Case Number: 3200305/2018

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Karumazondo**

Respondent: **Essex Partnership University NHS Foundation Trust**

Heard at: **East London Hearing Centre**

On: **5 October 2018**

Before: **Employment Judge Brown**

Representation

Claimant: Mr L Karumazondo (Husband)

Respondent: Ms J Davies (Counsel)

JUDGMENT

The judgment of the Tribunal is that the Respondent did not unfairly dismiss the Claimant.

REASONS

1 The Claimant brings a reinstated unfair dismissal complaint against the Respondent, her former employer.

2 The issues in the case were set out at a Preliminary Hearing in front of Employment Judge Russell on 29 June 2018. The issues were:

12.1 What was the reason for dismissal? The Respondent relied upon conduct.

12.2 Was that belief reasonably held following a reasonable investigation? In particular whether the Respondent should have investigated the duty rosters on the day of the incident.

12.3 Was dismissal fair in all of the circumstances of the case? The Claimant says that the sanction of summary dismissal was unduly harsh having regard to her length of service and/or inconsistent treatment of a

colleague Ms Laura Sanger and the Claimant's personal mitigating circumstances.

12.4 In the event the dismissal was unfair could a fair dismissal have occurred in any event, further or in the alternative did the Claimant contribute to the dismissal by her conduct?

3 At the start of the hearing today, I clarified that the Claimant had not brought a claim of wrongful dismissal.

4 The Claimant said that she sought reinstatement as the remedy in her claim of unfair dismissal. I therefore listed a provisional remedy hearing for 14 November 2018. However, seeing that the Claimant has not succeeded in her claim of unfair dismissal, that provisional remedy hearing will not go ahead.

5 I heard evidence from the Claimant and I read the witness statement of her witness, Lorraine Stalker. The Respondent did not wish to cross examine Ms Stalker and I accepted the evidence in her statement. I also read the evidence of Mfundo Sibanda, Deputy Charge Nurse, on behalf of the Claimant. Mfundo Sibanda did not attend to give evidence and therefore I attached little weight to that statement.

6 I heard evidence from Susan Stewart, Integrated Clinical Lead for Secure Services, who was the dismissing officer in the case; and Janette Leonard, Director of Information Technology and Performance, who was the chair of the disciplinary appeal panel in the case.

7 The Respondent provided a chronology and cast list. There was a bundle of documents. Both parties made submissions; the Respondent provided written submissions.

8 I reserved my decision.

Findings of Fact

9 The Claimant was employed by the Respondent as a Bank Support Worker from July 2001 until her dismissal on 8 October 2013. At the time of the matters in question the Claimant was working on the Respondent's Fuji Ward. Fuji Ward is a female, medium secure Ward which houses individuals with severe, enduring mental health problems. It includes patients who exhibit behaviour such as self-harming, violence and who are a threat to the safety of themselves and others. All patients in the Unit are detained under the Mental Health Act Section 3 and usually come from prisons, courts, detention centres, special hospitals and psychiatric intensive caring units.

10 The Claimant had undertaken up-to-date training in the prevention and management of violence and aggression. Patients on Fuji Ward are allocated a level of observation pursuant to the Respondent's Engagement and Formal Observation Procedure, page 103.

11 "Level 2 - Intermittent Observation" requires the relevant member of staff directly to observe the patient at least 5 times each hour at irregular intervals. This level is appropriate when patients are potentially, but not immediately, at risk.

12 "Level 3 – Within Eyesight Observation" is required when the patient could, at any time, make an attempt to harm themselves or others. During such an observation, "The patient must be kept within eyesight at all times, day and night, any objects that could be used to harm themselves or others must be removed.." page 106.

13 The Respondent's Engagement and Formal Observation Procedure provides, at paragraph 1.11:

> "At the end of each observation period, the staff member should have a break from observation. An individual staff member should not carry out observation above the general level for more than 2 hours (NICE 9 February 2005 Clinical Guideline 25), page 104.

14 The general level of observation is "Level 1." The Respondent's Procedure describes it thus, "This is the minimum acceptable level observation for all inpatients and involves knowing the location of all patients, though not all patients need to be kept within eyesight," page 105.

15 In June 2011 the Respondent mistakenly commenced an investigation into misconduct with regard to the Claimant. Almost immediately, the Respondent established that it had made an administrative error in doing so and apologised to the Claimant, page 157.

16 The Claimant normally worked night shifts when working for the Respondent. She undertook a night shift on 24 – 25 March 2013 on Fuji Ward. Fuji Ward has an Intensive Care Suite ("ICS") which is used for patients who are unsafe to mix with other patients for a period of time.

17 The CCTV recordings for Fuji Ward that night were reviewed later by Andy Ward, Head of Security. Having reviewed the CCTV recording of the Claimant's Level 3 observation of a patient "KW," Mr Ward reported to managers that he believed that the Claimant had fallen asleep during her observation between 3.00am and 4.00am on 25 March 2013.

18 In about May 2013 the Claimant was told that an investigation would be undertaken under the Trust's Conduct and Capability Policy and Procedure into allegations that:

18.1 The Claimant was seen to be sleeping on duty on the morning of 22 March 2013 at 3.00am on Fuji Ward whilst observing a patient in the ICS Unit; and

18.2 The Claimant was negligent in her duties as a support worker in this shift as she was found to have been asleep.

19 Amina Jappie was appointed as investigating manager. On 20 May 2013 Ms

Jappie wrote to the Claimant, inviting her to attend an investigatory meeting on 5 June 2013, page 200. The Claimant attended that investigatory meeting, accompanied by a work colleague. The Claimant was told that the allegation referred, in fact, to the morning of 25 March at 3.00pm, page 215 and 226.

20 Amina Jappie also interviewed Mfundo Sibanda, Deputy Charge Nurse and Lisa Chinnery, Staff Nurse, as well as Andy Ward, during her investigation. She completed an investigation report on 31 July 2013, page 276 – 286. Her investigation report concluded that there was sufficient evidence to support the allegations and that a disciplinary hearing should be convened.

21 By a letter of 17 September 2013, Sue Stewart, Disciplinary Hearing Manager, wrote to the Claimant, inviting her to a disciplinary meeting to be held on 8 October 2013. Ms Stewart said that the allegations under investigation were "that you were seen to be sleeping on duty on the morning of 25 March 2013 at 3.00am on Fuji Ward whilst observing a patient in ICS Unit … that you were negligent in your duties as a support worker on your shift as you were found to be asleep." Ms Stewart reminded the Claimant of her right to be represented by a trade union representative. She said that Amina Jappie would attend the hearing to present the findings of her investigation and that Andy Ward, Clinical Nurse Specialist, and Mr Mfundo Sibanda would be called as witnesses. She said that the Claimant would have the opportunity to question the witnesses at the hearing. Ms Stewart informed the Claimant that, if the allegations were found proven at the hearing, disciplinary action up to and including summary dismissal could be taken. Ms Stewart enclosed a copy of the investigation report.

22 The investigation report included, in its appendices, the Respondent's Conduct and Capability Procedure, transcripts of interviews with all the witnesses, the Respondent's Observation and Engagement Policy and Ward Rotas for the week commencing 25 March 2013, amongst other documents, page 288 and 276.

23 The Respondent's Conduct and Capability Policy provided that the following disciplinary sanctions were available to the Respondent in cases of employee misconduct: verbal warning, first written warning, final written warning, dismissal and summary dismissal, page 59. It gave examples of gross misconduct:

> "4.1 the following offences are regarded as very serious and will be treated as gross misconduct if proven …
>
> 4.2 Negligence – any action or failure to act which threatens the health and safety of a patient, member of the public or colleague, or causes unacceptable injury, loss or damage …
>
> 4.5 Being unfit for duty - through the effect of alcohol or non-prescription drugs or by being asleep on duty unless authorised to be so…" pages 61 – 62

24 The Claimant attended the disciplinary hearing on 8 October 2013. The Claimant had already seen the CCTV evidence, page 297, but she watched it again during the disciplinary hearing in the company of her trade union representative, page 298 and 350 – 351. Having reviewed the CCTV evidence, the Claimant was asked whether she agreed

that there was quite a long period during the hour when she was nodding off, page 351. She did not disagree. The Claimant was asked how she could have kept herself alert during the period. She said that she could have got up, or had a drink, page 352.

25 Mfundo Sibanda gave evidence to the disciplinary hearing and said that the Ward was adequately covered for the relevant shift. This was not challenged by the Claimant, page 330.

26 Ms Stewart produced a summary of the observations that the Claimant had undertaken from midnight until 7.00am, when her shift ended, on 25 March 2013. The Claimant agreed, in evidence to the Tribunal, that she had looked at the summary during the disciplinary meeting. Ms Stewart's summary showed that the Claimant had conducted a Level 2 Observation between 12 midnight and 1.00am, but had not conducted Observations between 1.00am and 2.00am. She had conducted a further Level 2 Observation 2.00am to 3.00am, and a Level 3 Observation in the ICS Unit between 3.00am and 4.00am. She did not conduct observations between 4.00am and 5.00am but conducted a Level 2 Observation from 5.00am to 6.00am. She did not conduct Observations from 6.00am to 7.00am.

27 The Respondent was not able to locate Observation records for the early part of the Claimant's shift on the evening of 24 March 2013 between 9.00pm and midnight.

28 Ms Stewart told the Employment Tribunal that, on viewing the CCTV evidence, she believed that the Claimant had brought a number of personal possessions into the ICS Unit whilst she carried out the Level 3 Observation. These included, at least, a coat and a bag. Ms Stewart told the Tribunal that the CCTV evidence showed that the Claimant placed a fleece over her legs and put om her coat, zipped it up and put her hood up. Shortly thereafter, Ms Stewart said that the CCTV recording showed the Claimant's head dropping and the Claimant appearing to be asleep. The Claimant stretched at one point, before appearing to be asleep again.

29 The Claimant told the disciplinary hearing that the ICS Unit was very cold and that she had put on her coat and a fleece over her legs to keep herself warm. She also said that she was due to have a knee operation and was on medication. She told the disciplinary hearing that, unfortunately, her daughter was ill in Zimbabwe at the time and that this was affecting the Claimant.

30 It was not in dispute that the Claimant had been working for the Respondent for 12 years and had a clean disciplinary record.

31 On 8 October 2013 Ms Stewart wrote to the Claimant, dismissing her. She said that she had considered the investigation report and everything that had been said at the disciplinary hearing, as well as additional information provided on the day of the hearing. She had considered Observations sheets for the period 12 midnight to 7.00am and CCTV footage of the incident. Ms Stewart said that she had taken into account that the schedule of Observations indicated that the Claimant had had time to take a break. The Claimant had not been placed on consecutive Observations and had been allocated only one Level 3 Observation between midnight and 7.00am. Ms Stewart said that the Claimant had been placed on an acceptable number of Observations, so that she would have been able to walk around and ensure that she was alert. Ms Stewart noted that the temperature in

the ICS Unit was reported as being cold. Ms Stewart further commented that the CCTV evidence showed that the Claimant had taken a fleece, coat and bag into the ICS Unit and that the Claimant was seen to put her fleece over her legs and zip up her coat; soon afterwards her head appeared to drop and the Claimant appeared to sleep. Ms Stewart said that the Claimant had acknowledged that she was nodding off during the Level 3 observation. She noted that the Claimant had advised that she had a physical health problem and had taken medication and that there were personal issues relating to her daughter. Ms Stewart noted that the Claimant had apologised for her actions and stated that she was ashamed of them.

32 Ms Stewart said that she was not convinced that the matter had been an isolated incident. With regard to the Claimant saying that she was waiting for a knee operation, so that she had not walked around when she was tired, Ms Stewart said that, as a support worker, she had a duty of care to patients and staff. If the Claimant was unfit for work she should not have undertaken the shift. Mrs Stewart said the fact that the Claimant appeared to be asleep was a matter of concern, given that all parties, including the Claimant, had agreed that the patient in question was violent and aggressive. Furthermore, on that day, the patient had been given rapid tranquilisation at 15.55 and the support worker therefore had to ensure that the patient's signs of life were checked.

33 Ms Stewart said that she believed that the Claimant was asleep on Fuji Ward for around 20 minutes whilst undertaking a Level 3 observation. Ms Steward said that this amounted to negligence and threatened the health and safety of the Claimant and others on the Ward.

34 Ms Stewart concluded by saying that being asleep on duty breached the Trust's Conduct and Capability policy and that the allegations were upheld. Ms Stewart said that she had considered the Claimant's mitigation, including the fact that she had been employed since 2001 and had had no previous issues of misconduct, that the Claimant had provided a letter from her GP and that the medication leaflet said that a side effect of the medication could be tiredness. She noted that the Claimant had been remorseful, had admitted nodding off on the day and had said that she had felt she had left patients down and had learnt a lot.

35 Ms Stewart said that the Claimant's behaviour constituted gross misconduct under the Trust's Conduct and Capability Policy and was therefore sufficiently serious to result in summary dismissal. She said that the Claimant's mitigation did not warrant a lesser sanction. Ms Stewart told the Claimant that she was summarily dismissed on the grounds of misconduct from 8 October 2013.

36 At the Employment Tribunal hearing, the Claimant said that, during the investigation into the allegations against her, she had been transferred to the day shift. She contended that this showed that trust and confidence had not broken down between the Respondent and the Claimant, despite the allegations against her. Ms Stewart gave evidence, however, that, in her view, given the nature and degree of the Claimant's negligence during her observations, summary dismissal was the appropriate sanction. Ms Stewart elaborated by saying that the patient in question was being nursed in the Intensive Care Unit and had a very serious history of assaultive behaviour. The Claimant had fallen asleep on the Observation and had put staff and the Claimant at considerable risk. Ms Steward said that she had not considered keeping the Claimant on the day shift

with a final written warning. The Respondent's policy provided for specific sanctions, which did not include transfer to different shifts.

37 Ms Stewart was cross-examined about the fact that she had not dismissed another individual, LS, who had also fallen asleep while undertaking a Level 3 observation. Ms Stewart confirmed that she had also been the disciplinary manager in respect of that other individual and said that there were very different mitigating circumstances in that case. The other individual had carried out three consecutive Level 3 observations, for several patients, with no relief or break. This was contrary to the Respondent's Observation Procedure. Furthermore, the individual LS had made attempts to keep herself awake, such as moving around, whereas the Claimant had settled down and made herself comfortable.

38 Ms Stewart produced the outcome letter for LS. The allegations in relation to LS were almost identical to the Claimant's, in that LS had been seen sleeping on duty whilst observing a patient in the ICS Unit and that LS had been negligent in their duties as a support worker on the shift as they had been asleep. The outcome letter said that the allegations were proven, and that the behaviour constituted gross misconduct, so that it would be regarded as sufficiently serious to result in summary dismissal. However, the letter said that, in light of the mitigation presented which directly contributed to the allegations, Ms Stewart felt that the sanction of dismissal was not proportionate in the circumstances. The letter specifically said, *"It was found today that you carried out Level 3 observations for several patients for 3 consecutive hours with no relief and conducted observations for 7 out of 10 shift hours, which directly compromises the Trust's Engagement and Formal Observation Policy and Procedure (CLP8/CLPG8)… The ward was short staffed on this night…".*

39 Ms Stewart said that the Claimant had not shown the same substantial mitigation. Ms Stewart had imposed the sanction of a final written warning in LS's case. In the Claimant's case, because her mitigation was not so substantial, summary dismissal remained the appropriate sanction for gross misconduct.

40 The Claimant appealed against her dismissal on 23 October 2013, page 364. On 12 December 2013 the Claimant was invited to an appeal hearing to be held on 20 December 2013, page 380. One of the Claimant's grounds of appeal had been that the sanction of dismissal in her case was inconsistent with the treatment of LS. The letter inviting the Claimant to the appeal hearing enclosed the outcome letter for LS, page 379 – 381.

41 At the appeal hearing, the Claimant's representative said that there was no dispute that the Claimant had been sleeping, page 389. The Claimant said, however, that she had undertaken another Level 3 Observation of a patient, MC, on the night in question between 2.00am and 3.00am, immediately before the Level 3 Observation from 3.00am to 4.00am (during which the Claimant was alleged to have fallen asleep).

42 The appeal hearing manager, Janette Leonard, adjourned the hearing to obtain the records for the patient MC, to establish whether the observation for MC was at Level 3 or Level 2. The Claimant agreed that she was happy for Ms Leonard to do that, page 435. It was put to the Claimant, during the appeal hearing, that the records of the observation prescribed for MC were Level 2 in communal areas, Level 3 in the bedroom, bathroom

and toilet until asleep, and, when asleep, Level 2. It was put to the Claimant that, at midnight, she had written that the patient was asleep, so that the Claimant was on a Level 2 Observation when the patient was asleep. The Claimant agreed to that interpretation, page 439.

43 On 23 December 2013 Janette Leonard wrote to the Claimant, dismissing her appeal, page 443 – 445. Ms Leonard stated that the grounds of appeal had been: harshness of sanction; less favourable treatment than another colleague; that the information upon which Ms Stewart had made her decision in respect of the levels of information was incorrect; and that not enough significance had been given to the Claimant's employment history. Ms Leonard said that the appeal panel had taken into account the management's statement of case and the verbal evidence of Susan Stewart, the disciplinary findings, the Claimant's verbal evidence and statement of case, the CCTV footage, the Trust's policies and procedures and the additional medical records requested during the hearing. Ms Leonard said that there were key differences between the Claimant's case and that of LS; LS had carried out Level 3 Observations for several patients for 3 consecutive hours, with no relief, in breach of the Trust's Engagement and Formal Observation Policy and Procedure. The Ward had been short staffed on that night and the individual had made attempts to keep themselves awake during the period. In the Claimant's case, the Trust's Engagement and Formal Observation Policy and Procedure had been followed. The Ward had been adequately staffed and that it was evident that the Claimant had not made attempts to keep herself awake during the period of her Level 3 Observation. Ms Leonard said that the Claimant's Observation on the patient MC was at Level 2 because MC was asleep in bed at the relevant time.

44 Ms Leonard said that the appeal panel had viewed the CCTV footage and considered that it was evident that the Claimant had not moved from her seated position during the period. The Claimant had not stood up, or walked around the room, or got a drink in order to prevent herself from falling asleep.

45 Ms Leonard said that the panel considered the sleeping on duty posed a significant risk to the Claimant and the patient, but also to other vulnerable patients and workers; the patient KW was known to be violent and had, that day, received a tranquiliser in relation to an incident which had occurred on the ward. She said that the Claimant's actions were therefore unacceptable and did amount to negligence, so that the decision to dismiss was not too harsh in the circumstances.

46 Ms Leonard said that, in the appeal panel's opinion, the Claimant's explanation and mitigation were taken into consideration by the disciplinary panel and that the decision to summarily dismiss the Claimant on the grounds of gross misconduct was fair, reasonable, and commensurate with decisions arrived at in similar cases within the Trust.

47 At the Employment Tribunal, the Claimant compared the way she had been treated with the treatment given to another employee, DD. The Respondent produced the disciplinary outcome letter for DD, page 514 – 515. DD had also been the subject of allegations that they had been sleeping on duty and had been negligent. DD was a qualified nurse. The outcome in DD's case was summary dismissal.

48 During the Employment Tribunal hearing the Claimant also contended that she had been undertaking duties as a Security Nurse on the night in question and, therefore,

was not able to take breaks and had been conducting more observations than Ms Stewart and Ms Leonard had found.

49 Ms Leonard and Ms Stewart explained that the Observations which the Claimant would have been undertaking as Security Nurse would have involved a single Observation each hour. The Claimant agreed that the Security Nurse Observations would have taken 5 to 10 minutes in the hour.

Relevant Law

50 By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer

51 *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*. Conduct is a potentially fair reason for dismissal.

52 If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

53 In considering whether a conduct dismissal is fair, the Employment Tribunal is guided by the principles set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379, affirmed by the Court of Appeal in *Post Office v Foley* [2000] ICR 1283.

54 Under *Burchell* the Employment Tribunal must consider whether the employer had an honest belief in the guilt of the employee of misconduct at the time of dismissal. Second, the Employment Tribunal considers whether the employer, had in its mind, reasonable grounds upon which to sustain that belief. Third, the Employment Tribunal considers whether the employer, at the stage at which he formed the belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

55 The Employment Tribunal also considers whether the employer's decision to dismiss was within a range of reasonable responses to the misconduct.

56 In applying each of these tests the Employment Tribunal allows a broad band of reasonable responses to the employer, *Iceland Frozen Foods v Jones* [1982] IRLR 439.

57 The band of reasonable responses test applies as much to the Respondent's investigation as it does to the decision to dismiss: *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23, LJ Mummery, giving the judgment of the Court, para 30.

58 However, delay can render an otherwise fair dismissal unfair, per Elias LJ in *A v B* [2003] IRLR 405 at para 66.

59 It is not for the Employment Tribunal to substitute its own view for that of the employer, but to consider the employer's decision and whether the employer acted reasonably, *Morgan v Electrolux Ltd* [1991] IRLR 89, CA. This last point was emphasised in *London Ambulance Service NHS Trust v Small* [2009] IRLR 563, CA.

60 A decision to dismiss an employee may be unfair if it is inconsistent with the practice or policy of the employer with regard to other employees, but only in limited circumstances. In *Hadjioannou –v- Coral Casinos Limited [1981] IRLR 382,* at paragraph 25, the Employment Appeal Tribunal stated that Tribunals should scrutinize arguments based upon disparity with particular care. It is only in the following limited circumstances that the argument is likely to be relevant:

60.1 that an employee has been led by the employer to believe that such conduct will either be overlooked or at least not dealt with by the sanction of dismissal;

60.2 the evidence supports an inference that the purported reason is not the real or genuine reason for the dismissal or;

60.3 evidence as to the decision made by an employer in truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable on the part of the employer to dismiss the employee for that misconduct.

61 The EAT commented there will not be many cases in which the evidence shows that there were other disciplinary cases at the same employer which were truly similar or sufficiently similar to allow an employee to argue unfair inconsistency in dismissal decisions.

Discussion and Decision

62 I considered, first, whether the Respondent had shown the reason for dismissal and that it was a potentially fair reason. I decided that the Respondent had shown that the reason for dismissal was misconduct, in the Claimant sleeping on duty on the morning of 25 March 2013 at 3.00am on Fuji Ward whilst observing a patient in the ICS Unit and being negligent in her duties as a support worker on the shift.

63 Both the disciplinary outcome letter and the appeal letter stated that those were allegations which had been upheld. It was clear from the evidence that I heard and from the documentary evidence of the investigation, disciplinary and appeal hearings that those were the allegations which were investigated and decided upon.

64 While the Claimant said that she had been mistakenly investigated in 2011 I saw no evidence that it had influenced the decision to dismiss her in 2013 in any way. I accepted both Ms Stewart and Ms Leonard's evidence that the reason that they decided that dismissal was appropriate in the case was that they both believed that the Claimant had fallen asleep while she had been allocated to conduct a Level 3 Observation and that hat constituted gross misconduct in the form of negligence and being unfit for duty while being asleep.

65 The Claimant contended that the Respondent did not have a reasonable evidence of misconduct and had not conducted a reasonable investigation.

66 I was satisfied that, while the original letter informing the Claimant that she was being investigated told her that the allegations related to 22 March 2013, during the investigatory interview it was made clear to the Claimant that the allegations related to 25 March 2013. Furthermore, the invitation to the disciplinary hearing gave the date of the alleged misconduct as 25 March 2013.

67 Moreover, the documents examined during the disciplinary hearing, including Observations from 12 midnight to 7.00am, all related to 25 March 2013. I decided that the Claimant was aware, during both the investigatory and disciplinary hearings, that the allegations related to the 25 March 2013. I decided that the Claimant was in no way hampered, or confused, in the evidence she gave to either meeting regarding the allegations against her.

68 The Claimant contended that the Respondent did not conduct a reasonable investigation because it did not produce records of Observations before 12 midnight on 24 March 2013. I was satisfied, on the Respondent's evidence, that the Respondent produced all the documents which it could produce. The patient Observations were not available, despite being looked for. The Claimant never asserted, in any event, that she had been conducting any Level 3 Observations before midnight on the relevant day. Since that was not a matter in dispute, it was not necessary for a fair or reasonable investigation for the records before midnight to be produced.

69 The Claimant contended that the CCTV evidence did not show the Claimant to be asleep and, therefore, there was no reasonable evidence of the Claimant being asleep on the shift in question. It was clear from the record of the disciplinary hearing and the appeal hearing that both the Claimant and her union representative conceded that the Claimant had been asleep during the shift in question. Furthermore, I accepted the evidence of Ms Stewart and Ms Leonard that the CCTV evidence did show that the Claimant settling down and dozing. I accepted their evidence that the Claimant did not move from her sitting position, she was still for long periods of time and her head was drooping, indicating that she was dozing. I considered that there was reasonable evidence that the Claimant fell asleep on the shift.

70 The Claimant argued that dismissal was not a reasonable sanction, considering her mitigation and in light of the fact that LS had not been dismissed for the same offence. Regarding LS, I considered that the circumstances of LS's case were very different. As both Ms Stewart and Ms Leonard explained, LS had been required to conduct Observations which were in breach of the Trust's own Policy. LS had been required to conduct three consecutive Level 3 Observations. The Trust Policy was clear that only two consecutive Level 3 Observations were permissible.

71 I found, on the evidence, that the Claimant had conducted a Level 2 Observation on MC and other patients between 2.00am and 3.00am and, then, one Level 3 Observation between 3.00am and 4.00am. She had therefore conducted only one Level 3 Observation, for one hour, and this was in accordance with the Trust Policy.

72 The fact that the Trust had acted in breach of its own Policy in relation to LS was a

significant mitigating factor in LS's case. It was clear that Ms Stewart did treat LS and the Claimant consistently, in so far as she concluded that both had fallen asleep on duty and both had been negligent. The difference between the cases was the fact that LS had more compelling mitigating evidence, in relation to breach of the Policy, but also in relation to the fact that LS had made visible efforts to stay awake, whilst the Claimant had not. There was no true comparison between the circumstances of the Claimant's case and LS's case. I decided that the Respondent had not acted unfairly in dismissing the Claimant when it give LS a final written warning.

73 I considered that the Respondent's decision to dismiss the Claimant was within the band of reasonable responses of a reasonable employer. On the Respondent's findings, the Claimant had fallen asleep while conducting a Level 3 Observation on a violent patient. Falling asleep on duty was an example of gross misconduct in the Respondent's Disciplinary Procedure. Negligence was also an example of gross misconduct. I considered that it was reasonable for the Respondent to conclude that the Claimant had been negligent when falling asleep at a time when she was supposed to be observing a potentially dangerous patient, who could have caused injury to the Claimant and any other person on the Ward.

74 During the Employment Tribunal hearing the Claimant contended that she had been undertaking duties as a Security Nurse on the night in question and, therefore, had not been able to take breaks. She said that she had been conducting more observations than Ms Stewart and Ms Leonard had found. Ms Leonard and Ms Stewart explained that the Observations that the Claimant would have been undertaking as Security Nurse would have involved a single Observation in an hour. The Claimant agreed that the Observation would have taken 5 to 10 minutes in the hour. On the facts, such observations were not comparable to the consecutive Level 3 Observations which LS had been required to undertake.

75 In summary, I decided that the Respondent did dismiss the Claimant for misconduct and that it conducted a reasonable investigation and had reasonable evidence on which to make its decision. I concluded that dismissal was reasonable sanction. The Respondent dismissed the Claimant fairly. Her claim for unfair dismissal fails.

Employment Judge Brown

2 November 2018