMG but made no comment at that stage. The other members of the gatehouse and switchboard teams were also formally interviewed by KPMG.

5.12. The respondent started a disciplinary investigation, carried out by Roger Evans, to consider the allegation that the claimant had not attended shifts or had left shifts early when she was rostered and paid to work. He interviewed the claimant on 15 April 2016 and she was accompanied by a trade union representative. The claimant did not, on the whole, dispute the evidence put forward by KPMG based on the CCTV footage but explained that, on each occasion when she had not attended, she had made up the time either by swapping shifts with other members of staff or coming in at other times to make up the hours. She was not able to recall all the dates of the shifts she swapped or the hours she made up. She accepted that she did not inform management of these changes but she made notes of the changes on pieces of paper which she inserted in the old diary. It was her position that there was a custom and practice of swapping shifts through private arrangements without the involvement of management.

5.13. Mr Evans interviewed the other switchboard operators, security staff and managers. All the people he interviewed confirmed that they were clear they needed to tell the manager of any changes to the roster and they said the diary was no longer in use. Some of the witnesses confirmed that the claimant would often leave her shift early. They also told Mr Evans that they had not swapped shifts since September 2015. Mr Evans did not look at the CCTV footage himself and relied on the report from KMPG.

5.14. Mr Evans concluded that the claimant had accepted that she had not worked her rostered shifts and that she had left shifts early. She maintained that she had made up time but this was not supported by any evidence or by her colleagues. He therefore decided that there was a case to answer and invited her to a disciplinary hearing to answer the allegations that between September 2015 and January 2016 she did not attend shifts on 12 occasions, left shifts early on 20 occasions and arrived late on 7 occasions when she was rostered and paid to work. He said that these were allegations of potential gross misconduct.

5.15. The disciplinary hearing took place on 16 and 27 June and was conducted by Phil Wisson. The claimant was accompanied by a trade union representative. Phil Wisson had sight of KPMG's statement, the claimant's statement with appendices and the investigation report of

Roger Evans. The claimant produced a schedule showing the shifts she had missed or left early and the corresponding times when she had made up the hours. In her defence, she admitted that she had not worked the rostered shifts but said that she had made up the hours by swapping shifts or by working on her days off and she had not been paid for hours she had not worked.

5.16. Imran Khalid and John Davis gave evidence to the hearing and were cross examined by the claimant's representative. Phil Wisson then decided to adjourn the meeting as there was a query about the instructions on shift swapping on the gatehouse noticeboard and he wanted to hear evidence from Helen Flynn and to allow the claimant's document to be formally submitted.

5.17. At the resumed hearing on 27 June, Ronnie Rubio, Nicholas Goodman and Helen Flynn gave evidence. The claimant's colleagues agreed that they had swapped shifts after September 2015 but only occasionally. This evidence was not consistent with the statements they had given during the investigation where they said that shift swapping had ended with the introduction of the e-roster system.

5.18. The claimant was then questioned by Roger Evans who maintained her position that she had changed shifts without authorisation but that she had made up all the hours. She said that there was no point informing management of the changes to shifts as they had no interest and when they were informed, they did not action the information.

5.19. The meeting adjourned while Phil Wisson considered the outcome. He concluded that four of the allegations were upheld and one was partially upheld. He found that the informal system of shift swapping came to an end in September 2015 and that it was made clear that any future changes must be notified to and authorised by management. He found that, while there had been some swaps after that date and the claimant had made up some of the time, she had not satisfied him that she had made up all the time. He found that the number of rostered hours not worked was excessive and unreasonable without clear evidence of the time being made up or managed approval to these alterations to shifts. He decided that summary dismissal was an appropriate sanction as the conduct amounted to gross misconduct and that the claimant's behaviour amounted to fraud.

5.20. The claimant appealed on the grounds that the decision was wrong, the procedure was unfair, the sanction was too harsh and new evidence had come to light.

5.21. An appeal hearing was held on 23 September 2016 and was chaired by Andy Stopher. The management case was presented by Phil Wisson and the claimant was represented by her union representative.

Andy Stopher had a copy of the management statement of case with supporting documents and the claimant's appeal letter with supporting documents.

5.22. The claimant produced evidence that she had been present at University study groups which explained why she had to leave her shifts early. She also alleged that John Davis discriminated against her on grounds of sex and that he did not manage her absence following due process. She complained that the respondent had relied on CCTV evidence but no CCTV record had been taken of her attendance on her non-scheduled days and this would have established that she had made up the hours. She also alleged that the new e-rostering policy had not been understood clearly and that the pieces of paper where she recorded the swapped shifts had been deliberately lost.

5.23. The claimant was given the opportunity to develop her grounds of appeal and Phil Wesson was able to comment on her reasons and put questions. The hearing took approximately three and a half hours and Andy Stopher promised a response within five days.

5.24. He sent the outcome letter on 27 September. He found that the evidence of her study group did not explain her failure to obtain authorisation. He agreed with her that her absence should have been treated as a welfare matter but rejected the allegation of discrimination. In relation to the CCTV issue, he rejected her appeal point and stated that it was up to her to obtain authorisation for changing shifts and establishing that she had done so by CCTV would not have explained her amending her shift pattern without authorisation. In any event, she should have had evidence of her making up the time without relying on the CCTV evidence. He rejected her point that the e-rostering policy was not clear but accepted that adherence should have been monitored better. He found no evidence that the pieces of paper in the diary had been removed. In conclusion, he upheld the dismissal decision for gross misconduct and found that she knew that changes to the roster needed to be approved and that she had taken advantage of weak management in an unacceptable way by arriving late, leaving early and changing shifts without approval.

Law

6. The relevant law for a dismissal based on an allegation of misconduct is as follows:

Unfair dismissal

6.1. Did the respondent belief that the claimant had committed the misconduct?

6.2. Did the respondent have reasonable grounds on which to sustain that belief?

6.3. Had the respondent carried out as much investigation as was reasonable in the circumstances?

6.4. Was the sanction of dismissal within the band of reasonable responses and was the dismissal fair in all the circumstances?

6.5. If the respondent failed to follow a fair procedure, would the claimant still have been dismissed if the defective procedure had been remedied?

6.6. Did the claimant contribute to her dismissal and, if so, to what extent?

Wrongful dismissal

6.7. Has the respondent shown that the claimant committed a repudiatory breach of contract entitling the respondent to terminate her employment without notice?

Claimant's case

7. The claimant contends:

7.1. The respondent's stated reason for dismissal is the claimant's failure to work her full contractual hours and thereby receiving pay for hours not worked. It is not open to the respondent now to rely on 'extreme and unauthorised' absence as this was not the reason given for dismissal or the basis on which the case has been pleaded.

7.2. The respondent did not have reasonable belief in the claimant's guilt as evidenced by Phil Wisson accepting under cross examination that he should not have used the word 'fraud' in his dismissal letter. He stated that the issue was not about financial loss but about working the rostered shifts.

7.3. There was a custom and practice of swapping shifts, confirmed by the evidence before the disciplinary hearing of Nicholas Goodman and it was unfair to single out the claimant for breaching the rostering rules when all the team were doing this.

7.4. Phil Wisson should not have concluded that there was no continuing custom of informal swapping beyond September 2015 having found Nicholas Goodman to have been a reliable witness.

7.5. The investigation was not sufficiently thorough, particularly with regard to the gravity of the allegations and the potential consequences for the

claimant. The CCTV footage was not viewed by management and it was unreasonable to rely on some footage without access to the entirety of the CCTV over the relevant period. The allegations were put to the claimant a long time after the events in question and it was unreasonable to expect her to remember what had happened in detail.

7.6. Phil Wisson only saw the abridged version of KMPG's report, which had comments supportive of the claimant's defence removed.

7.7. The sanction was not within the range of reasonable responses because Phil Wisson should not have found the claimant was guilty of fraud on the evidence before him. Her improvement notice should have been disregarded for disciplinary purposes according to the respondent's policy.

7.8. Insofar as there was clear evidence of an established practice of informal shift swapping, a reasonable employer could not dismiss for that reason.

7.9. Although the claimant has admitted not adhering to her rostered shifts and not obtaining management consent for changes, this was part of the established custom and practice and no other employees have been disciplined. The factors in the dismissal were management's failures to regulate the shift system and the dismissing officer's unreasonable assessment of the evidence before him.

7.10. The respondent has not proved that it was entitled to dismiss the claimant.

<u>Respondent's case</u>

8. The respondent contends:

8.1. The claimant was dismissed for misconduct because she repeatedly failed to turn up for rostered shifts, to work her full rostered hours, to seek authorisation for changes to her shifts or to follow any of the respondent's procedures for changing rostered hours.

8.2. The extent to which she did this was frequent, excessive and unauthorised which makes it serious enough to amount to gross misconduct. It is not necessary for fraud to be shown for there to be gross misconduct where the claimant has acted dishonestly in knowingly changing her rostered hours without management authorisation.

8.3. The respondent (Roger Evans, Phil Wisson and Andy Stopher) all genuinely believed that the claimant was guilty of not turning up to work when she was rostered and they had sufficient evidence on which to base that belief including the claimant's admission, the CCTV footage and the testimony of her colleagues

8.4. The respondent's investigation was fair and reasonable in all the circumstances. The claimant had the opportunity to test the evidence of

the witnesses relied on by management and to present her own evidence.

8.5. The respondent was entitled to reject the claimant's explanation that she was confused by the e-roster system in the light of documentary evidence and her own admission.

8.6. It was reasonable for the respondent to find the claimant's evidence lacked credibility based on her assertion that the diary was in use when her colleagues did not support that, that there were loose papers in the diary also not supported by her colleagues and the claimant's failure to keep any record of the time she allegedly made up lost hours. Her evidence that she was not aware she had to seek authorisation was not supported by her colleagues and she did not challenge her colleagues at the disciplinary hearing about informal shift swapping and use of the diary.

8.7. It was not unreasonable to gather CCTV only for the claimant's rostered days rather than all the days over the relevant period as the allegation being investigated was her failure to attend. The claimant did not raise the defence of making up her hours until April 2016 by which time the other footage had been deleted. Even if the other footage had shown what hours she made up, it would not have assisted her to answer the allegation that she was failing to work when rostered on a regular and excessive basis without management approval and in breach of the respondent's policies and procedures. The respondent was entitled to rely on the CCTV report without reviewing the actual footage since the claimant did not dispute the bulk of the information. Even if the CCTV issue is regarded as a procedural flaw, it makes no difference to the fairness of the dismissal as it is irrelevant to the central issues.

8.8. It is for the claimant to show that she made up the hours and not for the respondent to establish this. The document she produced to show the hours was not prepared contemporaneously and is unlikely to be reliable, in fact Phil Wisson found an error which the claimant admitted. Her colleagues did not provide objective credible evidence to support her assertion that she made up the hours. In any event, making up the hours does not address the failings in her conduct.

Determination of the Issues

9. I determine the issues as follows:

Issue 1: Did the respondent have a potentially fair reason to dismiss the claimant?

9.1. I find that the claimant was dismissed for a reason relating to her conduct, namely her failure to attend shifts as rostered and not working the entirety of her shifts. This is a potentially fair reason.

9.2. The respondent, in its dismissal letter, sets out the failure to work shifts as rostered without obtaining authorisation for changes and concludes that this amounts to fraud. The respondent's assumption is that the claimant received pay for shifts she did not work.

9.3. The respondent has, during the course of the hearing, sought to emphasise the breach of its internal procedures rather than the claimant's alleged financial gain and accepts that the issue is not one of fraud or financial gain but of disregarding instructions and wilfully failing to comply with procedures.

Issue 2: Did the respondent follow a fair procedure in dismissing the claimant?

9.4. Applying the test in *BHS v Burchell*, I find that the respondent did not genuinely believe that the claimant had committed fraud. I base this on the evidence of the respondent's witnesses who agreed that fraud was not the correct label for this misconduct.

9.5. However, I find that the respondent genuinely believed that the claimant disregarded its policies and instructions in relation to changing shift times and swapping shifts. I find that the respondent had reasonable grounds for reaching this conclusion and that a fair investigation had been carried out.

9.6. I do not find that the failure of Mr Evans and Mr Wisson to view the CCTV evidence themselves is a flaw in the investigation. The information which was reported to them by KPMG was not, other than in relation to one instance, challenged by the claimant. I do not see that any additional relevant information would have been obtained by viewing the actual footage.

9.7. While I accept that reviewing the entirety of the CCTV over the relevant period would have provided evidence to assist in determining whether the claimant's explanation was true, I do not find that it was a flaw in the investigation that they did not do so. It was for the claimant to provide evidence to explain her misconduct. She accepts she was aware of the procedures and did not act in accordance with those procedures. She therefore exposed herself to the allegations she later faced. Although the CCTV may have provided the evidence to defend herself, it was not the respondent's obligation to anticipate this defence and gather the information to support it. If the claimant had made it known earlier that this footage could be relevant, the respondent would have had to retain it but in the absence of this information, I find that the respondent did not act unfairly in deleting old footage in accordance with its policy and its data protection procedures.

9.8. I find it surprising that the claimant did not have other evidence to support her position, such as diary entries which might jog her memory why she need to leave early or swap shifts. Her colleagues provide evidence in

relation to some of the dates in question although none of them back up her contention that she placed bits of paper in the old swaps diary.

Issue 3: Was dismissal within the band of reasonable responses available to the respondent and was the dismissal fair in all the circumstances?

9.9. Having found that the respondent was entitled to conclude that the claimant had committed misconduct in relation to her repeated failure to notify management of changes to shifts, I go on to consider whether dismissal was an appropriate sanction.

9.10. Under the respondent's description of gross misconduct offences, the unauthorised absence would have to be 'extreme' to fall within the category of gross misconduct.

9.11. I find that, although frequent, the absences cannot be regarded as 'extreme' as the impact on the service was minimal and the claimant ensured that cover was available. There is no evidence that there were any problems which arose from her conduct and, once the respondent accepted that there was no financial loss to them, the damage done by the claimant was limited to a failure to keep management informed of the changes. Rearranging shifts, as she did, was not itself forbidden as long as management were informed. Her wrongdoing was not informing management.

9.12. Balancing all the factors, I find that the claimant's wrongdoing does not amount to gross misconduct.

9.13. I find, therefore, that the respondent's sanction of summary dismissal was outside the range of reasonable responses.

9.14. If I am wrong about this and the claimant's conduct should be regarded as gross misconduct, I must then consider whether the respondent is entitled to rely on this reason for dismissal in the light of the pleaded case which alleges fraud. Although the appeal document does not use the word fraud, it is clear from the dismissal letter and the Notice of Appearance that the respondent has been working on the basis that the claimant received pay for work not carried out. The respondent is no longer pursuing this argument, but this is the way the case has been pleaded.

9.15. I do not find that there is any substantive procedural unfairness in changing the emphasis of the misconduct in question because the allegations put to the claimant throughout the disciplinary process covered the misconduct now relied on by the respondent as well as the allegation of fraud. She has had a chance to answer those allegations during the course of the disciplinary process and is at no disadvantage as a result of this change of emphasis.

9.16. I find that the respondent has not sought to allege that the absences were sufficiently 'frequent' and 'extreme' so as to amount to gross misconduct until this hearing but the claimant has been able to respond to that allegation and I do not consider it necessary to prevent the respondent from presenting its case on that basis.

Issue 4: If the dismissal is unfair, should any award be reduced for contributory fault?

9.17. I find that the claimant changed shifts and did not work the full hours of the shifts she was rostered to work, usually by leaving early but occasionally by arriving late.

9.18. To the extent that there was any shift swapping taking place, this was almost always at the request of the claimant. I find that she was aware that she needed to seek management consent, or at the very least inform them of the changes, but she failed to do so.

9.19. She failed to provide an explanation for this other than her view that management would not action the information and therefore there was no point telling them.

9.20. I therefore find that she contributed to her own dismissal. Had she not had so many changes to her rostered hours without management being aware, the investigation and disciplinary process would not have started. She has admitted that she repeatedly failed to notify management. In finding that this does not amount to gross misconduct, I am not suggesting that this misconduct is acceptable. It is not. She was fully aware that she needed to follow minimal procedures in order to change her working hours and these would not have been difficult for her to do. However, she deliberately decided not to do so.

9.21. I conclude that the any award should be reduced by 50% to take account of the fact that the claimant has contributed to her dismissal.

Issue 5: If the dismissal is unfair for procedural reasons, would the claimant have been dismissed in any event?

9.22. I have found the unfairness to be in the sanction imposed and therefore I do not need to address this issue.

Issue 6: Was the respondent entitled to terminate the claimant's employment without notice on the grounds of her fundamental breach of contract?

9.23. I have found that dismissal was not an appropriate sanction on the basis that the claimant's wrongdoing was not an act of gross misconduct. As such she has not committed a fundamental breach of contract and is entitled to notice pay.

Conclusion

10. In conclusion, the Claimant's complaint of unfair dismissal succeeds subject to any award being reduced by 50% by reason of her contributory conduct.

11. The claimant's complaint of wrongful dismissal succeeds.

12. A remedy hearing will be listed to deal with matters relating to remedy.

Employment Judge Davidson on 31 January 2018