



EMPLOYMENT TRIBUNALS

Claimant Respondent
GEMMA HOOLEY v. LISIEUX TRUST LIMITED

FINAL HEARING

Heard at: **Birmingham** on: **18 & 19 March 2019**

Before: **Employment Judge McCluggage**

Appearance:

For the Claimant: Mr Komeng (consultant)

For the Respondent: Mr Warnes (solicitor)

JUDGMENT

- 1) The claim for unfair dismissal is not well-founded and is dismissed.

- 2) The claim for wrongful dismissal is not well-founded and is dismissed.

Employment Judge McCluggage
15 April 2019

Reasons

1. By her ET1 received by the tribunal on 21 March 2018 the Claimant seeks compensation for unfair dismissal and wrongful dismissal. The claims were resisted.
2. The tribunal was provided with an agreed bundle of documents.
3. The tribunal received witness statements and also heard oral evidence from:
 - a. Debbie Bates, the Principal Manager of the Respondent.
 - b. John Gillon, a Senior Support Worker employed by the Respondent.
 - c. The Claimant.
 - d. Mr Patrick Pennie, a former Support Worker.
4. An issue arose at the commencement of the hearing over whether the Claimant should be entitled to raise a procedural criticism of the appeal process. The appeal decision-maker was a Mr Robert Downing, an employment consultant. The Claimant wished to make a criticism that Mr Downing was not independent and had amended his decision letter with input from the Respondent's HR manager. However, Mr Warnes on behalf of the Respondent complained that the Agreed List of Issues formulated in June 2018 had raised no procedural complaints and hence he had not arranged to call Mr Downing. This issue was first raised in the Claimant's witness statement exchanged on 18 February 2019. The Respondent's decision-makers were on holiday at that time and so instructions could not be immediately taken. Enquiries were made of Mr Downing in March but unfortunately, he said that he could not attend because of a family funeral, which related to his niece. There was no complaint about the appeal in the ET1 and the Claimant had the relevant documents at the time the List of Issues was agreed. I decided that while an ET1 was not to be considered analogous to a civil court statement of case, there was inadequate notice of this issue to enable it to be fairly dealt with. I decided that the Claimant would have to apply to amend her case or at the very least run the risk of an adjournment to enable the appeal issue to be fairly determined with the necessary witness in attendance. The Claimant through Mr Komeng elected not to pursue any point regarding the fairness of the appeal process. This did not of course prevent the Claimant from raising any procedural criticisms of the fairness of the disciplinary process in general.

Facts Found

5. I will divide my findings of fact between those relevant to the unfair dismissal claim and those additionally relevant to the wrongful dismissal claim, given the need to be careful to keep findings relevant to the latter issue distinct.

Unfair Dismissal

6. The Respondent is a voluntary not-for-profit organisation registered with the Charity Commission which provides accommodation and assisted living support to disabled individuals. The disabilities are generally learning disabilities. The client base housed by the Respondent is varied and some clients have challenging behaviours.

7. The Respondent owns and runs a number of residential homes. One home is called Lisieux House at which the Claimant was based. Another home is Francis House which features heavily in the events at the heart of this case. The clients at these homes enjoy 24 hour care and supervision. There are also various properties which allow for assisted living, that is, semi-independently. One of these was called The Bungalow, located just beside Lisieux House and with which the Claimant also had involvement.
8. The Claimant was employed from 3 October 2011 initially as a Support Worker, later as a Senior Support Worker. In due course she received a promotion to a position titled Supported Living Co-ordinator on 9 February 2017, which held managerial responsibilities. She was summarily dismissed on 22 December 2017.
9. The case arose out of an allegation, broadly put, that the Claimant had come off her rota and contracted working location, Lisieux House, on Sunday 19 November 2017 and spent the afternoon at Francis House engaging in other and non-essential activities.
10. The Respondent contends that this was a conduct dismissal and that the dismissal was fair; and further, that the conduct was so serious that it justified a summary dismissal.
11. The Claimant does not accept that conduct was the reason for her dismissal and advances an alternative reason, that the real reason for dismissal was one of cost-cutting and redundancy. She contends that her dismissal was unfair in any event and that her conduct, even if established, did not justify summary dismissal.
12. The Respondent's Conduct Policy under the heading Reliability (page 216 of Bundle) stated:

“Employees must never leave their working shift at any time earlier than their due time other than with the express permission or instruction of their project Line Manager, the On-Call Manager, the Principal Manager or Chief Executive Officer...”
13. The Respondent's Time-Keeping Policy (page 219 of Bundle) stated:

“... employees are required to remain at work whereby they must carry out their role and responsibilities at least until their appointed finish time; unless granted authorisation by their Line Manager to leave early...”
14. The Respondent had a disciplinary policy (pages 221 to 223 of bundle). Gross misconduct contained a familiar list of examples of serious misconduct which included, “A serious breach of trust or confidence”.
15. As a Co-ordinator, the Claimant was required to ensure there were adequate staffing levels at each property. Much of the oral evidence at the hearing concerned the scope of the Claimant's duties and effective revisions to her role.

16. Originally the Claimant had Co-ordinator responsibility for 4 properties, but by the time of the critical events, her responsibilities were limited to Lisieux House and the Bungalow.
17. The Claimant complained that while her job title was that of a Co-ordinator, she was still required to carry out many of the duties of a Senior Support Worker. This followed a restructuring of management roles and resignation of the former CEO in September 2017.
18. The re-structure was documented in 'Managers Meeting Minutes' dated 19 September 2017. The Claimant was said to be working with Denise at Lisieux House but was also to continue her Co-ordinator role for Nehemiah and Lichfield Road. The reference to Denise was to Denise Barratt who was the Registered Manager of Lisieux House. Ms Barratt had regulatory responsibility for the home to the Care Quality Commission.
19. In a staff supervision session dated 13 November 2017 between Ms Bates and the Claimant evidenced by a record, the Claimant expressed her confusion between the roles of Co-Ordinator and the fact she was also undertaking Senior Support Worker responsibilities. Ms Bates explained at that meeting that there was not sufficient Co-ordinator work for the 2 properties to amount to full-time work, the Co-Ordinator duties amounting to 1 day and 2 hours per week respectively for the properties. She said that all members of the management team were currently sharing joint roles and responsibilities. The Claimant expressed her understanding of this position. Ms Bates did not tell the Claimant her job was not financially viable. Ms Bates in oral evidence accepted that the Claimant was in effect covering as a Senior Support Worker to support Ms Barratt.
20. The Claimant's responsibilities were by the time of critical events reduced to Lisieux House and the Bungalow. I accepted Ms Bates' explanations in oral evidence that it made sense for the Claimant to work with Denise Barratt as the Claimant was relatively inexperienced as a Co-ordinator.
21. On 19 November 2017 the Claimant was on rota as 'double cover' for Lisieux House and the Bungalow. There were 5 residents at home during the shift, with another resident out with his family until later. Richard Hall was the Support Worker on duty at Lisieux House between 7am to 3pm, with Rebecca McKeown taking over from him from 3pm to 11pm. An agency worker was at the property in addition from 4pm onwards. Another support worker was working alone at the Bungalow. The Claimant's responsibility was to work across Lisieux House and the Bungalow as needed.
22. On the evening of Sunday 19 November 2017, Ms Barrett, the Home Manager, attended Lisieux House to collect a resident to take her to a presentation. Ms Barrett spoke to Ms McKeown who had been on shift from 3pm. Ms McKeown told Ms Barrett that she had not seen the Claimant on shift, but that the Support Worker on shift before her, Mr Hall, had said that the Claimant had left to go to Francis House. Ms McKeown was working on her own until 4pm when the agency worker arrived. The Claimant had

gone over to Francis House getting a lift with a member of staff who was bringing one of the Lisieux residents between the two properties.

23. On 20 November 2017, the Claimant was asked to attend an Investigation Meeting with Denise Barrett, the Home Manager of Lisieux House. This was minuted by Mary Heap, the Home Manager of Francis House. The Claimant was questioned about her shift the previous day, 19 November. She confirmed her shift hours were 8.30am to 5pm. She accepted that she had left Lisieux House at 2.30pm to 3pm to collect her car from Francis House. She also said that she had said to John Gillon, a Senior Support Worker, at Francis House that she was visiting. The Claimant acknowledged that she did not return to Lisieux House. She said that she had intended to return but dealt with an 'on call' issue from Francis House at about 4pm. The Claimant accepted that she was the 'double cover' for both Lisieux House and the Bungalow. The Claimant was orally suspended for absenting herself from shift without justification. This was followed up by a letter dated 21 November 2017.
24. Over 20 and 21 November 2017 Denise Barratt also interviewed Patrick Rennie (a Support Worker at Francis House, but who was also the Claimant's partner), Tom Mortiboys (a Support Worker at Francis House), John Gillon (a Senior Support Worker at Francis House), Rebecca McKeown and Richard Hall.
25. Mr Mortiboys said he had come on shift at 2.35pm and the Claimant was already at Francis House by then. She was said to be "talking to staff and families and socialising" and dealt with an on-call.
26. Mr Gillon said that he did not know the Claimant was coming to Francis House to speak to him and that because he was so busy he did not have time to speak to her properly. He did ask her a question how she had got on with the recent meeting with Ms Bates. He thought the Claimant had arrived at 2.40pm and he was sure he had left the property by 3.03pm. He could not say what the Claimant was doing when he left and it was not his place to question the Claimant as she was a Co-ordinator. On further questioning, he said that the Claimant had mentioned that she might come over for a cup of tea but denied the Claimant's account that there was a pre-arranged meeting between them to discuss their recent supervision meetings. When he left the Claimant was sitting in the office drinking a cup of tea
27. Mr Hall said he thought the Claimant was going over to Francis House to collect her car. He said that the Claimant left at about 2.30pm and had not returned by 3pm when he finished shift.
28. On 27 November 2017 the Claimant was invited to a disciplinary hearing to consider the following allegations:
 - i. Dereliction of duties in that that she had left Lisieux House at 2.30pm though down to be on shift from 9am to 5pm, leaving the property and staff vulnerable.
 - ii. Arriving 25 minutes late for shift on Monday 20 November 2017.
 - iii. Leaving shift without authority; potentially leaving a CQC registered property vulnerable, due to decreased staffing levels.

- iv. Inappropriate use of company time, collecting her personal vehicle from another location.
29. Evidence from the investigatory meetings was enclosed with the invitation. The Claimant was warned that the issues were potentially gross misconduct.
30. The Disciplinary Hearing was held on Tuesday 5 December 2017 and was minuted by Joanne Bongiovi. The decision-maker was Ms Bates. At the hearing, the Claimant provided her own Witness Statement and a 'Statement of Defence'. The Witness Statement was read out. The minutes of the meeting were not verbatim and were added to by the Claimant with additions at a later stage. I did not find any alteration to be material to the issues.
31. Points made by the Claimant within her documents and at the meeting included that:
- a. She had left Francis House at one point but had to return as she had left her charger there. In oral evidence this was clarified as being for her on-call phone.
 - b. Whilst at Francis House, she dealt with an 'on call' shift issue and dealt with it there with access to rotas.
 - c. She had completed all necessary work at Lisieux House and the Bungalow before leaving.
 - d. She was on the Respondent's premises for her shift and was contactable at all times.
 - e. As a manager she was entitled to take decisions to visit another property without authorisation.
 - f. Gaps in shifts without double cover was quite common. For example, for the original rota for the Sunday, there would have been lone working between 1pm to 4pm. Various example rotas were supplied.
 - g. As the Claimant was the 'on call' manager that day, she could have been called away from the properties at any time for legitimate unexpected reasons, leaving the Support Workers on their own.
 - h. She said Mr Gillon was mistaken, as he was aware that she was visiting Francis House to see him and discuss their recent supervision meetings concerning the re-organisation.
 - i. She was speaking to a parent of a resident, to Mr Gillon and another member of staff before she left Francis House.
 - j. She said that she had spoken to Ms McKeown though had not seen her. It was clarified in oral evidence that the Claimant's position was that she had telephoned Ms McKeown in the course of the afternoon.
 - k. She considered that there was a conflict of interest in having Denise Barratt investigate the matter as she had also reported the issue to Head Office.
 - l. Denise Barratt had left Ms McKeown alone at Lisieux House on 20 November when she went to Head Office to report the matter.
 - m. Only one resident on the Sunday actually required double cover and he was out with his family.
 - n. Denise Barratt had told her she wanted a Senior Support Worker for Lisieux House only a week before the incident.

32. It is apparent from the meeting notes that Ms Bates was concerned as to whether leaving Lisieux House to visit Francis House to speak to Mr Gillon about their recent supervision meetings was a proper or justifiable business reason to leave her shift.
33. Ms Bates adjourned the hearing to further reflect on what had been said and the documents the Claimant had provided her with.
34. A variety of other investigations were undertaken before a reconvened hearing. These steps included a further enquiry with Ms McKeown, who denied that the Claimant had spoken to her on the telephone. The answerphone was checked and there was said to be no message from the Claimant on it. Other support workers on duty at Francis House on 19 November were interviewed.
35. One point that arose from the further investigation was that the Claimant may have left Francis House to pick up a private prescription from a chemist during the relevant afternoon. The function of double covers at the properties was checked. The policy was for double cover between 9am and 10pm to prevent lone working with GT, one of the clients. However, GT was not usually at Lisieux House between 10am and 9pm on a Sunday as he would spend the day with his family. However, as Ms Bates observed in her oral evidence, he could in principle have come back at any time.
36. The disciplinary hearing was reconvened on 18 December 2017. The Claimant produced some additional materials commenting upon the new investigation material.
37. In the reconvened hearing there was discussion about the call the Claimant said she had made to Lisieux House. The Claimant produced her personal mobile telephone that showed a 22 second call was made at 4.14pm. The Claimant was questioned about neither Ms McKeown or the agency worker recalling any call being received. She was taken by Ms Bates through all of the additional investigation material. The Claimant accepted that she had not told Richard Hall, the morning/early afternoon shift support worker at Lisieux House, where she was going or for how long. The Claimant discussed the issue of her vulnerability about her job. The Claimant denied leaving Lisieux House to go to gossip with Mr Gillon.
38. Ms Bates sent a letter dismissing the Claimant on 21 December 2017. This was a detailed 6 page letter which appears at pages 104 -109 of the bundle. To summarise Ms Bates' reasoning, she found that the Claimant had consciously left her post rather than prioritising Lisieux House on 19 November. She did not consider the Claimant's defence that all work at Lisieux House had been completed to be valid or acceptable as there was always in reality work to be done. The fact that the Claimant was 'on call manager' did not justify the Claimant leaving her rota to collect her car and to have a conversation with Mr Gillon. Ms Bates considered that the Claimant left shift to deal with matters of a personal nature. She had reduced staffing levels and increased potential risk for residents within a CQC registered property. The conversation with Mr Gillon was not considered to be a priority or a business matter. Mr Bates conclusions were that after this conversation with Mr Gillon finished at latest at 3pm, the Claimant stayed at Francis House in the office chatting until 4pm when she left to collect personal tablets before returning to collect a mobile telephone charger whereupon an

'on call' matter was dealt with at 4.07pm at Francis House. Ms Bates found that the Claimant's account of speaking with Ms McKeown was untrue, noting that the 22 seconds of the alleged call matched the time until the Lisieux answerphone would trigger. It was felt that the Claimant had not followed the Respondent's Conduct policy in respect of Honesty, Leadership or Time Keeping.

39. Thus Ms Bates upheld the 'abandonment of shift' allegation. She did not uphold the allegation relating to attending late on the morning of 20 November, as she was satisfied that the Claimant was dealing with a justifiable work-related matter that morning. Ms Bates considered that the Claimant's conduct showed that she was not sufficiently capable of making sound risk-managed decisions and that she was insufficiently trustworthy in her role. She considered that the misbehaviour amounted to Gross Misconduct.
40. The Claimant appealed this decision on 24 December 2017. She provided a detailed "Appeal Statement". She challenged Ms Bates' reliance upon the 22 seconds timing of the Lisieux House answering machine with reliance upon information from BT and the manufacturer of her mobile telephone Samsung. She contended that her visit to Francis House was a justifiable decision and risk-assessed. She did not consider that the investigation questions were adequate to show that her visit to Francis House was other than work-related. A number of procedural irregularities were raised, for example, a lack of signatures on the investigatory witness statements and there being only 2 days' notice before the reconvened disciplinary hearing.
41. The appeal hearing took place on 11 January 2018 with Mr Downing. Notes were produced.
42. Mr Downing dismissed the appeal by correspondence dated 19 January 2018.
43. As part of the documentary evidence, I was provided with an Organogram both before and after the Claimant's dismissal. This indicated that the Supported Living Co-Ordinator position had a change of job title to "Supported Living Manager" and that a further Senior Support Worker was to be recruited under the management of the Supported Living Manager.

Wrongful Dismissal Facts

44. In relation to further facts that I considered were directly relevant to the Wrongful Dismissal allegation I found the following.
45. Mr Gillon impressed me as a witness. In his witness statement he expressed sympathy for the Claimant's position and felt the decision to dismiss was harsh. Nonetheless in both his witness statement and oral evidence he was straightforward and direct about the limited nature of his interaction with the Claimant on 19 November. I accepted his evidence.
46. The Claimant left shift at about 2.30pm having in effect hitched a lift to Francis House with the intention of picking up her car. Mr John Gillon had not asked the Claimant to

come over to discuss their supervision meetings and nothing formal had been arranged between them on the telephone. They had a short discussion in the garden whilst Mr Gillon smoked a cigarette before he left his shift at 3.03pm in a taxi.

47. The discussion they had was informal and more in the nature of a general chat. It was not formal work business. I would not apply the descriptor 'gossip' to their conversation, but it was in the nature of casual conversation which involved the Claimant's personal concern for her position in relation to the restructuring.
48. The Claimant did not therefore leave Lisieux House on formal business. A decision to speak to Mr Gillon this way was not in the nature of a managerial decision.
49. Given the paucity of the conversation with Mr Gillon, I concluded that the Claimant left shift primarily for the reason of collecting her car.
50. She left Francis House to collect a private prescription, but then returned to collect her charger and thereafter dealt with an 'on call' issue. The 'on call' issue could have been dealt with back at Lisieux House.
51. At Francis House, she may have spoken to residents' families, but I accepted Mr Gillon's evidence that there was no requirement for her to do so, given these were not the families of residents that she had responsibility for. There would have been a limit to what could have been meaningfully discussed.
52. In practice, there could from time to time be gaps in rotas where there was not double-cover. There was no clinical or care assessment need for there to be double cover for the residents at Lisieux House or the Bungalow that afternoon, but there would always have been work to do. Double cover was in any event desirable.
53. The Claimant's actions were inconsistent with the Respondent's Conduct and Time Keeping Policies.

Law

Unfair Dismissal

54. Section 98(1) of the *Employment Rights Act 1996* requires an employer to establish a potentially fair reason for a dismissal. In considering the fairness of the dismissal the tribunal is required to apply the considerations set out in section 98(4) of the Employment Rights Act. This entails consideration of whether the dismissal was fair or unfair having regard to the reason shown by the employer whereby the tribunal takes into account the circumstances of the case, size of the employer and equity.
55. Although the statutory test is of course overlaid with much case law where conduct is concerned, the considerations within Section 98(4) ultimately is the starting point and indeed the end point for any judgment applied to the facts found by the tribunal.

56. As this is said to be a conduct dismissal, the well-known questions from British Home Stores Ltd -v- Burchell [1978] IRLR 378, endorsed by the Court of Appeal in Foley v Post Office [2000] ICR 1283 are apposite:

- (i) whether the employer genuinely believed that the employee was guilty of the alleged conduct;
- (ii) whether the employer had carried out a reasonable amount of investigation into the matter.
- (iii) that the employer had reasonable grounds to sustain its belief;

57. Turner v East Midlands Trains Ltd [2012] EWCA Civ 1470 re-affirmed that the band of reasonable responses test did not simply apply to the question of whether the sanction of dismissal was permissible: it applied to all aspects of the dismissal process, including whether the procedures adopted by the employer were adequate.

58. As recently observed by Lord Wilson in Reilly v. Sandwell Metropolitan Borough Council [2018] UKSC 16 at para 22:

“In effect it has been considered only to require the tribunal to inquire whether the dismissal was within a range of reasonable responses to the reason shown for it and whether it had been preceded by a reasonable amount of investigation.”

59. I reminded myself that the law obliges a tribunal to be careful not to substitute its own subjective judgment for that of the employer. The tribunal’s role is not to engage in a re-hearing function.

Breach of contract/Wrongful Dismissal

60. In contrast, in considering whether the Respondent was entitled to dismiss the Claimant without notice, I had to consider the underlying truth of the disciplinary allegations to determine whether the Claimant was in repudiatory breach of contract. If the Claimant had repudiated the contract by her actions, the Respondent would be entitled to accept the breach and terminate summarily.

61. It was no part of the Respondent’s case that the Timekeeping Policy was incorporated. Therefore I treated this as a case where the implied term of trust and confidence was the term which fell to be considered. As Lord Steyn described it in Malik v. BCCI [1998] AC 20, the term requires that neither party will without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence.

62. When determining whether there was gross misconduct, the focus must be on the damage to the relationship between the parties. As it was put in Adesokan v. Sainsbury’s Supermarkets [2017] EWCA Civ 22, deliberate actions or dishonesty which poisoned the employment relationship would obviously fall into the gross misconduct category. Where negligent action was concerned, the question for a tribunal is whether a dereliction of duty was so grave and weighty to amount to a

justification for summary dismissal. The fact that harm is not actually caused is not a mitigating factor.

Analysis and Conclusions

Unfair Dismissal

63. I accepted Ms Bates' evidence as to the reason why she dismissed the Claimant. She was a compelling witness in the manner in which she gave evidence and in the substance of what she said. I accepted that she dismissed the Claimant for the reason alleged in the dismissal letter, that is, conduct relating to the Claimant going off the Lisieux House premises on 19 November. I rejected the Claimant's submission that the misconduct allegation was a cover to prevent having to make her redundant and pay a redundancy award. I accepted Ms Bates' explanation for why the Co-ordinator position was not replaced at paragraph 11 of her witness statement.
64. Therefore, the Respondent has satisfied me that the reason for dismissal is a potentially fair reason for dismissal under section 98 of the Employment Rights Act 1996.
65. I considered whether Ms Bates had reasonable grounds to find the Claimant guilty of the misconduct alleged. It was not in dispute that the Claimant went off the properties she was on rota to cover. Ms Bates had the interview record of Mr Gillon who said that he had only a brief chat and did not speak to her properly. Ms Bates was entitled to accept Mr Gillon's account including that he had left at 3.03pm. She was entitled to accept that there was no fixed arrangement to meet Mr Gillon and that this was not in any event an acceptable reason for the Claimant leaving her rota.
66. I concluded that the Respondent had carried out a reasonable investigation into the misconduct. A wide variety of staff had been spoken to. I saw nothing in the point that the witness interviews had not been signed – there was no suggestion that they had been pressurised to say what they had. The Claimant herself was interviewed at a preliminary stage, had the benefit of a full disciplinary hearing and provided written documentation that Ms Bates plainly considered before taking her decision. Further enquiries were made between the first and second parts of the disciplinary hearing including timing the Respondent's answerphone.
67. I was sympathetic to the Claimant's point that her mobile telephone would not record as a call made the time spent trying to connect before the answering machine at Lisieux picked up. However, this seemed to me a minor point given the relevant members of staff denied receiving a call from the Claimant. I would not criticise a reasonable employer for omitting to make further enquiries with, for example, Samsung in that regard. Whether the Claimant made a call at about 4.15pm appeared to me a minor part of the overall story. Ms Bates was entitled to accept the account of Ms McKeown and the agency worker that they had not spoken to the Claimant.

68. In my judgement, the Respondent thereby had a reasonable basis to conclude that the Claimant was guilty of the misconduct alleged and specifically was in breach of the Timekeeping Policy. She was supposed to be working at one location and a reasonable employer was entitled to come to the view that visiting Francis House to pick up a car and when doing so to have a chat with Mr Gillon did not constitute a valid exercise of the managerial responsibility delegated to the Claimant. A reasonable employer would have been entitled to find that the Claimant could and should have returned to Lisieux House soon thereafter and that her justifications of speaking to the families of clients who were not her direct responsibility was not a sufficient excuse for failing to return to Lisieux House within the further 2 hours she was required to be on shift. That also applied to picking up a private prescription and dealing with the On Call, though I accepted that it was harder to criticise the Claimant for dealing with the On Call at Francis House.

69. The question of substance in this case it seemed to me was whether the sanction of dismissal was within the band of reasonable responses. Like Mr Gillon, I had some sense that the decision was one that many hypothetical employers in the Respondent's position might not have taken in absence of a current disciplinary record or previous problems of this type for an employee of 6 years' service. Many employers might have been inclined to issue a written warning or final written warning. However, the tribunal's role is not to redetermine but rather review the reasonableness of the decision made. Hearing Ms Bates' account of her reasoning justified under cross-examination, I found that the sanction she decided fell within the band of reasonable responses. Ms Bates affirmed she had taken into account the Claimant's service and good record. She acknowledged there was only a lack of cover from 2.30pm to 4pm. However, she pointed out that the Claimant's lack of acceptance that she had made an error of judgement during the disciplinary hearing was apt to undermine the Respondent's trust in her as a manager.

70. In determining whether the decision fell into the band of reasonable responses, I took into account that there was no material suggesting that there had been client problems at either Lisieux House or the Bungalow caused by the Claimant's absence and that there were occasions when there might be gaps in cover on rotas. However, I concluded that this did not undermine the trust point which allowed for the sanction to fall within the requisite range.

71. Thus, the claim for unfair dismissal fails.

Wrongful Dismissal

72. Accepting that the Claimant wilfully took herself off Lisieux House to the other property, I was required to address whether that is sufficient to amount to conduct likely to seriously damage the relationship of trust and consequence.

73. The question is objective.

74. I have concluded that the Claimant's acts in taking herself off shift were intentional.
75. Holding a conversation with Mr Gillon was no justification for her action and did not fall within the remit of a legitimate managerial activity as would allow her to take herself off the property she was required to work at.
76. The lack of consequences is immaterial according to the Court of Appeal in Adesokun.
77. A manager, albeit an inexperienced one, taking herself deliberately and consciously off a scheduled rota for flimsy reasons is an action likely to undermine the trust and confidence between the employee and employer on the facts of this case sufficient to constitute a breach of the implied term of mutual trust and confidence.
78. That breach was accepted by the Respondent in electing to dismiss her.
79. Though this seemed a harsh result due to the lack of consequences to the Claimant's actions, it was in my view the conclusion the law required me to reach.
80. The claim for wrongful dismissal must therefore also be dismissed.

Employment Judge McCluggage

15 April 2019