EMPLOYMENT TRIBUNALS

Claimant: Mr K Moore

Respondent: Sunrise UK Operations Limited

Heard at: Southampton **On:** 22 November 2018

Before: Employment Judge Jones QC

Representation:

Claimant: Miss England, Solicitor
Respondent: Mr P Chadwick, Consultant

JUDGMENT

1. The Claimant's application to amend his claim is accepted

2. The Claimant's claim for unfair dismissal is dismissed

REASONS

The Application to Amend

1. The Claimant has a pleaded single claim: unfair dismissal. Although at the outset of the hearing Miss England appeared to suggest that the fairness of the dismissal might be being challenged on a number of grounds, ultimately her position was that the pleaded case raised a single criticism – that dismissal was not within the range of responses open to a reasonable employer.

2. The Claimant applied to amend his claim. He wished to add an additional ground of unfairness:

> "The Claimant contends that at the start of the disciplinary hearing he was told by the disciplining officer that *his job was not at stake, that although it says in the disciplinary letter you received that you could lose your job at the end of this enquiry, I assure you that this not going to happen, that it* [dismissal] *was off the table so sit back, relax and don't worry.* The Claimant contends that in the circumstances the dismissal was procedurally unfair in that it was a breach of ACAS Code of Practice, paras 2, 4, 12 and 23**.**"

3. The Respondent opposed the application.

4. The Tribunal took the view that the course that was most consistent with the fair and efficient disposal of the proceedings was to hear evidence (including evidence as to what might have been said at the disciplinary hearing) and for the application to be considered as part of submissions at the end of the hearing.

5. The ET1 was lodged on 4 May 2018. The application to amend was made on 20 November 2018, 2 days before the hearing. The letter from the Claimant's representatives suggested that the reason for the late application was that the Claimant was only now legally-represented.

6. Even before taking advice, the Claimant had alleged that he had been told at the outset of the disciplinary hearing that dismissal was not being considered. For example, he makes reference to the issue in his letter of appeal, dated 17 February 2018:

> "To paraphrase what James Glanville [the dismissing officer] said to me: this inquiry will definitely not lead to my dismissal and that I should relax and not worry. Not only was this advice misleading it also undermined the strength with which I attempted to defend myself".

Given that the Claimant considered the point significant in February 2018, there was a need for an explanation as to why it had not been included in his ET1. Under cross-examination, he gave three answers. They were not easily reconciled. They were:

1. He did not think there was room on the form to include the point;
2. He simply forgot to include it; and
3. He had thought that he would be able to add to his grounds of complaint later and therefore omitted it.

7. The Claimant argued that he was not seeking to introduce a new head of claim. He said that the point was a strong one and that he would suffer considerable prejudice if he were not allowed to rely upon it. He contended that the Respondent, by contrast, would not suffer any prejudice as they had attended with the evidence necessary to rebut the point.

8. The Respondent's position was that it should not be penalised for the fact that it was well-prepared and that the Claimant's explanations for delay in raising the matter were unconvincing and contradictory.

9. Applying the **Selkent** principles and para 5 of the **Presidential Guidance**, the Tribunal has determined that the amendment should be allowed. As to the nature of the amendment, there is no attempt to add a new head of claim; the Claimant is relying on a factual issue to strengthen an existing claim of unfair dismissal. As to time limits, no point arises as the amendment is designed to underpin an existing claim that was commenced timeously. As to the timing and manner of the application, it is plainly unsatisfactory but since the Tribunal considers that no real prejudice is caused by the amendment, it is disinclined to deny it on punitive grounds (see **Sefton NBC v Hinks** [2011] ICR 1357).

Issues

10. The issues for determination are:

    10.1 What was the reason for the Claimant's dismissal;

    10.2 Was the reason a potentially fair reason within the meaning of **Employment Rights Act 1996, s. 98**;

    10.3 Was the Respondent entitled to treat the reason as a sufficient reason to terminate. More specifically:

        10.2.1 Did the Respondent have reasonable grounds for its belief that the Claimant had misconducted himself;
        10.2.2 Did the Respondent carry such investigation as was reasonable; and
        10.2.3 Was dismissal within the range of response open to a reasonable employer?

Findings of Fact

11. The Claimant has worked in care services for around 18 years. He commenced employment with the Respondent on or about 4 May 2010. He was summarily dismissed on 1 February 2018. At that point, he was working as a Senior Care Assistant. The Respondent is a company which runs a number of residential care homes, including the Westbourne Care Home in Bournemouth where the Claimant worked. The Claimant was allocated, specifically, to the home's dementia unit. The unit was called "Reminiscence".

12. The Claimant's responsibilities were set out in a Job Description. The purpose of the post is described in the following terms:

> "The Reminiscence Senior Care Assistant is responsible for providing the highest standards of care to our residents while complying with all company polices and regulations".

The Claimant had the following specific responsibility:

> "The Reminiscence Senior Care Assistant is responsible for communicating all issues regarding Reminiscence department to coordinators, residents' families and other team members in the absence of the Reminiscence Coordinator."

13. Amongst the "Essential Key Duties" identified in the job description were:

- Provide/assist with personal care;
- Effectively communicate and/or document any information regarding the residents, according to the procedure explained by the Reminiscence Coordinator; and
- Notify Reminiscence Coordinator or Wellness if a resident has a change in care needs.

14. On 8 January 2018, the Claimant attended for work on the second shift of the day. There were three shifts: 6:45 am to 2:15 pm; 1:45 pm to 9:15 pm; and 9 pm to 7 am. The shifts overlapped to allow for a proper handover. 8 January 2018 was the Claimant's first day back after a period of sickness absence. He was not fully recovered. It was suggested that he was asked to come back to work but the Respondent asserts (and the Claimant accepts) that if he was not fit to perform his job he should have stayed away whether he was asked or not. The care of residents should not be put at risk through a care assistant's inability properly to discharge their responsibilities.

15. The Claimant was to perform two roles that day: He would lead the shift and he would be responsible for distributing medicines. Some medicines have to be distributed at specific times of day or at specific intervals. It was suggested on his behalf that performing both roles would have meant that, at times, he would have to focus on one to the detriment of the other. The Respondent's witnesses, Mr Glanville (the home's General Manager) and Dr King (who, at that point, was Director of Operations) gave that suggestion short shrift. Their evidence, which the Claimant accepted when he came to be cross-examined, was to the effect that "doing the meds" was not particularly time-consuming and there was sufficient flexibility to allow a senior care assistant to put it to one side to deal with anything that arose urgently.

16. There were two other staff members on duty with the Claimant: Tina O'Donnell and Lucy Grose. Those were just the staff members on the specific floor of the Reminiscence unit. There were staff working in other areas of the home who, the Tribunal was told and finds, could be called on in the event of urgent need.

17. 8 January 2018 was an important date for a particular resident, who will be referred to in this judgment as "R". He has "mixed dementia". The Tribunal was shown an anonymised copy of his individualised service plan ("ISP"). The ISP records that R can sometimes refuse care. The plan provides that rather than force R to accept care the carer should "leave" and "come back an encourage [him] to have care again". As Dr King explained, where cooperativeness fluctuates it is important to take opportunities as they become available. The

ISP also records that the Claimant is at "high risk of pressure ulcer development" and that he gets "moisture lesions". He had been risk-assessed for being moved using a hoist, although the practice appears to have been not to use the hoist with that Claimant on the basis that it had never previously proven necessary.

18. The ISP also provides that the Claimant is to be encouraged to have "frequent continence care". On the front page of the ISP it is suggested that he should be asked whether he would like to be assisted to the toilet every 2 to 3 hours. Because he can be doubly incontinent he wears a "pad". Throughout the evidence, ensuring that the Claimant was not wearing a soiled pad was referred to as providing him with "personal care" albeit that that term has, the Tribunal was told, a wider meaning.

19. R appears to have had his pad changed at around 7 am. By the time the Claimant's shift started he had not had his pad changed. Nor was it changed during the Claimant's shift. Nor was it changed during the night shift. This resulted in his sitting in his own faeces and urine for so long that he suffered injuries to his buttocks that the Claimant was later to describe as "horrendous".

20. The Respondent commenced an investigation. It was conducted by Abi Gardiner who was Reminiscence Co-ordinator and the Claimant's line-manager. The picture that emerged was that the two junior carers had made a number of attempts to provide personal care but the Claimant had not proven cooperative. They both told the investigator that they had referred the matter to the Claimant. Ms O'Donnell said:

> "I handed over to the lead – I'm not sure if it was reported."

Ms Grose said:

> "We kept telling the lead who said to leave him".

21. The Claimant was interviewed on 10 January 2018 and asked whether he had tried to check R's pad. This led to the following exchange:

> "AG: Did you go and try?
> KM: No
> AG: Why?
> KM: I suppose I shouldn't of done [the Claimant accepted he had said he supposed that he *should* have done and that the note is inaccurate in that respect]
> AG: Why wasn't he hoisted?
> KM: We don't tend to hoist [R]
> AG: He is assessed for hoist so it can be used.
> KM: I can accept that.
> AG: No documentation on communication in care connect [the Respondent's computerised records system]. No pressure cushion on wheelchair.
> KM: I believe he was.

AG: How long until someone intervened?
KM: I hoped he would be repositioned and care given at night."

During the interview the Claimant accepted that he had not sought to raise the difficulty in checking R with a nurse.

22. Ms Gardiner's recommendation was that the Claimant should be subject to disciplinary action.

23. On 26 January 2018, the Respondent wrote to the Claimant requiring him to attend a disciplinary hearing. The allegation that he was to face was set out in the following terms:

> "You neglected the needs of a Resident whilst leading shift and failed to document or report issues to your Manager or any Clinical members of staff."

The letter also spelt out the possible consequence of the hearing:

> "As the allegation amounts to gross misconduct, if it is upheld the outcome of the hearing may be your summary dismissal."

The Claimant accepted in cross-examination that "neglect" is a very serious matter and that if he were guilty of it, it would, indeed, amount to gross misconduct and would justify summary dismissal.

24. On 31 January 2018, the Claimant wrote a personal statement. Summarising, the Claimant told the Respondent that he had still been ill on his return to work and that his "compromised physical condition and the mental strain this put [him] under made it very difficult for [him] to concentrate and to effectively carry out [his] duties as a shift leader and medication technician".

25. The disciplinary hearing took place the next day. It was conducted by Mr Glanville. A note was taken by Ms Joanne Blake, who is the Business Office Coordinator for the home.

26. As will be clear from the discussion of the amendment application above, there is a dispute as to what happened at the outset of the meeting. The Claimant says that before the meeting formally began (and before Ms Blake began to take her minute), Mr Glanville said two significant things. The first was that the personal statement would "act as mitigation in the final verdict". The second was that the Claimant's job was "not at stake". The suggestion in the letter of 26 January that summary dismissal was a possibility was expressly repudiated. He was told to sit back, relax and was advised not to worry. The consequence of this advice, says the Claimant, was that he made a series of admissions that he would not otherwise have made. He would instead have defended himself with greater vigour. This is a surprising proposition. The Claimant says that once he was not at risk of dismissal, he became *less* inclined to give a truthful account of events. In support of his account, he points out that when he later

appealed his dismissal, he raised the question as to whether Mr Glanville had misled him in the first paragraph of his appeal letter of 17 February 2018.

27. Mr Glanville flatly denies having given any such reassurance. It was, he says, an allegation of the utmost seriousness. The senior care assistant for the morning shift was dismissed and the senior care assistant for the night shift resigned before disciplinary action could be taken. It would have been irrational for him to have given any such assurance and inconsistent with the very clear warning in the letter. Ms Blake, who took the minutes, also denied that any such reassurance was given.

28. The Tribunal finds that the Claimant was not told that dismissal was "off the table" and that he should relax. A resident had been significantly harmed as a result of a failure on the part of care staff to check his pad. He had been left sitting in his own urine and faeces until it had caused him a wound. The Tribunal does not consider that there is any real prospect that, against that background, the alleged reassurance would have been given. It is inconsistent with the letter and with the way in which the Claimant and others were dealt with following the investigation. The Tribunal found the evidence given by Mr Glanville and Ms Blake more credible, partly because of its consistency with the contextual matters referred to immediately above and partly because they gave their evidence with a directness and confidence which the Claimant's testimony lacked.

29. It follows that the Tribunal does not find that the Claimant was lulled into giving an untruthful account of events during the disciplinary hearing. The suggestion that the Claimant would admit to wrongdoing when he did not consider that he had done anything wrong is, in the Tribunal's view, incredible. Further and in any event, the Claimant specifically accepted during cross-examination that the Respondent would have had no reason not to accept what he told Mr Glanville at face value.

30. As to what he told Mr Glanville, he insisted that R was "high on [his] list". He said that when R had been taken to supper in a wheelchair at 4 pm (there was later a suggestion that this was nearer to 5 pm) that there was "an opportunity to check him". The Claimant said:

> "I regret that I an opportunity to intervene and I didn't take it".

He was asked what he would have done differently, to which he replied:

> "Using the hoist. We've been reluctant in the past due to behaviour. Got him on the bed and changed him. I deeply regret what happened, I saw pictures of the skin on his bottom the next day and it was horrendous"

Mr Glanville asked him whether he should have escalated the situation to his manager or someone else during the shift. The Claimant responded:

> "Yes. I could have asked a nurse."

He volunteered that he had not written notes either and when asked why, he replied:

> "I don't know. I really wasn't feeling well. I take responsibility, I came to work. I shouldn't have come in. I couldn't think straight. I understand the severity of my actions and I am culpable."

He said that he regretted his actions and omissions on the day.

31. There was then an adjournment during which time Mr Glanville consulted with the Respondent's HR adviser. He concluded that R had been neglected; that the Claimant bore some responsibility for that and that he had committed and act of gross misconduct. The Claimant was dismissed summarily. The decision was confirmed in writing in a letter dated 2 February 2018. The decision was as follows:

> - "You have admitted that you did not escalate the issues you were having with an unresponsive Resident to your manager or a nurse on duty, or document this in Care Connect.
> - I believe that during the course of your shift you could have done more to ensure the wellbeing of the Resident. You stated that you were made aware of the situation by your care team but you did not intervene yourself or seek assistance from the wider team. Your failure to act led to the Resident's needs being neglected, resulting in the Resident sustaining an avoidable wound.
> - I am satisfied that as an experienced Senior Care assistant, you would be aware of the appropriate escalation channels in which you could raise your concerns regarding the Resident to managers or nurses in the building."

32. The Claimant wrote on 5 February 2018 asserting that his summary dismissal was neither "just nor appropriate". He asserted that he had been assured that he would not be dismissed at the outset of the meeting. He complained that the decision had not taken account of how his illness had compromised his abilities. He then said:

> "I freely admit failings on my part during the shift"

However, he wished them to be put into a context where he had been struggling to work because of ill-health. In addition to the point about his illness, he raised the "pressures of [his] home life". He had been acting as a full-time carer to his mother. His appeal was supplemented by a further letter dated 17 February 2018. He again asserted that the decision to dismiss him was "unfair and unreasonable and totally disproportionate". He made his case, again, for the significance of his illness. The letter also contained the following statements (albeit they are included in the course of a detailed attempt at exculpation):

> "They did not attempt to take him to the bathroom to check his pad … With hindsight this should have been attempted, but the priority at the time seemed to ensure he got his supper, which he did."

> "Of course, the failure to provide personal care during my shift will have contributed to the pressure sore – I accept that."
>
> "James suggested that we might have tried hoisting but we have never been encouraged to use it when [R] was uncooperative because of his known periods of unpredictable and aggressive behaviour".
>
> "I am as upset as anyone that we did not manage to provide better care for [R]. with hindsight I and all my colleagues on the shifts that cared for him over the course of those days and nights have a lot to learn – mistakes were made."

33. The appeal was conducted on 23 February 2018 by Dr King. No procedural complaint is raised about the appeal. For that reason it is unnecessary to make detailed finding about it. Very broadly, having heard from the Claimant, Dr King commissioned an inquiry which was critical of a number of aspects of the home's policies and practices and of individuals involved. The Claimant's criticism of the appeal decision is, as it was in relation to the original dismissal decision, that dismissal was disproportionate.

34. A minute of the appeal hearing was kept by Ms Blake. Consistently with what the Claimant had had to say during the original investigation and his disciplinary hearing, he accepted that opportunities to perform a pad check had not been taken:

> "The movement from chair to wheelchair was a missed opportunity, and me intervening that's another missed opportunity"

The second opportunity missed is, in context, a reference to the Claimant's response when approached by the staff members that he was supervising. Of that interaction he says:

> "I told them I wasn't going to help at that time – I didn't feel well enough. I said that we would leave it to the night staff. There were no skin condition issues passed over to me …"

He accepted that he had not documented the issue.

35. Dr King wrote to the Claimant on 9 April 2018. She identified the Claimant's grounds of appeal as:
    - "You felt that the decision to dismiss you was unfair, unreasonable and disproportionate
    - You were not feeling well and had just returned from a period of sickness absence
    - It was not uncommon for the Resident to decline care or to be moved
    - Your long service with the Company and your clean disciplinary record until this incident"

The alleged false reassurance about dismissal being off the table had been relied on as an aspect of the first ground. Dr King's summary of the appeal grounds is a fair one and the Claimant did not suggest otherwise in the course of his own evidence before the Tribunal.

36. Dr King's conclusions were as follows:

> "Given the elements of the hearing that you confirmed, and looking at the specifics of the allegations against you, I am upholding the original decision to dismiss you for gross misconduct. I am doing this because –
>
> - By your own admission there were at least two occasions during the shift when you could have ensured the resident received personal care. By your account, the resident's cooperation was fluctuating and it was normal to try and deliver personal care as and when the gentleman would accept it. Knowing this, and knowing as you readily accept, that the resident had not been cooperative all morning, it was especially crucial that the resident received personal care at this time.
> - You confirmed that you had the chance to deliver personal care but did not feel well enough to attempt this. At this time you were aware that the resident had not had any personal care for over 12 hours and that the resident may become uncooperative again. However, you still chose to hand over to the next shift. This is a clear instance of neglect which will certainly have contributed to the harm the resident went on to suffer. Whilst I appreciate that you felt unwell, you are responsible to ensure you are fit and ready for duty and to highlight to others if you become too ill to discharge your duties whilst at work.
> - You did not document the care of this resident [in] any way or form during the shift and did not handover anything in writing to the next lead. This in itself fell far below accepted standards of care. This was particularly poor given that you were the lead on shift and were responsible for setting standards of care for others to follow."

The Law

37. The reason given for dismissal was a reason relating to conduct within the meaning of **Employment Rights Act 1996 s. 98(2)(b)**.

38. The first issue which requires to be answered, is whether the Respondent genuinely believed that the Claimant had committed an act of misconduct (**British Home Stores v Burchell** [1980] ICR 303n EAT). If the Tribunal is satisfied that such a genuine belief existed it must ask whether it was the reason or principal reason for the dismissal. On these matters, the burden of proof lies with the Respondent.

39. If satisfied that the reason has been established, the Tribunal must turn to consider the question posed by **Employment Rights Act 1996, s. 98(4)**; that

is whether the dismissal is fair or unfair. That question depends upon "whether the in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee". The Tribunal must determine this question "in accordance with equity and the substantial merits of the case". The burden at this stage is neutral.

40. Guidance as to how to approach the fairness of a dismissal for a reason relating to misconduct is given in a number of familiar authorities including **British Home Stores v Burchell**, **Sainsburys Supermarkets v Hitt** [2002] EWCA Cov 1588, [2003] ICR 111 and **Iceland Frozen Foods v Jones** [1983] ICR 17 EAT. The guidance that may be derived from the authorities may be summarised in a series of questions as follows:

    (1) Did the Respondent have reasonable grounds for its belief;

    (2) Did the Respondent carry out such investigation as was reasonable in all the circumstances, bearing in mind:

        (a) that the reasonableness of the investigation falls to be judged against the standard of the range of investigations that might be conducted by a reasonable employer;
        (b) the guidance provided by the ACAS code of practice; and
        (c) the principles of natural justice and

    (3) Was dismissal within the range of responses open to reasonable employer in the circumstances?

41. The Tribunal reminds itself that the "range of reasonable responses test" is properly understood to guide Tribunals away from substituting their decision for that of an employer and recognises that however strongly it might have preferred a different outcome, it is only where the employer takes a decision that would not be open to a reasonable employer, that Tribunal may find unfairness on this ground.

42. The Claimant's representative drew a number of additional authorities to the Tribunal's attention. The first was **Burdett v Aviva Employment Services Ltd** EAT/0439/13. I was not shown a report, but rather what appears to be an extract from the IDS Handbook on Unfair Dismissal. There were two points. The first was that the EAT found that the ET had failed to assess whether the employer had reasonable grounds to conclude that the employee had committed an act of "culpable gross misconduct" where his behaviour (sexually assaulting women) was because of his mental impairment of paranoid schizophrenia. The present facts are very different. In so far as the Claimant relies on his illness as having affected his judgment, he was, by his own admission, capable of recognising that he was struggling and there were steps he could have taken to obtain assistance. He failed to take them. The second point is an *obiter* indication that it should not simply be assumed that a finding of gross misconduct will always justify dismissal. The Tribunal has avoided making that assumption.

43. The second authority, again in the form of an extract from an IDS handbook, was **Boxall v Surrey and Sussex Healthcare NHS Trust** ET/3101155/99. This was a case in which a midwife was negligent and a child was stillborn. The employer dismissed her concluding that retraining could not address the difficulties because she had recently been the subject of a period of supervised practice and, further, failed to acknowledge her own incompetence. The Tribunal concluded that the first factor had been given too much weight and the second could have been overcome by training. The authority it not binding on this Tribunal. As described, it would seem to come perilously close to the line of substitution, but the Tribunal bore in mind that it had to weigh as a factor the fact that the allegation in this case was a single instance of neglect and that other lesser penalties were available. The Claimant's own case was that a final written warning would have been fair.

44. The final authority before the Tribunal was **Sarkar v West London Mental Health NHS Trust** [2010] EWCA Civ 289. It was relied upon as supporting an argument that if the Claimant had been told that he would not be dismissed it would be unfair later to treat the allegation more seriously than it had been previously indicated it would be. Given the Tribunal's finding that he was not told that he would not be dismissed, the relevance of the case fell away.

Discussion

(a) Reason for dismissal

45. The reason for dismissal was misconduct; specifically, the matters identified in the dismissal letter of 2 February 2018 and the appeal outcome letter of 9 April 2018. The Claimant appeared at one point to be arguing that misconduct was not the reason, but it became clear on questioning that his point was that the Respondent genuinely but mistakenly thought he had done wrong.

(b) Reasonable grounds for belief

46. This was not substantially in issue. The Claimant's evidence was that there was neglect for which he was in part responsible and which contributed to R's injury. The Tribunal asked him what he thought the outcome should have been. He thought he should have received a final written warning. Even if the Claimant had not accepted that there were omissions for which he could properly be criticised, the admissions he made at each stage of the disciplinary process, the Tribunal concludes, provided the Respondent with reasonable grounds to find that he had failed to discharge his responsibilities and was guilty of misconduct.

(c) Reasonable investigation

47. The Tribunal is satisfied that the Respondent carried out an investigation that was reasonable in all the circumstances. We have specifically rejected that suggestion that the Claimant was misled as to possible outcomes at the outset of his disciplinary hearing. Even if the Tribunal had been satisfied that the

Claimant's account was accurate it would not have rendered the dismissal unfair because:

1. The Tribunal does not accept that the effect of any representation as to outcome was that the Claimant was less inclined to make admissions. The position that he adopted initially, at the disciplinary hearing and during the appeal was essentially the same: he accepted that there were opportunities to intervene that he did not take; that he had not contacted a manager or nurse and that he had failed to record the issue in writing; and

2. Even if it had rendered the dismissal potentially procedurally unfair, as the Claimant maintains, he was under no illusions when the appeal was heard and the appeal gave him a fresh chance to put his case. There is no suggestion that the appeal was procedurally unfair and it therefore would have served its purpose of "curing" a defective first hearing.

(d) Range of reasonable responses

48. It was on this issue that the Claimant concentrated his fire. He was ill and subject to pressures at home that left him unable properly to discharge his duties. During the course of his evidence, the Claimant appeared to move from this position somewhat. The movement took two specific forms. First, he accepted in cross-examination that the essence of what he had been accused of was neglect; that neglect constituted gross misconduct; and that gross misconduct justified dismissal. Second, he suggested that he had failed to intervene when asked for help not because of his illness but because he took a judgment that the issue could be left to the night shift. The latter evidence was, perhaps surprisingly, repudiated, apparently on instruction, by Miss England in the course of her closing submissions. She invited the Tribunal to reject her own client's evidence and to focus instead upon his illness.

49. However his case is formulated, the Tribunal is satisfied that the decision to dismiss falls comfortably within the range of responses open to a reasonable employer. A resident, for whose well-being the Claimant was responsible, suffered what was, by his own admission, an horrendous injury. The Claimant accepts that opportunities to intervene were let pass and that he did not escalate or document the issue, the effect of which failure was that in addition to not helping directly, he denied R the opportunity of help coming from elsewhere. He accepts that his failure to intervene was a part cause of the injury. He insisted at one point in his evidence that had he intervened he might not have been able to check the pad and that if he had tried to escalate matters he might not have been able to raise the nurse. The failure to document matters had to be viewed in the context, he said, of his having given an oral handover. The Respondent's position, which the Tribunal accepts, is that had he made genuine efforts and failed through no fault of his own to achieve the desired outcome that would be a materially different case. His illness and home pressures are grounds for empathy but not, in the circumstances, decisively exculpatory. As the Claimant accepted, if he was not capable of discharging his responsibilities, he should not have come to work. If, once at work, he felt

unable to do his job, he should have escalated that issue. The physical safety of exceptionally vulnerable people depended on he and his colleagues meeting their responsibilities. The Respondent appears to have had his illness and his otherwise clean disciplinary record in mind when reaching its decision. The Tribunal has not felt able to conclude that those factors were ignored or given less weight than was open to a reasonable employer.

50. In the circumstances, the claim for unfair dismissal is dismissed.

Employment Judge Jones QC

Date: 5 December 2018