EMPLOYMENT TRIBUNALS

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Claimant	**Respondent**
v	
Ms C Ogbomo	**Independence Homes Ltd**

Heard at: **Ashford Employment Tribunal**

On: **21-22 March 2019**
30 April (In chambers)

Before: **EJ Webster**
Ms B C Leverton
Mrs C Upshall

Appearances
For the Claimant: **In person**
For the Respondent: **Ms J Gould (Solicitor)**

JUDGMENT

1. The Claimant's claim for unfair dismissal is successful.
2. The Claimant's claim for wrongful dismissal is successful.
3. The Claimant's claim for race discrimination is not upheld.

REASONS

The hearing

1. By an ET1 dated 24 May 2018 the claimant brought claims for unfair dismissal, breach of contract and race discrimination. By an ET3, submitted to the tribunal on 16 August 2018, the respondent defended all the claims.

2. The tribunal was provided with 2 separate bundles. The respondent had not complied with the orders sent to the parties regarding disclosure and preparation of bundles and documents and bundles had been produced late. This placed the claimant at a significant disadvantage when it came to preparation of her witness statement and when cross examining the witnesses. The claimant informed the tribunal that she was willing to proceed and that despite the late exchange of documents and bundles she had had sufficient

opportunity to consider the papers. She submitted her own separate bundle which included documents which the respondent had not included in the main bundle. No explanation was given by the respondent as to why these had not been included. We agreed to work from both bundles in the circumstances.

3. Further, despite express orders from Employment Judge Sage that the details of patients at the premises of the respondent be redacted, the names and medical details of the patients were not redacted in most of the documents. This is a breach of patient confidentiality and of the tribunal's orders. As a result no bundles were made available for public inspection. Where possible during the proceedings only initials were referred to in open court.

4. The tribunal heard from 4 witnesses; the Claimant, and three witnesses for the respondent - Mr R Christie (who carried out the investigation for the respondent), Mr Hemsley (who made the decision to dismiss the Claimant) and Mr S Fegan (who heard the appeal against the dismissal).

5. During the hearing we were shown a video by the respondent's representative on her phone and we were then emailed the video. This video was relied upon by the respondent as part of the evidence they said demonstrated gross misconduct.

6. It was approximately 7 seconds long and the respondent asserted that it showed the claimant asleep. The claimant had seen the video before but had not been emailed it either for the purposes of this hearing or during the disciplinary process. The respondent said that this had been because it was too big a file to email yet they were able to send it to the tribunal with no difficulties. It is therefore not clear why it had not been sent to the claimant.

Issues

7. The Issues had been agreed with the parties at the preliminary hearing on 11 September 2018. This Tribunal went through the issues with the parties at the outset of the hearing and it was agreed that they were the only issues to be decided by the tribunal at this hearing.

Unfair Dismissal

8. What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.

9. Did the respondent hold that belief in the claimant's misconduct on reasonable grounds?

10. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

11. At the time that the Respondent had formed that belief had it carried out as much investigation as was reasonable in the circumstances?

12. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities that the claimant actually committed the misconduct alleged.

13. Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

Section 13: Direct discrimination on grounds of race

14. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act 2010, namely:
    (i) Preferring Ms Jordan's evidence over the Claimant's in relation to allegations that she slept whilst at work on the 25 December 2017;
    (ii) Preferring Ms Jordan's evidence to that of the Claimant's in relation to the allegations that the claimant had signed for work she did not complete on the 25 December 2017;
    (iii) Believing Ms Jordan's explanation of the events of the 22 December 2017 over the Claimant's in relation to Ms Jordan's conduct – a new recruit;
    (iv) The respondent failing to take disciplinary action against Ms Jordan after the Claimant notified the Respondent that Ms Jordan had breached the Service Users' Protocol by signing ahead of schedule of tasks she had yet to undertake.
15. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on a hypothetical comparator.
16. If so has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?
17. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Breach of contract

18. It is not in dispute that the respondent dismissed the claimant without notice.
19. Does the respondent prove that it was entitled to dismiss the claimant without notice because the claimant had committed gross misconduct? NB This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the gross misconduct.
20. To how much notice was the claimant entitled?

Time/limitation issues

21. The claim form was presented on 24 May 2018, she entered into ACAS conciliation on the 28 March 2018. Accordingly any act or omission which took place before 29 December 2018 is potentially out of time, so that the tribunal may not have jurisdiction.
22. Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

23. Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

Factual Findings

Background

24. The respondent runs several care homes. The care home that the claimant worked at was a residential unit which cared for adults who had significant care needs and suffered from epilepsy thus meaning that they needed constant care and supervision.

25. The claimant worked as a carer on the night shifts. The claimant identifies herself as black African. At the time of her dismissal she had worked for them for over 4 years. The claimant had no disciplinary record as at the date of dismissal.

26. It is alleged by the respondent that the claimant fell asleep or was not alert on duty on 25 December 2017 and it was for this reason that they say they dismissed her. The claimant worked the night shifts on 22 December and 25 December 2017. She worked both shifts with a new colleague, PJ (identified as white, British). PJ's first shift was on 22 December and her second shift was on 25 December. The respondent states that the evidence they relied upon to conclude that the claimant had fallen asleep consisted of the statement of a service user (KF), the statement of a colleague (PJ) and a video that was taken at the time on PJ's mobile phone. They also interviewed another colleague Odetta after the initial investigation meeting with the claimant.

The Investigation

27. The incident of the claimant allegedly sleeping on duty ('the incident') was apparently first raised by an email dated 27 December sent by a manager, Lucy Wells, to various other managers. The email is said to set out what the claimant's colleague, PJ, has said about the claimant falling asleep and the fact that she took a video of the claimant sleeping on her phone. However there is no explanation of how PJ had originally reported the incident and no information from Ms Wells or anyone else from the respondent about how it was reported to Ms Wells before the email was sent, how the video was first shown to Ms Wells or any other member of staff or how the video was sent from PJ's phone to anyone within the respondent. The statement is less than a page long. It is not signed by PJ and there is no further information or evidence from PJ that has been provided to the tribunal.

28. We conclude, from the introductory text of the email, that Ms Wells did not send the reporting email 'out of the blue' and that it had been presaged by a conversation between Ms Wells and some of the managers who she is emailing because it does not say what the email statement is in relation to nor does it given any context.

29. None of the respondent witnesses had spoken to either Ms Wells or PJ about the incident, the content of the email that was sent reporting it and that is

now being relied upon as PJ's witness evidence, or how the email came to be sent or the video viewed.

30. Mr Christie was appointed to carry out the investigation into the allegations against the claimant. Mr Christie said that he did not see the need to interview anyone else and accepted that he had relied on this email/statement without speaking to PJ or Ms Wells and had accepted it as true.

31. Mr Hemsley (who made the decision to dismiss the claimant) also accepted that he had not tried to speak to PJ or Lucy Wells saying that he thought that her evidence was sufficiently covered by the investigation despite knowing that Mr Christie had not spoken to PJ or Ms Wells. He mentioned that PJ became difficult to get hold of at some point but he could not say when. Nobody challenged the claimant's evidence that PJ was still employed at the time of her dismissal and therefore we conclude that both Mr Hemsley and Mr Christie could have spoken to PJ had they wanted to. In any event both could have spoken to Lucy Wells at any time.

32. Mr Fegan (who heard the claimant's appeal against her dismissal) says that he did try to speak to PJ but by that time she was not responding to calls from HR. We were given no evidence of any attempts to contact PJ to discuss this matter by HR or anyone else. Mr Fegan did not speak to Lucy Wells either nor make any attempt to do so.

33. The statement given by PJ in the email was sparse on detail. It does say that she saw the claimant asleep and that she videoed her. However there are significant gaps in the information provided such as at what time she videoed the claimant and when she says the claimant was actually asleep. PJ's statement appears to suggest that the claimant was asleep for over 3 hours. This is significant because of other evidence which the claimant took us to which we examine further below which expressly proves that she was not asleep for 3 hours. As nobody spoke to PJ it is impossible to say what she meant by the time frames she gave nor to test the veracity of any aspect of her statement or what led her to film the claimant.

34. After the email was sent by Ms Wells to the managers, a witness statement was taken from one of the residents in the home, KF. It was agreed by all the witnesses that KF had significant care needs and could be difficult with staff. Mr Christie did not speak to KF as part of his investigation into the allegations against the claimant. A manager, Saj, spoke to KF – no information was provided as to why Saj had been asked to undertake this task. Mr Christie said that he did not need to speak to KF because Saj had done so. He did not explain why Saj carried out this interview rather than him. Neither Mr Hemsley nor Mr Fegan spoke to KF either or tried to do so. This was despite the fact that KF's statement appeared to suggest that the claimant had been asleep for 6 hours and despite the fact that the claimant raised significant concerns about the statement and the reasons that KF may have to lie about the claimant before her disciplinary hearing took place.

35. The claimant was invited to an investigation meeting. The claimant was told she was being investigated for two possible acts of gross misconduct:

(i) Sleeping on the job
(ii) Writing her initials over someone else's when signing for work completed/checks on residents.

36. At the investigation meeting the claimant was shown the video. This is confirmed in the minutes of that meeting. The claimant asserted that she couldn't remember anything happening on 25 December that would have caused her to sleep. She did however recall an incident on 22 December where she had cleaning fluid in her eyes and sat in the office with her eyes closed as a result. She also stated that she did not believe the video could been taken 25 December as she recalled wearing different clothes.

37. The respondent relied upon this confusion about dates and the claimant saying that it could not have been 25 December because of what she was wearing as evidence that the claimant was unreliable and defensive and kept deflecting attention away from herself because she talked about other dates. We do not agree. The video did not have a date on it, the claimant was trying to recall how this incident could have been recorded and was attempting to explain it to the best of her recollection. We find it implausible that her response could have been anything else, guilty or innocent, as she was doing her best to explain what she thought had happened. There was very little detail in the information from the witnesses or the video about which shift or when during the shift it was taken.

38. At the investigation meeting the claimant suggested that Mr Christie speak to another member of staff, Odetta, whom she had worked with on 22 December but not on 25 December. This was because the claimant believed it had been taken during the cleaning fluid incident on 22 December. Mr Christie did speak to Odetta. She said that she had not seen the claimant much during that shift because she had been on a different floor for most of the time so Mr Christie felt that her evidence was largely irrelevant because she had not worked on 25 December when the incident took place and had not spent much time working with the claimant during the shift on 22 December.

39. We conclude that Mr Christie's investigation consisted of:

(i) Reading and accepting as true the email/statement from PJ;
(ii) Reading and accepting as true a statement taken from KF by another manager;
(iii) Viewing the video footage;
(iv) Speaking to the claimant;
(v) Speaking to Odetta.

40. We believe that the lack of a more thorough investigation might have been reasonable if the video evidence was incontrovertible. However we make the following findings about the video:

(i) It is extremely brief
(ii) It is taken from one side with various objects obscuring a clear view of what was happening
(iii) It does not show the person's face (though there is no dispute that it was the claimant, the dispute is whether she was asleep)_

(iv) It does not have a date or time stamp on it
(v) It was rapidly moved away from focusing on the individual so only approximately 5 seconds shows the person
(vi) It shows the claimant sitting at a desk with her head looking down and her arm on the desk
(vii) It does include the sound of somebody breathing but not snoring.
(viii) There is no evidence of where that breathing came from

41. Mr Hemsley said that it showed the claimant with her head down on the desk with her arms crossed underneath her head. He said this in evidence today and had put this to the claimant in the disciplinary meeting. This is clearly not true. The video shows that the person had their head facing down and one arm on the desk. The head is clearly not resting on her arms which in turn are not folded in front of her on the desk.

42. Whilst Mr Christie and Mr Fegan do not make the same assertion, it is clear that the video evidence was such that that it warranted no other supporting evidence and no consideration of any contradictory evidence.

43. Further there is reference to snoring by Mr Hemsley in his evidence. We do not accept that there was any snoring whatsoever on the audio we heard. There were breathing sounds. The breathing has also been resolutely assigned as being the claimant's by all the respondent witnesses but, as the claimant queried at every stage, there is nothing to say that it could not be the breathing of the individual who took the video. We agree that you cannot assign the breathing to anyone with certainty.

44. The respondent's representative stated that the reason the video was so short and cut away from the person's face so quickly was because PJ was worried about getting caught by the claimant. However this contradicts the assertions that the claimant was fast asleep, and that she was asleep for some time. It also indicates that PJ had spoken to someone in HR or one of the managers about how she took the video – however that evidence was not provided to the claimant or the tribunal and so has not been able to be properly examined.

45. We find that the video is so inconclusive that whilst we can understand it prompting an investigation, an investigation about it was clearly necessary to assess what the person taking it believed it showed, when it had been taken and why. We also find that the video was so inconclusive that the questions the claimant raised in her written defence at the disciplinary meeting ought reasonably to have been considered and further investigation considered and where reasonable, undertaken.

46. As a result of his investigation Mr Christie concluded that there was a disciplinary case to answer and recommended that there be a disciplinary hearing. This was solely in relation to the accusation that she was not alert at work. The allegation that she had written over someone else's intials was not taken forward to a disciplinary hearing as Mr Christie accepted her explanation the PJ had been new to the job and she had been correcting her errors. The claimant was therefore never disciplined in relation to this allegation.

47. The claimant was then written to and invited to a disciplinary hearing. She was told of her right to be accompanied and the meeting was rescheduled to enable her to attend at a time that suited her.

48. The claimant remained in post and was not suspended between the investigation meeting and the disciplinary meeting (14 February 2018). Mr Hemsley stated that decisions about suspension were made on a case by case basis by HR with the managing director and that he believed that the claimant would not have been considered a significant risk on the basis that there were usually at least 2 other members of staff on duty. The respondent did not provide evidence to the tribunal as to why she was not considered a significant risk to the service users at this time given Mr Christie's recommendations as a result of his investigation which stated that falling asleep on duty did present a significant risk to the residents and their ultimate conclusion that falling asleep on duty placed the residents at such a significant risk that the claimant ought to be dismissed for gross misconduct. Nonetheless, we recognize and accept that a care worker at this particular care home could represent a significant risk to residents if they fell asleep.

The disciplinary hearing

49. On 26 January (before the disciplinary hearing) the claimant provided a written defence to the allegations (pgs 116-120). We have summarized the defences she raised as follows:

(i) Time log ins on the Kronos system showed that she swiped every 30 minutes. Swiping required her thumb print and could not have been done by anybody else;
(ii) That KF had threatened to report her as sleeping on the job when she had refused her cigarettes during that shift.
(iii) That on 8 January 2018, the claimant had a meeting with PJ and another colleague, Ibrahima where PJ had said that she had not been the person to report her and that management, including Darren C and Sajed U had asked PJ to ''spy' or report on the claimant's activities at work.
(iv) That the claimant had signed Personal Care Plans for two other residents at times when she was allegedly asleep.
(v) That there were discrepancies between the evidence given by Odetta about 22 December and PJ.

50. The investigation meeting was chaired by Mr Hemsley on 14 February 2018. The meeting lasted only 7 minutes according to the respondent's minutes at page 131. At that meeting the only question asked by Mr Hemsley was in relation to the video. He conceded to us that he did not investigate any of the defences listed in the paragraph above or carry out any further investigation whatsoever.

51. At the tribunal hearing before the claimant put forward why she had raised these defences. Taking them in turn.

Defence (i)

52. It was not in dispute that the claimant had swiped every 30 minutes and it is not disputed by the respondent that she could not have faked swiping in as

it involved her using her thumb print. This is contradictory to PJ's apparent assertion in the statement at p99 that the claimant was asleep from 2.45-5.15pm. It also contradicts KF's evidence that the claimant was asleep for 6 hours.

Defence (ii)

53. The claimant took us to numerous reports in the bundle about KF's behaviour. We accept that she was an individual who displayed very challenging behaviour and frequently made allegations against her carers particularly when denied food or cigarettes in accordance with her care plan. This was established by pages 289 and 300 where her behavior, including alleging that a carer scratched her (pg 294), was erratic and at times threatening and often not true.

54. There was an acknowledgement by Mr Christie that service users say things that aren't always true (p192) however KF was believed with regard to her allegations about the claimant.

55. When the tribunal asked why KF's allegations against the claimant had been believed, Mr Hemsley stated that a user needed to be believed and allegations investigated. We accept that this must be correct given how vulnerable the residents are. He said that when making his decision to dismiss the claimant he gave the evidence the following weightings: 10% to KF's statement, 50% to the video and 30-40% to PJ's evidence.

56. He said that he accepted that KF was wrong about the timings that the claimant was asleep and that she had a pattern of threatening staff when she did not get what she wanted and he had taken that into account when making his decision. However it is not clear how this was taken into account in the meeting notes or the outcome letter.

57. We find that he did give weight to KF's witness statement. He did prefer her evidence to the claimant's. In our view it was unreasonable to prefer KF's evidence given the clear pattern of her behavior in making allegations against carers when she did not get what she wanted (which he was aware of) and because he did not speak to her or ask her any questions himself about the incident including about the timing or any of the other apparent inaccuracies in her statement. He did not speak to Saj who had taken the original statement from KF, nor did he take into account the claimant's allegations about Saj's potential involvement when assessing the apparent concerns the claimant had about the interview.

58. In short no investigation was carried out into the allegations made by KF despite the claimant raising significant and evidenced concerns about the possibility that KF's statement was at least partly untrue and no consideration was given at all to the claimant's concerns.

Defence (iii)

59. Whilst we make no findings as to the validity of this aspect of the claimant's defence, it is clear that she is raising significant concerns that PJ has been asked to keep track of her and that this is what prompted the

reporting on 27 December. She refers to seeing a text message on PJ's phone to this effect.

60. Mr Hemsley accepts that he did not look into this defence as he states it was referring to an incident that post-dated the disciplinary charge and was therefore not relevant. He accepted that he did not speak to Darren or Saj or Ibrahaima. There have been subsequent allegations that this meeting amounted to the claimant bullying a whistleblower which we will deal with below.

61. We believe that given it could have demonstrated that the claimant was being targeted or framed, that Mr Hemsley should have considered it as part of a reasonable investigation or disciplinary process. There was no attempt to look at PJ's phone either to establish whether such a message existed, or to consider the time stamp on the video that was given so much weight. There was no attempt to speak to PJ (still a member of staff at this time) or to Darren or Saj who remain members of staff. No reason was provided to the tribunal as to why these steps were not taken nor why they would have been difficult to carry out.

Defence (iv)

62. The claimant stated that in addition to the swiping evidence showing that she was swiping in every 30 minutes, there were signing sheets to show that she had done other work at times when either PJ or KF alleged she was asleep. Mr Hemsley accepted that he did not look into this. We conclude that given that it could have corroborated the claimant's evidence it should have been looked at.

63. Further, we were taken to this evidence during the hearing and it appears to show that the claimant was working at the times she was alleged to be asleep. The respondent asserted that there were discrepancies because the same time was put for two different pieces of work. Mr Fegan said that they demonstrated very little because they could have been filled in retrospectively. Whilst we accept that this was possible, they provided no evidence that it was likely, or that in any event that they had considered it at all when reaching their decision or considering the appeal.

Defence (v)

64. Odetta was spoken to about her work on 22 December which was not the date that the respondent considered the incident to have happened on. We find, on balance, that the video was probably taken on 25 December. We make this finding based on the PCP form in the foreground of the video which appears to match the PCP at page 259.

65. However we find that it was not unreasonable for the claimant to question the date of the video given that there was no date stamp on the versions she was shown. Whilst Mr Hemsley states that he took into account the document at pg 259, this was not put to the claimant at the disciplinary meeting and we find it implausible that he looked into this in detail given that he made no other investigations at all and makes no reference in his decision making letter. Further nobody could tell us what time the video was supposed

to be taken or whether they had asked to see it on the phone it was taken it on or asked PJ what time it had been recorded.

66. We find that Mr Hemsley carried no further investigation whatsoever and relied solely upon the information provided to him by Mr Christie. This was despite the claimant raising, in advance, several issues which challenged the veracity of the evidence being relied upon and raised several significant points that would have been easy to check.

67. We find that Mr Hemsley either gave no consideration to or assigned any weight to any of the possible defences raised by the claimant.

The appeal

68. The appeal hearing was held on 15 March 2018 by Mr Fegan. That meeting, according the respondent's minutes took 12 minutes. Mr Fegan did no further investigation in terms of obtaining more evidence or considering the issues raised by the claimant. The claimant specifically asked why her concerns, raised in her defence statement, had not been looked into. Mr Fegan's response was that he would consider this when he made his decision and address it in his decision making letter.

69. The outcome letter appears at pg 155 and is 3 paragraphs long and gives no reasoning as to why her appeal was not upheld save to say that the original decision was fair and she had not produced any new evidence at the appeal hearing.

70. We find, based on their evidence to us and the lack of evidence of any further investigation that the respondent witnesses saw the video and only considered evidence which confirmed what they thought it showed. We find that they decided, having seen the video, that it was not necessary to consider anything else or to question the veracity of the other evidence they say they relied upon nor to consider any of the evidence that the claimant brought to their attention.

Different treatment on grounds of race

71. The claimant asserted that she was treated differently from both PJ and Ibrahaima on 3 occasions.

72. The claimant states that the decision not to discipline PJ about the incorrect completion of paperwork on 22 December and 22 January 2018 (p115) was less favourable treatment. We conclude that on the first occasion the respondent accepted the claimant's explanation that she had written over PJ's initials because it was PJ's first shift and they made a decision not to discipline either person on this basis. This is confirmed by the fact that the disciplinary meeting was convened solely to consider whether the claimant had been asleep and did not consider the second charge that had been investigated.

73. With regard to 22 January there is no evidence to say whether the respondent investigated this at all or took any steps. However the claimant was

not disciplined for incorrectly filling out paperwork either. There was therefore no difference in treatment with regard to the paperwork 'errors'.

74. The respondent pleaded in the alternative that they would have dismissed the claimant in any event because of the conversation at pages 196-231 between the claimant, PJ and another care worker, Ibrahaima. They assert that this transcript shows the claimant bullying PJ in an attempt to get her to withdraw her statement about the claimant sleeping on the job. The claimant asserts that it shows that PJ did not understand the correct process for filling out her work sheets and that she and Ibrahaima had been trying to explain that to her. She says that the respondent was aware, because she had made this recording, that PJ was not following the correct procedure and

75. We were taken to several passages of the transcript and have read it in full. We make the following observations:

(i) The conversation about sleeping on the job was initiated by Ibrahaima not the claimant (pg 216).
(ii) The issue raised with PJ that makes her cry has nothing to do with the allegations against the claimant, it's about the difference between the way PJ fills in her work records and the way that the claimant and Ibrahaima complete theirs. We disagree that this document could reasonably be interpreted as showing the claimant bullying PJ or attempting to get her to change her evidence. There is simply no reference to getting PJ to change her evidence about the claimant sleeping.

76. We find that the majority of the transcript concerns the signing of documents and the methodology behind it. There was significant disagreement at the hearing as to whether the claimant's understanding of the signing protocols was correct. However this was not part of the decision making process undertaken by the respondents during the dismissal. What they say is that the fact that PJ cried shows that the claimant tried to get her to change her evidence against the claimant. In fact the document shows PJ crying when the claimant asks her to correct the time of signing for that shift on 8 January not with regard the shift in December nor in any way in reference to the evidence about the claimant sleeping. Neither of the excerpts relied upon by Mr Hemsley when he was directly asked (pgs 201 and 222) show the claimant bullying PJ about her evidence they show her asking PJ to change how she has signed for work done or carried out patient checks.

77. Ibrahaima clearly demonstrates the same understanding of the signing protocol as the claimant and we accept the claimant's evidence that she was trying to help PJ understand the rules and there is evidence within the transcript supporting this not least the fact that Ibrahaima is also talking about this and not about the claimant sleeping at work.

78. The issue of the claimant being accused of sleeping on the job is discussed later in the transcript. The person who raises the issues is Ibrahaima and he then does most of the talking about this matter. When the claimant talks to PJ about it the claimant reassures PJ and says that she does not need to worry and that the claimant knows she wasn't asleep so she isn't worried or

words to that effect. At pg 229 the claimant and PJ are joking about what happened on 25 December and are laughing together.

79. Further, despite retrospectively relying on this transcript, both Mr Hemsley and Mr Fegan accept that they have not spoken to Ibrahaima about the transcript or his understanding of the signing protocol or taken any further steps to consider the issues raised in it.

Unfair Dismissal

The Law

80. Section 98 of the Employment Rights Act 1996 (ERA) provides as follows:
    (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
        (a) The reason (or if more than one, the principal reason) for the dismissal, and
        (b) That it is either a reason falling within subsection (20 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
    (2) A reason falls within this subsection if it –
        (a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
        (b) Relates to the conduct of the employee,
        (c) Is that the employee was redundant, or
        (d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
    (3) In subsection (2)(a)
        (a) 'capability' in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental qualify and
        (b) 'qualifications in relation to an employee means any degree, diploma or other academic technical or professional qualification relevant to the position which he held.
    (4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismiss is fair or unfair (having regard to the reason shown by the employer) –
        (a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee and
        (b) Shall be determined in accordance with equity and the substantial merits of the case.

81. The respondent's case was that this was dismissal for conduct. That is a potentially fair reason under s 98(2)(b) ERA. In the event that the respondent is correct in that context a determination of the fairness of the dismissal under s98(4) is required. This involves an analysis of whether the respondent's

decision makers had a reasonable and honest belief in the misconduct alleged. Further a tribunal must determine whether there were reasonable grounds for such a belief after such investigation as a reasonable employer would have undertaken. The burden of proof is neutral in relation to the fairness of the dismissal once the respondent has established that the reason is a potentially fair reason for dismissal. The tribunal must also determine whether the sanction falls within the range of reasonable responses to the misconduct identified. This test of band of reasonable responses also applies to the belief grounds and investigation referred to.

Conclusions

82. We conclude that the respondent did genuinely believe that the claimant was guilty of gross misconduct in that they believed she had fallen asleep on 25 December 2017 whilst on shift.

83. We conclude that at the time that the Respondent had formed that belief had it had not carried out as much investigation as was reasonable in the circumstances. There were significant flaws in the investigation process.

84. The test as to whether the employer acted reasonably in *section 98(4)* is an objective one. We have to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (*Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*). We have reminded ourselves of the fact that we must not substitute our view for that of the employer (*Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82*);

85. We have also reminded ourselves that this test and the requirement that we not substitute our own view applies to the investigation into any misconduct as well as the decision. (*Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*. This means that must decide not whether we would have investigated things differently, but whether the investigation was within the range of investigations that a reasonable employer would have carried out. We know that we must assess the reasonableness of the employer not the potential injustice to the claimant *Chubb Fire Security Ltd v Harper [1983] IRLR 311*). and only consider facts known to the employer at the time of the investigation and then the decision to dismiss (W Devis and Sons Ltd v Atkins [1977] IRLR 31.)

86. We have found that the situation depicted in the video was not clear enough to excuse the respondent from carrying out any other type of investigation as we have set out in paragraph 40 above. Whilst we have reminded ourselves that we must not substitute our opinion of what we would have done, we think that it is entirely reasonable to expect the respondent in these circumstances, to have interviewed the member of staff who reported the claimant to be sleeping particularly whilst she was still an employee and particularly given that the information provided by her was very brief, contained no times and appeared to be contradicted by the evidence that the claimant had swiped every 30 minutes. Further there existed evidence that the claimant had carried out tasks when the whistleblower appeared to say she was asleep.

This was all information easily available to the respondent at the time that they carried out their investigation and made their decision to dismiss.

87. Further PJ at no point explained the context of the video, why she moved her phone away so quickly or what she had seen in addition to the video footage which was short and inconclusive. None of the people who gave evidence to the tribunal and who made decisions about the disciplinary process spoke to PJ and no reasonable explanation as to why they chose not to speak to PJ was provided, save by Mr Fegan who said that he did try but that she had left. She had not left however when Mr Christie and Mr Hemsley made their decisions.

88. Failing that we believe it would have been reasonable to interview Ms Wells given that the incident had apparently reported to her in the first instance yet no attempts were made to speak to her about the report.

89. There were other flaws in the investigation which whilst not as serious as failing to interview PJ, when considered cumulatively also mean that we find that the investigation was unreasonable. In the case before us the respondent failed to investigate anything that the claimant raised in terms of her concerns about the evidence being relied upon or the information she raised in her defence - apart from interviewing Odetta which was in relation to the claimant's mistaken belief that she may have been recorded on a different shift.

90. The respondent did not interview Saj who carried out the interview with KF and who had allegedly texted PJ to spy on her and that was raised in the claimant's defence letter which was provided to Mr Hemsley on 26 January 2018.

91. They did not interview KF when the claimant raised concerns about why KF may have made allegations against her after that shift. We understand however that it may not have been reasonable to repeatedly interview KF given her caring needs but given the weight that was then placed on KF's evidence without any apparent question regarding its veracity this contributes to the unreasonableness of the investigation.

92. They did not interview Ibrahaima with regard to the claimant's assertions about PJ's comments about why she had reported her as sleeping and raised by the claimant in her defence document.

93. They did not interview Darren Capper about his apparent involvement as set out in the claimant's defence.

94. Whilst we recognize that a respondent is not expected to carry out anything other than a reasonable investigation in all the circumstances, we conclude that they did not do even a basic investigation which reasonably ought to have included speaking to the whistleblower given the lack of detail in the video and her witness statement.

95. The claimant raised these concerns in her defence letter, which she referenced in her dismissal meeting and her appeal meeting that she had

concerns and none of them were looked into at all prior to both the original decision being made and the appeal decision being made.

96. We conclude that, there was no evidence to suggest that the respondent carried out any further investigation or that it made its decision based on anything other than the video evidence. We conclude that this was not a reasonable decision to take given that the evidence provided by the video was not conclusive in the way that the respondent now asserts.

97. Given the lack of a reasonable investigation and the paucity of the evidence they relied upon we also conclude that their decision was not within the range of reasonable responses for an employer in all the circumstances.

98. Had they reasonably investigated some or all of the concerns raised by the claimant before they made the decision they may have come to a different conclusion, or they have come to the same conclusion based on a reasonable investigation. However we cannot speculate as to what conclusion they could reasonably have come to had they carried out a proper investigation as they did not do so and did not consider any of the easily obtainable evidence available to them they ought to have considered either because of the claimant's concerns or because of the clear problems in the evidence they relied upon.

99. The claimant's claim for unfair dismissal is therefore upheld as the investigation was not within the range of reasonable responses and the decision to dismiss, based on that investigation, was not within the range of reasonable responses.

100. We have been taken to sufficient evidence by the claimant to show that parts of PJ's witness evidence apparently relied upon could not have been correct because she had signed in every 30 minutes, she completed work sheets during that period. The signing in evidence was known about by the respondent at the time.

101. Further, the other apparently confirmatory witness evidence provided by KF was taken as true despite the respondent acknowledging that KF was prone to making up allegations against carers when she did not get her own way which the respondent did know at the time of the investigation and their subsequent decision. Yet KF's witness evidence was given more weight and consideration than the claimant's and PJ's was also given more weight and not tested in any way at all, despite there being no grounds for them being given that weight because neither of the witnesses had been interviewed by the people making the decision and because their evidence could easily have been undermined had they considered the claimant's defence in any way or looked into the issues she reasonably raised.

102. We therefore do not conclude that had the respondent followed a proper procedure the claimant would have been dismissed in any event as the claimant raised a significant number of discrepancies in the evidence which had not been explored by the respondent and had they been properly considered could very well have led to a different conclusion by them.

Wrongful Dismissal

Conclusions

103. We were not provided with sufficient evidence to conclude, on the balance of probabilities, that the claimant had failed to remain awake and alert whilst on duty because the claimant raised a significant number of discrepancies in the evidence which had not been explored by the respondent.

104. The claimant's claim for wrongful dismissal and/or dismissal in breach of her contract is upheld.

Race Discrimination

The Law

105. S9(1) Equality Act 2010 defines race as a protected characteristic under the Equality Act.

106. Section 13 of the Equality Act 2010 states that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

107. S 23 Equality Act 2010 states that a claimant must show that it has been treated less favourably than a real or hypothetical comparator whose circumstances are not materially different to theirs.

108. The tribunal must consider the "reason why" the claimant was treated less favourably. It must consider what the employer's conscious or subconscious reason for the treatment? (*Nagarajan v London Regional Transport and others [1999] IRLR 572 (HL)*).

109. The discriminatory reason need not be the sole or even principal reason for the employer's actions. If race was a substantial cause, a tribunal can find that the action infringed the Equality Act 2010. The EHRC Code states that for direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment "but does not need to be the only or even the main cause" (*paragraph 3.11*).

110. S123 Equality Act states that a discrimination claim must be brought within

(a)the period of 3 months starting with the date of the act to which the complaint relates, or

(b)such other period as the employment tribunal thinks just and equitable.

…..

(3)For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

Conclusions

111. We find that the claimant's claims for race discrimination is in time. The decision to dismiss her and the respondent's decision to rely on the evidence that the claimant asserts was unfavourable treatment, all took place after 29 December and her claims are therefore in time.

112. We understand the two stage test as set out in the guidance from Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332 and confirmed in *Igen Ltd and others v Wong and other cases [2005] IRLR 258 and more recently in* Ayodele v Citylink Ltd [2017] EWCA Civ 1913. That two stage test is:

Stage 1: can the claimant show a prima facie case? If no, the claim fails. If yes, the burden shifts to the respondent.

Stage 2: is the respondent's explanation sufficient to show that it did not discriminate?

113. We have born in mind that the two stage test is not rigid. In Hewage v Grampian Health Board [2012] IRLR 870, the Supreme Court found that "it is important not to make too much of the role of the burden of proof provisions" and that the test "will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other." (*Hewage, paragraph 32)*.

114. We had to reach conclusions as to the primary facts and then decide whether they are sufficient to justify whether an inference could be drawn, not whether it should be drawn. If we decide that there is that prima facie case then we must consider the respondent's explanation to decide whether it had non-discriminatory reasons for the treatment. If the tribunal does not accept those reasons then it must make a finding of discrimination.

115. The claimant must establish more than just a difference in treatment. This would only indicate the possibility of discrimination whereas a prima facie case requires that a reasonable tribunal could properly conclude from all the evidence that there has been discrimination. (Madarassy v Nomura International plc [2007] IRLR 246 (CA)). It is therefore not enough to show just a protected characteristic and a detrimental event, there must be some evidence of a third element, which is a causal link between the two.

116. The claimant failed to establish a prima facie case that she (identifying as black African) was treated differently from her comparator, PJ (identified as white British). Although the agreed list of issues generated by EJ Sage states that she is using a hypothetical comparator it is clear that she is relying upon PJ as her comparator and this is in paragraph 1 of the ET1 and throughout the outline of her discrimination claim.

117. The claimant asserted four incidents of less favourable treatment:

(i) Preferring Ms Jordan's evidence over the Claimant's in relation to allegations that she slept whilst at work on the 25 December 2017;

(ii) Preferring Ms Jordan's evidence to that of the Claimant's in relation to the allegations that the claimant had signed for work she did not complete on the 25 December 2017;

(iii) Believing Ms Jordan's explanation of the events of the 22 December 2017 over the Claimant's in relation to Ms Jordan's conduct – a new recruit;

(iv) The respondent failing to take disciplinary action against Ms Jordan after the Claimant notified the Respondent that Ms Jordan had breached the Service Users' Protocol by signing ahead of schedule of tasks she had yet to undertake.

118. The claimant has established that PJ was believed over her with regard to (i) (ii) and (iii) above. However she has not established that for point (iv). The claimant was not disciplined regarding that incident either and her explanation of what had happened was accepted. There is therefore no factual basis for this part of her claim.

119. We have not been provided with any evidence to suggest that (i) (ii) and (iii) above occurred because of the claimant's race. We find that the respondent chose to prefer PJ's evidence because of the existence of the video and this closed their minds against investigating anything further. We were provided with no evidence whatsoever to suggest that the claimant was treated less favourably because of her race. There were no facts at all from which we could reasonably draw any such inference. She has simply shown us a protected characteristic and detrimental treatment but not something else that establishes a link between the two. Instead we have concluded that the respondent relied upon the video without considering alternative explanations and the claimant has shown us nothing that would indicate that this could be concluded to have occurred because of her race. She has not therefore established facts that provide a prima facie case that has shifted the burden of proof.

120. The claimant's claim for race discrimination is not upheld.

121. This case will now be listed for a remedy hearing to establish the claimant's losses arising out of her unfair and wrongful dismissal claims.

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Employment Judge Webster

Dated: 19 May 2019