Case Number: 3322456/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss C Wu	**v**	**Bupa Care Homes (AKW) Limited**

Heard at: Watford **On**: 8, 9, 11 & 12 July 2019

Before: Employment Judge R Lewis

Appearances

For the Claimant: Mr C Nwajagu, Counsel
For the Respondent: Ms L Gould, Counsel

JUDGMENT

1. The claimant's claim of breach of contract is dismissed on withdrawal.

2. The claimant was not unfairly dismissed, and her claim of unfair dismissal is dismissed.

REASONS

Procedural matters

1. This was the hearing of a claim presented to the tribunal on or about 5 February 2016. It is necessary to record how matters then proceeded.

2. Due to administrative error in the tribunal, the claim was not served until 20 February 2018. Due to a second administrative error in the tribunal, it was, when served, treated as if it were a claim for unfair dismissal only, so that by letter of 20 February the tribunal listed the full hearing and set a case management timetable.

3. The response was received early in April, when the present Judge suspended the then case management timetable and directed that the listed full hearing be converted to a preliminary hearing for case management.

4. The hearing came before Employment Judge Vowles at Reading on 21 May. The claimant appeared in person. For reasons set out in the order sent to the parties on 5 June, he adjourned to 15 August 2018.

5. The matter came before Employment Judge Henry on 15 August. The claimant was represented by Mr Nwajagu. Judge Henry's orders were sent on 30 August. By Judgment of that day, all discrimination claims were dismissed on withdrawal. It was apparent from the narrative of the case management order that a claim for breach of contract had also been withdrawn, but not recorded in Judge Henry's judgment, an omission which is rectified above.

6. The effect of Judge Henry's order was that the claim was a claim of unfair dismissal only and no other. He listed for five days 8-12 July 2019 and set a case management timetable.

7. The start of the listed hearing was delayed due to a third administrative error, a failure to arrange the attendance of a Mandarin language interpreter. I was most grateful to Ms Yue who attended at short notice for the first two days of the hearing, and to Ms Xheng, who attended on the third day of hearing.

8. Although the tribunal's shortcomings were administrative, not judicial, it seemed to me right, at the end of the public hearing, to tender formally to the parties the apologies of HMCTS for having fallen below the standards to which the public is entitled. I told the parties that I would record that apology in this judgment.

9. There was a bundle in excess of 400 pages. During evidence the claimant said that she had not previously seen the bundle. Having taken instructions, Ms Gould clarified that the bundle was to a great extent that which had been prepared by the respondent in compliance with the case management orders of February 2018 and in anticipation of the trial being on 21 May 2018. Her instructions were that it had been sent to the claimant then.

10. Witness statements had been exchanged. The respondent had served the statements of three witnesses, all of whom attended to give evidence. They were, in order of giving evidence:

    10.1 Ms Linda Marks, Home Manager, who conducted the formal investigation which led to the claimant's dismissal;

    10.2 Ms Caroline Spring, a Registered Nurse since 1975 and a Home Manager of about 18 years' experience, who conducted the disciplinary hearing and dismissed the claimant;

    10.3 Mr David Parry, then Area Manager (the post was also designated Regional Director), now retired, who heard and rejected the claimant's appeal against dismissal.

11. The claimant was the only witness on her own behalf. All witnesses adopted their statements on oath and were cross examined. The claimant was at all times assisted by interpreters.

12. I had two concerns about the claimant's witness evidence. Although this hearing took place 11 months after the withdrawal of all claims other than that of unfair dismissal, her witness statement set out allegations of discrimination, and about public interest disclosure, which were not before the tribunal, and in the case of public interest disclosure, never had been before the tribunal. I told Ms Gould that she need not cross examine on those matters.

13. A second concern was that the bundle contained a schedule of loss (479) which claimed an uncapped compensatory award. It had either been prepared before withdrawal of the discrimination claims, or without regard to ERA section 124(1ZA), which applied the statutory cap of 52 weeks' pay to the compensatory award for unfair dismissal. I was concerned that it set out an expectation of the outcome of these proceedings which, as a matter of law, was far beyond what was realistic.

14. Before the public hearing started, I discussed timetabling with the representatives. It was agreed that the tribunal would first decide on liability, including any contribution or Polkey point which arose before dismissal, and would deal with calculation of remedy, if any, on the last listed day, Friday 12 July. It was not possible to adhere to that timetable. On the afternoon of Tuesday 9 July, Ms Gould began to cross examine the claimant on the contents of the bundle in some detail. At that point, the claimant said that she had not received the bundle before, and was reading the documents for the first time. There was dispute between representatives as to whether the bundle had been available to the claimant in advance.

15. The pragmatic solution seemed to me that it was not in the interests of justice to compel a claimant, giving evidence in a second or third language, and with the assistance of an interpreter, to answer questions about documents which she claimed she had not seen before. That would be slow and cumbersome. Pragmatism was required of the tribunal in a case which had been the subject of administrative error. The course which I proposed was immediately agreed by Mr Nwajagu; Ms Gould opposed it, and asked me to record (as I here do) that the respondent's costs position was reserved.

16. The tribunal adjourned at the end of Tuesday 9 July and did not sit the following day. It was explained to the claimant that she remained under oath, and that she should use the Wednesday to read the bundle. Fortunately, the respondent had a spare copy for the claimant to take home. Ms Gould assisted further by providing the numbers of the pages in the bundle to which she intended to refer in cross-examination. It was explained to Ms Wu that those were the documents on which she should concentrate. Given that scenario, I also suggested to the parties, and both agreed, that the remainder of the claimant's evidence, and closing

submissions, be concluded on Thursday 11 July; that a provisional day for a remedy hearing then be set, and that judgment be reserved, such that the parties would be released at the end of Thursday 11 July. That course was adopted. I confirm that the provisionally listed remedy hearing is **cancelled**.

The Legal Framework

17. This was a case of unfair dismissal, brought under the provisions of Part 10 of the Employment Rights Act 1996 ('ERA'). The first task of the tribunal is to find the reason for dismissal, in the sense of the operative consideration in the mind of the person making the decision to dismiss.

18. The reason advanced by the respondent for dismissal was that the claimant had committed acts which it identified as gross misconduct. I find that that was the reason for dismissal, in the sense stated above. The factual matters which were stated related to the conduct of the claimant. It was therefore a potentially fair reason for dismissal, in accordance with section 98(2) of ERA.

19. I next had to consider it through the provisions of section 98(4) of the 1996 Act, which provides,

> "[T]he determination of the question whether the dismissal 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 reasonably 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."

20. I had to have regard to the guidance given in authorities, notably British Home Stores v Burchell 1978 IRLR 379 (always bearing in mind that that case was decided under a burden of proof which differs from that now in force) and Sainsburys Supermarkets Ltd v Hitt 2003 IRLR 23. I must take care not to substitute my own view for that of the employer at any stage, and to bear in mind that at each stage where the employer exercises discretion, the question is whether its decision or conclusion has been within the range of reasonable responses: that range includes the range of reasonable inquiries open to the reasonable employer investigating the allegation. An employer is not duty bound to pursue every line of inquiry, provided that the inquiry was in total objectively reasonable. In setting penalty, the question is not whether the tribunal considers the sanction of dismissal to be harsh or excessive, but whether it is within the range of reasonable responses.

21. The questions to be answered by the tribunal are whether in dismissing the employee, the respondent had a genuine belief, based on a reasonable inquiry and on reasonable evidence, that the claimant had committed the misconduct alleged; and if it did, was dismissal within the range of reasonable responses.

22. If the tribunal finds that the dismissal was unfair, but that the conduct of the claimant was such that it would be just and equitable to reduce the basic award to any extent, it must reduce the basic award to that extent. If it finds that the claimant's actions caused or contributed to his dismissal, it shall reduce the compensatory award by such proportion as it considers just and equitable. The reduction need not be the same in both instances, bearing in mind in particular that the basic award represents accrued service before the dismissal event.

23. By virtue of section 123(1) of the ERA, the compensatory award is

> 'such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.'

In an appropriate case, the Tribunal must have regard to a Polkey reduction, by considering what might have happened if an element of unfairness had been avoided.

24. In the course of the respondent's evidence, I raised the issue of consistency, a matter not raised or pleaded, to which Mr Nwajagu subsequently gave some focus. Consistency may be an element in section 98(4) fairness. Consistency may be 'conduct consistency'. That may happen where a claimant's dismissal for certain conduct is inconsistent with the respondent's previous tolerance of the same conduct. It would, for example, not be fair to dismiss a claimant for persistent lateness if lateness had previously been tolerated, unless the claimant had been alerted to a change of policy by the respondent. Alternatively, consistency may be 'comparative consistency'. This might arise where more than one person has engaged in the same conduct, but not all of them are dismissed for it.

25. The tribunal should, in considering consistency, look to the factual basis of the cases being compared, and that consistency of treatment as an element in fairness requires that the material circumstances of the comparative cases under consideration must be very similar, if not identical. The lay person's argument, which is (for example) that it is unfair to dismiss A for poor quality work, when B has not been dismissed for lateness, is not a helpful comparison in law because poor work and lateness are not sufficiently similar reasons to lay the basis of comparison.

26. I approached the matter by considering each of the reasons for dismissal separately through the Burchell analysis. I do not need to consider whether the claimant actually did the thing for which she was dismissed. I proceed on the understanding that a claimant may be fairly dismissed for something which she did not do; or unfairly dismissed for something which she did do. I take care in each instance not to substitute my view for that of the decision maker; I accept that this creates a high hurdle in the present case, where the decision maker was at the time of dismissal in her fortieth year of professional registration and a hugely experienced Home Manager. I also must bear in mind that throughout these events, all of

those involved shared the objective of providing the best possible care to vulnerable residents.

General approach

27. During the respondent's course of managing this matter, the original 12 allegations against the claimant were reduced to six, so that allegations were re-numbered. That was a source of potential confusion, which I try to avoid. During the management process, three specific residents were referred to by name. In the documents and in the evidence, their names were redacted, but it appears not consistently. I have taken the liberty of adopting my own anonymising, which has been simplistic. I heard about three residents. One had a continence issue, whom I refer to as 'C;' one was diabetic and is referred to as 'D;' and a third had Parkinson's disease and is referred to as 'P'.

28. In this case, as in many others, the tribunal was referred to a wide range of matters. Where I make no finding on a matter which was mentioned; or where I make a finding which does not go to the depth to which the parties went; my approach should not be taken as indicating oversight or omission, but as reflecting my analysis of the extent to which the point was truly of assistance and relevant to the issues for decision. The latter point was particularly important in this case, in light of the concerns identified above about the scope of the claimant's witness statement.

29. I appreciate also the inherent difficulty in this case for both sides, which was that delay in serving the ET1 meant that the respondent first knew of this claim about 30 months after dismissal.

30. That said, the bundle would have benefited from more detailed checking, so that there were fewer incomplete documents. It would have assisted the tribunal if the crucial handwritten documents had been transcribed for the purposes of this hearing. A chronology would have been of assistance.

31. While it is a truism of unfair dismissal law that the tribunal must not substitute its view for that of the employer, that was a particular challenge in light of the attack made by Mr Nwajagu on the dismissal process. Ms Spring dismissed the claimant on five allegations. Three allegations were of forms of misconduct with which an Employment Tribunal is relatively familiar, and which require no specialist consideration. However, two related to the management of medication. The difficulty which those allegations caused the tribunal are that in the absence of independent evidence on behalf of the claimant (from, for example, a clinical practitioner or even expert witness), it is a difficult task to challenge the analysis and decision of an experienced, qualified dismissing officer. It has been helpful to bear in mind that Ms Spring's analysis of the medication issues may be right or wrong, but I am not in a position to assess its clinical accuracy, nor required to do so.

Background fact find

32. I turn first to the mechanical chronology. The claimant, who was born in 1965, is a UK graduate and a Registered Nurse, having obtained registration after graduation in 2008. Her first language is Mandarin (and English may be a third, not second language). The dedication and commitment which she must have shown in qualifying in her early 40's, in a language other than her mother tongue, cannot be overstated.

33. Her continuous employment dated from 12 January 2009 (25), and at all material times, she worked at Hill House, Elstree, described in evidence as:

> "a care home providing care for young physically disabled and elderly frail residential nursing and palliative care over six units".

34. Hill House, at the date of this hearing, had 92 employees, and around 70 residents. At the relevant time, the Home Manager was Mr Sharp, and the Deputy Manager Ms Sandsakumar.

35. The claimant was employed as nursing staff. By the time of the events in question, there were occasions when as part of working routine, she was the senior employee on site. Other than the events in this case, I heard nothing to suggest that she had anything other than an unblemished record and was a respected colleague and practitioner.

36. The main events in this case took place in late November 2014. Three of the events took place in that period and two other events were undated.

37. One of the main events concerned 'D', a long term resident who was admitted from Hill House to hospital on 16 November 2014. He was discharged back to Hill House on 27 November (409).

38. A first group of complaints was raised against the claimant in the period 18 to 24 November 2014. I had little detail in evidence about how these complaints arose. I make that finding on the basis of the summary of the Appendices to Ms Marks' report (238) which shows statements made in that period by five different colleagues.

39. The claimant was off sick from 27 November 2014 (the day D returned to Hill House from hospital) to 1 January 2015 inclusive. She was then off sick again between 6 February 2015 and about 24 September 2015. She was suspended on 16 October 2015 and did not return to work after then before dismissal.

40. A second round of reports about the claimant was made in the period after 19 January 2015, including a complaint from 'C' (238).

41. Ms Marks was a Home Manager (not at Hill House). She was not a clinically qualified nurse. She had, at the time of this hearing, been employed by the respondent for 19 years, eight of them as a Home

Manager, and said in evidence that she had conducted about 60 disciplinaries.

42. Ms Marks was appointed to investigate all the allegations against the claimant. There was little in evidence about how exactly that came about. She prepared a report which was written as dated 30 January 2015 (217) although that date cannot be correct, as some of the interview material and documentation referred to (230-239) post-dated that date.

43. I do not set out a chronology of the steps taken by Ms Marks. At the beginning of her report (219-220) she set out in some detail a list of those whom she had interviewed, and of the documents which she had considered. It is apparent that she carried out a thorough inquiry, including a lengthy interview of the claimant on 30 January.

44. Ms Marks' report should be read in full. She considered twelve allegations, and advised that six go forward to a disciplinary hearing.

45. Ms Marks' report noted in addition the following:

> "that at the time there was "a wider issue" in the absence of the standard handover procedure; that there was, at least, uncertainty as to completion of the controlled drugs books; there was at least training required in countersigning controlled drugs; and a "generic problem" about hoisting".

46. Ms Marks denied in evidence that this indicated any structural issues. While the word "chaotic" (used about the management of Hill House more than once in closing submission by Mr Nwajagu) seemed to me excessive, I do find that the events with which I was concerned took place in a setting which was under-managed, and seen by Ms Marks to be in need of standard setting. I accept that that was the position over four years ago. I have no clear evidence of what has happened since.

47. The exact process by which the matter came to Ms Spring to conduct a disciplinary was not clear. The then Regional Manager, Ms Brewer, asked her to conduct the disciplinary. Ms Spring is a Registered Nurse, having obtained registration in 1975 which she has maintained. She has been employed as a Home Manager for over 15 years and said that she has undertaken about 40 disciplinaries. She had had no previously dealings with the claimant.

48. Matters were on hold during the claimant's long sickness absence. Ms Spring wrote to the claimant on 6 October 2015, shortly after her return from sick leave. She was told of six allegations against her and invited to a disciplinary hearing to be held on 14 October. She was referred to the procedure and alerted to the risk of dismissal. She was advised of her right to call witnesses and her right of accompaniment (297). Ms Spring's letter referred twice to enclosures, which were Ms Marks' report, the disciplinary procedure, and other internal documents. A detailed index would have been of assistance.

49. There was repeated dispute about whether the claimant received this letter. She was at work as normal on 14 October, and after completion of a training commitment was invited to the meeting with Ms Spring, who was accompanied by Ms Parrott-Carter of HR as note-taker. The tribunal only had handwritten notes (299).

50. The notes start as follows:

> "CS did you receive the letter?
> CW Yes, I did get the letter.
> CS have you read everything?
> CW No not yet
> CS This is a formal disciplinary.
> Nov & Feb. some things have gone to disciplinary.
> OK to go ahead.
> CW Yes."

51. Ms Wu denied that she had received the letter of 6 October, and denied having told Ms Spring that she had received it. Ms Spring replied that Ms Wu must have received the letter, as indicated by the notes above. She also said in evidence that the claimant had the pack of enclosures with her, and that Ms Spring could see it. There was discussion about what was the meaning of the question "Have you read everything?" and of Ms Wu's answer.

52. I prefer Ms Spring's evidence. I find that the claimant had received the letter of 6 October, and that Ms Spring properly asked the claimant if she was ready to proceed. She took the claimant's consent to proceed as given and did so. I make this finding because given her experience of disciplinaries, I can see no interest which Ms Spring would have had in proceeding to discipline an unprepared employee on the basis of documents which the employee asserted she had not read. Ms Spring knew that the events were nearly a year old, and must have known that a delay of a week or two would make no substantial difference to the respondent, but might make an important difference to objective fairness.

53. Ms Spring was unable to conclude matters at the meeting on 14 October and adjourned in order to make further enquiries. It would have been good practice if the note of the meeting had recorded a start and finishing time, and if the claimant had been formally told in writing by way of confirmation how things had been left.

54. After 14 October, Ms Spring undertook further enquiries. In particular, she pursued with Mr Sharp and Ms Sandsakumar the potentially important point of whether either had received from the claimant a report about care staff sleeping on duty (310-321). She suspended the claimant on full pay by letter dated 16 October (313). The claimant did not return to work after that.

55. The disciplinary meeting was scheduled to resume on 28 October, and the claimant did not attend. By letter dated 30 October (322), Ms Spring invited the claimant to the reconvened disciplinary on 3 November. The

same letter notes a conversation in which the claimant told Ms Spring that she was unwell, but in any event did not wish to meet her again, and had answered all the questions.

56. The claimant did, nevertheless, attended a further meeting on 3 November, again with Ms Spring and Ms Parrott-Carter (323-333).

57. An issue arose about a document, which the claimant was asked to try to retrieve from her home computer. It was an email, in which the claimant said that she had told Mr Sharp that carers were sleeping on duty. Mr Sharp denied having received any such email from the claimant. The claimant wrote to Ms Spring on 5 November and 10 November in identical terms to say that the document could not be recovered (334-335).

58. Ms Spring dismissed the claimant by letter of 11 November (336-344) which should be read in full.

59. She was advised of her right of appeal. By undated letter to Mr Parry (352-362), drafted, the claimant confirmed, with her solicitor's help, the claimant submitted 78 points of appeal. Given the comprehensiveness of that document, and that it was the first document in these events on which the claimant had had professional assistance, it was not surprising that Ms Gould cross-examined the claimant on points on which her evidence to the tribunal differed from the points which she had raised by way of appeal.

60. Mr Parry invited the claimant to attend an appeal meeting on 3 December. She did so. Mr Parry was accompanied by Ms Edwards, a note taker, and the claimant by a colleague, Ms Onyeneho (366-375). Mr Parry has since retired. At the time, he was an Area Manager. He is a qualified social worker, with over 40 years' experience in the health and social care sectors. He was employed by Bupa for six years. By letter dated 4 January 2016 (376-384) he rejected the claimant's appeal.

61. The respondent referred the claimant to external bodies. I add for sake of completeness that on 18 October 2016, the Disclosure and Barring Service informed the claimant that she had not been included in any Barred List. There was a hearing before the NMC Fitness to Practise Committee on 22 to 24 January 2018. The allegation was that in light of the matters which had led to her dismissal (I paraphrase) the claimant's fitness to practise was impaired by reason of misconduct. The determination of the NMC was that there was no case to answer. The claimant is therefore free to resume practice, although she has plainly found it difficult to do so.

62. Mr Nwajagu commented on the omissions from the respondent's evidence. As stated separately, I attach no weight to his observations that no direct complainant against the claimant gave evidence to the tribunal. That must be a matter for the respondent and its solicitors.

63. Mr Nwajagu's observation that there was no evidence about the management of Hill House seemed to me better made. The respondent

cannot be criticised for placing the investigation, disciplinary and appeal in the hands of experienced managers who had not worked with the claimant and were not based at Hill House. However, the tribunal had no evidence about the history of C, D or P; or about any wider management issues at Hill House, or about the residents and colleagues who complained against the claimant, or about the claimant's working record, or (as Mr Nwajagu repeatedly asked) about any other follow up within Hill House about any issue which management considered arose out of these events. Such evidence went no further than Ms Marks' rather bland comment that she understood that a number of the system issues which she identified in her report (see paragraphs 45-46 above) had since been remedied.

The reasons for dismissal

64. I next turn to the matters for which the claimant was dismissed. As already stated, Ms Marks received 12 allegations, and allowed six to proceed to disciplinary. Ms Spring considered the allegations and expressed them as five allegations upon which the claimant was dismissed, and Mr Parry rejected the appeal on those five. I have accepted that those five points made up the reason for the claimant's dismissal.

Resident C

65. It appears that on 19 January 2015, resident 'C' made a complaint which was received by Mr Sharp (161). The burden of the complaint was that on the night of 16 January C had her bedding and incontinence pad changed by the claimant, without either being necessary, and without 'C' having consented. Mr Sharp, who received the complaint, understood 'C' to have capacity to understand the nature of the event, to give or refuse consent, and to complain about it.

66. A carer who was working on the same night wrote a letter the same day (162) stating that 'C' would raise a complaint, and that she, the carer, did not want to work again with the claimant, broadly because she found her difficult to work with in a number of respects, of which the episode with C was one instance.

67. On 27 January, Ms Marks interviewed C, whose account of events was recorded as (168),

> "I was sound asleep in bed. All of a sudden, bed clothes pulled off me and started looking at my pad. Abruptly said that she will change it. Rolled me over. I said I wanted to use toilet. She told me I am to weak. I said sorry I need to get out to go to the toilet. She didn't give me alternative. Other carer was in the room. I didn't know what to do. She kept shouting at the carer."

68. 'C' said the event made her feel "terrible". She also reported that the claimant had shouted at the carer because the carer had tried to support 'C'.

69. The carer was interviewed by Mr Sharp on 19 January (164) and by Ms Marks on 27 January (185). Her account was broadly corroborative of what 'C' had said. The carer confirmed that 'C' had mental capacity and wanted to use the commode rather than be changed by the claimant.

70. There was an issue as to whether 'C' was indeed mobile and capable of using the commode, in relation to which Ms Marks relied on an assessment of 10 April 2014, which had been reviewed on a monthly basis (429), most recently on 9 December 2014 and again on 19 January 2015. The gist was that the 'C' was mobile with support, and could be moved from chair or bed to the commode with two staff and her Zimmer frame. The assessment also reported that she was continent. The claimant referred to an agency nurse called Lorraine, who had apparently written on 15 January that C was weak. In the event, Lorraine was not identified sufficiently by the respondent to enable her to be traced, and so she was not interviewed. Ms Marks recommended that this allegation should proceed to a disciplinary hearing.

71. Ms Marks and Ms Spring accepted the evidence of 'C' and of the carer, which was that the claimant had undertaken the procedures on C without consent. They also found that the claimant had shouted at the carer in the presence of the resident.

72. Ms Spring rejected the claimant's response, which was that 'C' had to be changed because of a history of diarrhoea. Ms Spring relied on a GP record to the effect that by 16 November 2014, C's previous symptoms of being unwell had resolved (339).

73. I find that Ms Spring had a genuine belief, on reasonable evidence and after reasonable enquiry that the claimant had committed both acts complained of in this incident; and that each and both constituted misconduct and unprofessional conduct. I find that the requirements of procedural fairness were followed: the allegation was put to the claimant who had the opportunity to reply, or to call witnesses, and any reply which she gave was taken into account in the balance. If it were a matter of this allegation alone, dismissal could not necessarily be said to be outside the range of reasonable responses.

The sleeping allegation

74. The fifth act of misconduct was curious. The tribunal receives a number of cases from the residential sectors. Many arise out of the need to provide 24 hour care. It may be permissible for night staff to sleep in the work place and be permanently on call. In other settings, sleeping is not permitted, as residents require a permanently vigilant member of staff. Managers often carry out random checks, and sleeping on duty is a not uncommon reason for dismissal. When the claimant was working night shifts with carers, she was the only clinically qualified person on site, and the senior member of staff on site.

75. Ms Marks' interview note with the claimant on 30 January 2015 includes discussion about the number of carers who were permitted to use the hoist, and whether a carer could use the hoist alone. The claimant said that she had to remind carers of the policy. In that context, (ie a discussion about the extent to which care staff do not comply with rules) the claimant told Ms Marks that staff sleep on duty, including one who 'brings her blanket' to work to use in the lounge. Ms Marks asked the claimant how many staff were sleeping on duty, to which she replied, "Most staff". Ms Marks asked for names of the sleeping staff, which the claimant declined to give. The note reads (196):

> "L have you reported it?
> C Yes but don't say they are sleeping
> L So you haven't reported it.
> C No What do you expect me to do."

76. When Ms Marks completed her report, she added an allegation "that on unknown dates, CW has not reported staff sleeping whilst on duty". The source of that allegation was the claimant herself. Ms Marks asked Mr Sharp and his deputy whether the claimant had reported staff sleeping to them and both denied that she had done so. (Interviews on 30 January 2015, 214-216).

77. This allegation proceeded then on the curious basis that the evidence was that which the claimant herself had given, which almost by definition was uncorroborated, and which the claimant denied.

78. This put the claimant in an unenviable difficulty. If she were to ask carers, in her own defence, whether they had slept on duty, none was likely to confirm having done so. At a later stage, the claimant alleged that she had made an e-mail report, but Mr Sharp denied having received any e-mail to that effect from the claimant, and the claimant reported that due to an IT problem she was unable to retrieve the sent item.

79. I find that Ms Marks and then Ms Spring were entitled, taking the note of the claimant's initial interview as a whole, to rely on the claimant's admission, and in particular on the plausibility of the overall context in which it had been made. It was difficult to think of why the claimant would have made such an admission if it were not true, and it may well be that it was too late when she realised that it damaged her own interests.

80. At this hearing, the claimant pursued the allegation that another member of night nursing staff, named to me as Mabel, had also not reported sleeping carers. There was no evidence to support this. Even if it were true, (a matter on which I cannot make a finding in the absence of evidence), it would only assist the claimant to advance an argument of inconsistency if Mabel's misconduct had been known to the respondent, and if the respondent had taken no action on it, by contrast with the respondent dismissing the claimant for the same misconduct.

81. I accept that Ms Marks and Ms Spring were reasonably entitled to accept Mr Sharp's denial of having received an e-mail notification of sleeping staff from the claimant. In so saying, I rely on a matter of common sense. If night care staff were asleep on duty, Mr Sharp, as Home Manager, had no interest in acquiescing in that misconduct or covering it up. It was on the contrary in his interest to avoid the risk to residents which would follow if an untoward event took place while night staff were asleep.

The shouting allegation

82. Ms Spring also upheld an allegation that the claimant had separately shouted at a carer in a resident's room. Ms Marks interviewed both the resident and the carer. Although the interviews were some time after the event, the carer reported having worked with the claimant on only a handful of occasions (185). The resident gave a cogent account on 27 January (183) in which the resident spoke of a "screaming match" in which,

> "the nurse stormed out and left the carer to get on with it. I told the carer the other one shouldn't have shouted at her … she was nearly in tears."

The carer corroborated this account when interviewed the same day (185-186).

Resident D

83. The main dismissal issue concerned resident 'D'. There was evidence and cross-examination about diabetes. There was, however, no independent expert evidence.

84. 'D' was a type 1 diabetic. I understood that his diabetes was unstable, and managed by insulin. The bundle contained a specialist assessment of 10 September 2014 (418).

85. On a daily basis staff, including the claimant, assessed D's blood sugar using a BM machine (blood monitoring). Depending on the reading, there was an assessment of how much insulin would be given. The claimant had been involved for some time in the management of 'D'.

86. The claimant recorded that on the morning of 16 November 2014 she had recorded D's blood glucose as 18.5, and that before breakfast she had given him 34 units of Humulin M3 insulin (404). It will be recalled that handover procedures were generally unsatisfactory at that time.

87. Later the same morning, at 7.20 am, a nurse, Ms Nursiah, reported finding 'D' unresponsive in his room. An ambulance was called. Paramedics recorded that they found D's blood glucose level to be below 1, which was dangerously low. The note which appeared in 'D's' subsequent hospital discharge form, and which must have been based on ambulance reports, stated (409):

> "He was treated with intravenous dextrose, which brought the blood level up to 8.4. He was treated for hypoglycaemia secondary to insulin over-treatment."

88. 'D' was admitted that morning, and remained in hospital until 27 November. The discharge summary said (409),

> "As an inpatient he had his insulin reviewed regularly. This was changed a few times after he underwent a number of hypos."

89. When Ms Marks came to investigate the matter, she looked at 'D's' daily residential care record, a document called 'Daily Life & Review'. She noted the record by the claimant that early in the morning of 16 November 'D's' blood sugar level was at 18.5. There was no independent verification of this reading. Ms Marks understood that the BM machine would store a record of all readings in the previous five days on a rolling programme. There was no verification that a reading of 18.5 was obtained.

90. The fundamental issue was straightforward. There was no disputing that at around 8am on 16 November, 'D' was found to have a blood sugar reading below 1, a level which is potentially fatal. Drawing on their experience of the management of diabetes, and of D, no other practitioner or manager could reconcile that objective fact with the veracity of two records made by the claimant alone, which were (a) the administration of medication and/or (b) the reading of 18.5. Both of those were unverified assertions and records made by the claimant.

91. That being so, the investigation by the respondent was in part an investigation into why 'D' had been in the unresponsive state in which he had been found; which became an investigation into whether the claimant had made an accurate reading of 18.5 and recorded it truthfully and accurately; and / or whether the claimant had administered the medication. The claimant vehemently at all times maintained that she had.

92. Although these matters were initially considered together, along with an allegation about an inadequate handover, in the event Ms Marks' report advised that two matters proceed to further disciplinary, which were whether the 18.5 reading had been correctly read and recorded and/or whether the correct dosage had been given.

93. The matter was discussed at length at the claimant's investigation interview and disciplinary. It is fair to say that the claimant expressed herself defensively, given the ambulance and hospital findings.

94. She replied first that the BM machine was faulty, and there was clearly some discussion of whether one or more BM machines were faulty or had been moved. I accept that the respondent had no record of any machine being found faulty, or having to be replaced. I have dealt separately below with Mr Nwajagu's submission that the respondent was at fault for failing to have any machine tested by an engineer.

95. The claimant was asked if she could explain the absence of a record on any machine of a reading of 18.5. The evidence was slightly unclear as to

how many machines were tested for this and if so, by 21 November (after which any record made on 16 November was over-written). I accept that there was no record of such a reading.

96. As a third point, Ms Spring attached weight to the discharge summary (404-409) and in particular to the sentence, "He was treated for hypoglycaemia, secondary to insulin over-treatment". She was, in my view, reasonably entitled to form the view that that was hospital guidance indicating that something had gone wrong with 'D's' medication.

97. Finally, I accept that the claimant drove herself back on a line of defence which presented in a number of manifestations. The dismissal letter states, for example:

> "When the ambulance crew came, they took the BM reading which read less than 1; this is confirmed in the hospital report ….. you stated that the ambulance crew were lying".

98. Human experience is that few people lie when they have no reason to. In the health sector, lying or deliberate mis-recording of medication can harm the patient and is grounds for dismissal. The paramedics had absolutely no reason to lie about 'D's' blood sugar as they found it. I would require compelling evidence to make a finding to that effect. There is no such evidence.

99. Mr Nwajagu cross-examined extensively on the final two lines of the hospital discharge, to the effect that if 'D' was unstable while under the 24 hour care of a major hospital, and if, while in hospital, he had to change his insulin, there must clearly have been some underlying issue with his diabetes, which had not been identified. In particular, he focused on the hospital report that while in hospital, "he underwent a number of hypos". Mr Nwajagu submitted that that was indicative of a wider instability and an indication that the hypo on 16 November had been triggered by the nature of 'D's' condition.

100. I found those submissions serious and troubling. If I had to ask whether they left some lurking doubt about the claimant's culpability, I would answer in the affirmative. That, however, is neither the burden of proof, nor the correct approach. The question for me is whether Ms Spring's approach met the Burchell test. I find, not without misgivings, that it did. She had a genuine belief that the explanation for the hypo episode lay with the claimant's failure in management of 'D'. She was reasonably entitled to accept the reliability of the ambulance report, and to accept that it was irreconcilable with the truthfulness of what the claimant said that she had done.

101. She was reasonably entitled to consider the explanations put forward by the claimant, and to reject them. There was no evidence of the machine having been faulty. It stood to reason (although Ms Spring did not express it in this language) that a faulty machine would manifest faults more than once, and the faults would be dealt with by more than one person on one

occasion. There was no evidence to that effect. (In so saying I bear in mind that the claimant went off sick on exactly the same day that 'D' was discharged from hospital back to Hill House; so that the management of 'D', including his blood monitoring, was undertaken by her colleagues).

102. Drawing on this evidence, I find that Ms Spring had a reasonable basis to conclude, as she wrote in the dismissal letter:

> "that you failed to take 'Ds' BM that morning, and administered insulin which then caused 'D' to fall and make him extremely unwell requiring hospital admission."

103. I add that even though I have taken the view that the correct approach to the range of reasonable responses is to take Ms Spring's findings as a whole, because she dismissed on the totality of her findings, this matter is of such outstanding gravity that if I had had to consider it in isolation, I would have found dismissal on that matter alone to have been fair. Of all the matters before me, it was the one which most closely engaged the issue of patient safety.

Resident P

104. The final matter related to medication prepared for resident 'P'. He was required to take a particular tablet, co-beneldopa four times a day, and the claimant and colleagues were required to keep a record of this.

105. A colleague, Ms Pun, alleged that the claimant could not have given 'P' the proper dose of medication on 18 November 2014, because when Ms Pun went off duty there were two tablets waiting to be given to him in the bottle, and when she returned, there were still two tablets. The claimant denied this, and stated that Ms Pun was in error. Ms Marks accepted that she could not take this allegation forward in the absence of contemporaneous evidence, and in particular in the absence of a functioning handover procedure at the time.

106. As with the sleeping allegation, much turned on the claimant's admissions when interviewed. In interview with Ms Marks on 30 January 2015, the claimant appeared to discuss an incident when she said she had seen Ms Pun pour tablets into her unwashed hands. It is evident from the notes that the claimant became emotional. Ms Marks went on to ask whether the claimant had checked the medication balances. The claimant said that she had not, there was no point, it was for Ms Pun to do and she was too upset.

107. I find that the notes record the claimant accepting that she had not checked balances. Ms Marks in witness evidence explained that "conducting a balance refers to the practice of keeping track of medication as it is administered." Furthermore, having alleged that Ms Pun had tipped medication into her hands, the claimant should have made a report of that, as the respondent's procedure was that care staff should not touch tablets but should dispense them through trays. This incident went forward for further consideration by Ms Spring.

108. Ms Spring, at the disciplinary, relied on the claimant's own words as recorded by Ms Marks in her notes. When interviewed by Ms Spring on 14 October, the claimant confirmed that she had failed to conduct a balance check and gave an explanation (inability to establish its accuracy) which it is clear Ms Spring rejected.

109. The claimant had then made her position worse, by confirming that she had not reported the 'hands' incident, and by giving a reason which could not be acceptable to the respondent, namely, that she had lost trust in the Home manager and deputy manager.

110. Ms Spring's conclusion can be shortly stated (339):

> "As you have admitted that you failed both to check the balance of the medication and failed to report your concerns about Ms Pun's actions on that day, you potentially put this resident at risk by not checking the balance as stock checking gives an audit line to prevent over or under administration of any medication".

Cumulatively

111. Ms Spring wrote that

> "individually and cumulatively, these were sufficient serious breaches of obligations to warrant dismissal without notice".

112. It seems to me that my proper task is to consider the matter cumulatively, as was done by Ms Spring. I accept that she was entitled to consider whether any systemic issue arose from the accumulation of these matters, and to find that there was, and to dismiss on the basis of that accumulation. I accept that a number of the findings against the claimant went to resident safety. Given the claimant's status, her role on shift as the most senior clinical person, and the respondent's attempts to improve professional standards and accountability, there can be little doubt that dismissal was within the range of reasonable responses.

113. I deal briefly with Mr Parry's appeal. I accept that he read the material put forward in support of the appeal by the claimant, and also read the management materials which had led to the decision to dismiss. I accept that he listened professionally and courteously to the claimant's points at the appeal hearing, who was for once accompanied. I accept that he weighed up the material which she placed before him. I noted one striking piece of good practice, which he said he followed in all appeals, which was to conclude the appeal by asking "Do you feel that I have treated you fairly and you have been listened to today?" The note records the claimant's reply as, "Yes I feel you have shown me respect today" (375). I accept that that was her answer. While I accept that Mr Parry's question, in the context of an appeal against dismissal, was one which some employees would have found difficult to say 'no' to, I also accept that the question would have been the ideal opportunity for the claimant to raise the interpreter question, and that she did not do so.

114. I do not find that there was any procedural failing below which Mr Parry was required to correct. I find that taken as a whole, the appeal process, including the outcome letter of 4 January 2016 (376), concluded the matter fairly.

The claimant's points

115. In case I have failed to explain fully my reasons for preferring the respondent's case, I here set out separately (not in order of priority) the main points raised in the course of evidence or submission on behalf of the claimant, and my reasons for rejecting them.

The machine was faulty

116. There was no evidence that any machine was faulty. I accept that any machine can become faulty. When that happens, I do not accept that the machine rights itself. I accept the integrity of the respondent's case, which was that the at the time in question no BM machine was repaired or replaced, and that no other employee reported a malfunction of D's machine or any other BM machine.

No engineer

117. It was common ground that the respondent did not call out an engineer to check any BM machine. My finding is that it was reasonable management at the time not to form the view that an engineer was necessary to inspect a machine which had not been reported as faulty.

Delay

118. I accept that the procedure was delayed. I find that the main reason was the claimant's sickness absence. I do not find that any point of fairness follows. If it is suggested that it would have been fair to conduct the disciplinary process earlier, but during a period of sick leave, I reject the submission.

Agency nurse

119. There was criticism of the respondent's failure to trace Lorraine (see paragraph 70 above). At best for the claimant, she might have said that she found C to be weak on a particular occasion. It is difficult to see how this could have answered the complaint made in C's own words above, corroborated by the carer who was present. In light in particular of Hitt, I do not find that the respondent's failure to try to trace Lorraine renders the claimant's dismissal unfair.

Management at Hill House

120. Mr Nwajagu drew on Ms Marks' comments about procedures at Hill House to raise a general question about the quality and consistency of

management. I share his general concern, and I repeat that while the respondent cannot be faulted for placing this whole matter in the hands of experienced managers based at other locations, that left a gap in the information available to the tribunal about Hill House. It also left much of Mr Nwajagu's point as, at best, surmise. I would have been concerned if evidence had indicated that the claimant had been the scapegoat of wider organisational failings. There was no evidence to that effect, and no evidence of either form of inconsistency which rendered this dismissal unfair.

121. There was a specific allegation by the claimant that another nurse, identified only as Mabel, had acquiesced in care staff sleeping at night. I do not regard the failure to enquire into this as unreasonable; the issue could only be relevant to the claimant if it showed conduct consistency, namely that Mabel's default had been known to the respondent, which had taken no action against Mabel, but then dismissed the claimant for the same or very similar misconduct. There was no evidence to that effect.

Reduction of allegations

122. Mr Nwajagu's point was that Ms Marks' analysis was flawed by her decision to permit only six of twelve allegations which she investigated to go forward to disciplinary. I prefer Ms Gould's reply, which was that on the contrary that showed open and fair-minded analysis of each of the twelve issues separately.

Hospital stay

123. Mr Nwajagu submitted powerfully that the record of D's hospital stay (409), in which he was recorded as having had many hypos, cast a doubt on the provenance of the hypo which was central to this case, and therefore a doubt on the fairness of the decision to dismiss.

124. As a medical layman, I record that I have sympathy with the common sense in that submission, but there was no evidence to make good the assumption on which it was based, even if I were able to make a material finding without substituting my own view. I am simply in no position to find that the hypos during D's hospital stay in some way should be considered as part of an innocent explanation of the hypo on 16 November 2014.

Meeting notes

125. The claimant and Mr Nwajagu made many attacks on the integrity of the notes of the claimant's meetings with Ms Marks, Ms Spring and Mr Parry. The tribunal's experience is that notes of meetings should be an accurate summary, but are very rarely a full transcript. It is not necessary that they record everything that was said, but what they record should be a fair and accurate summary. There was no compelling evidence to the contrary in this case.

126. I agree with Mr Nwajagu that it is best practice that notes of meetings be circulated (preferably having been typed), as soon as possible after the meeting to those who were present, with an invitation to make any corrections. That did not happen. In this case neither the typing nor the circulation happened.

127. Mr Nwajagu suggested that the notes should be signed and countersigned to vouch for their accuracy. I agree that it is good practice that an employee should be asked to countersign notes, but I would not go so far as saying that the absence of counter-signature renders the respondent's reliance on the notes unfair.

128. I do not, in this case, find evidence which leads to the conclusion that any shortcoming in the notes or note-keeping rendered the dismissal unfair.

Live witnesses

129. The respondent's disciplinary procedure states (71),

> "You may ask relevant witnesses to appear at the disciplinary hearing, provided you give us sufficient advance notice to arrange their attendance. You will be given the opportunity to respond to any information given by a witness. However, you will not normally be permitted to cross-examine witnesses unless, in exceptional circumstances, we decide that a fair hearing could not be held otherwise".

130. It was clear that that language, which the claimant may not have fully understood before giving evidence, did not distinguish between witnesses regarded as management witnesses, and defence witnesses, whom a claimant may wish to call to speak in reply to allegations. There was no evidence of the claimant having asked for the attendance of a defence witness at any meeting in this case, and I therefore took all discussion to relate to the witnesses against the claimant on behalf of the management case.

131. Mr Nwajagu at some length submitted that fairness demanded that the witnesses who were identified by Ms Marks as witnesses against the claimant be examined personally by Ms Spring and Mr Parry, so that they could test their evidence and enable the claimant to challenge them by questions. That is not the procedure which applied at this workplace. I add that it would be a procedure unique in my own long experience of workplace disputes.

132. The respondent's procedure was that an investigator interviews witnesses, who are asked to sign a summary of what they say, and that that written material is then considered by other managers. That is almost invariable practice in my experience. I do not agree that fairness requires that witnesses be personally interviewed by the dismissing officer or cross-examined by the potential claimant. Not only would that be a unique procedure; it would entrench conflict between an employee (who might not be dismissed) and colleagues; it places a disciplinary officer in the role of having to manage an open confrontation between colleagues; and it is

naïve to imagine that an employee can put questions to a colleague in the style of professional cross examination or with any realistic hope of eliciting a retraction of an allegation.

133. Likewise, Mr Nwajagu's observation that the primary complainants against the claimant were not called as witnesses in the tribunal, was true but of no assistance. The tribunal is not called upon to adjudicate on the primary allegations, and rarely hears from primary complainant witnesses. (Mr Nwajagu did not address the problem of how the tribunal would deal with the many cases which might involve vulnerable witnesses, such as C). The tribunal is called upon to adjudicate on the reasonableness of how management dealt with the matter, and therefore almost invariably hears only from management witnesses.

Interpreter

134. The claimant was adamant that she asked each of Ms Marks, Ms Spring and Mr Parry for an interpreter to be present at their meeting, stating that she was unable to fairly to proceed without; and that each refused. It followed that each HR observer and note-taker at each meeting colluded in each refusal. The claimant's case required me to accept that at least six people were so lacking in any sense of fairness as to proceed against an employee who said that she could not understand what was happening.

135. There was no record of this in any note of any of the three meetings; at each meeting the decision maker was accompanied by a person from HR who was note taking. If I accepted the claimant's submission, I would have to find that none of the three note takers took the trouble to record the request or its refusal.

136. In rejecting this allegation, I note the claimant's English language qualification, registration and experience. The respondent had every reason to believe that she had a command of functioning working English. I also note that in her letter of appeal (355, paragraph 33) she raised a language allegation, stating that she needed each meeting to be dealt with "sensitively and in a structured and clear pace so that I can follow it accurately" (355). She made no complaint of having asked for an interpreter twice, and twice been refused. I have commented above on her response to Mr Parry's question about the fairness of the appeal hearing.

NMC

137. The bundle contained most of the outcome letter of proceedings brought against the claimant in the NMC (her professional regulator) which found in 2018 that there was no case to answer. This material did not assist on the question of unfair dismissal. The NMC considered the matter long after dismissal, applying a different test and a different approach from the tribunal. The fact that the NMC wished to hear live witnesses was not material, in light of my earlier findings about live evidence.

Watford General Hospital

138. This was a bizarre corner of the case. On 28 May 2015, Mr Anthony Romaine of the respondent wrote to the claimant to say that he was investigating an allegation that while off sick she was working at Watford General Hospital. The claimant replied with an immediate denial (477). There was apparently a prompt reply from Mr Romaine or the respondent (not in the bundle) assuring the claimant that it was a case of 'mistaken identity' and the allegation was not proceeded with.

139. Two points followed. It was submitted that this allegation demonstrated hostility towards the claimant on the part of the respondent in a general sense. I disagree. An allegation was raised, which on its face was sufficiently serious to require investigation. The investigation promptly exonerated the claimant. That alone indicates that it was approached with a fair and open mind. The claimant alleged secondly both at the time and in evidence, that managers had 'sold' her personal data so that another person could pretend to be her, while working at WGH. That was a fanciful allegation of which there was no evidence.

Right of Accompaniment

140. The respondent's procedure (71) conferred a right of accompaniment at any formal meeting, limited to "a fellow employee or a trade union representative". That is standard wording, which reflects the statutory framework. Employers who permit employees to be accompanied to meetings by friends, relatives or even a lawyer may do so as an act of discretion or kindness, but the failure to do so has no impact on fairness.

Medical notes

141. Mr Nwajagu criticised the respondent for its failure to send the claimant medical notes about C, D or P before the disciplinary hearing. It was common ground that that was the case. The respondent's observation was that it was not at liberty to send out of its control residents' medical records, but that they were available for consideration at the relevant meetings. I do not find that this was a matter for which the respondent can be criticised. It was required to balance fairness to an employee with the privacy rights of residents. I accept that it achieved a fair balance by the procedure which it followed.

Conspiracy

142. Neither the claimant, nor Mr Nwajagu used the word 'conspiracy', but Ms Gould did, to characterise the breadth and nature of the attacks made by the claimant on those around her, and in particular her assertion that at least ten former colleagues were liars.

143. As this procedure went on, the claimant defended herself with a widening range of more serious allegations against colleagues, of which the

common thread was bad faith. Her defence was that colleagues (and others, such as the ambulance paramedics) had systematically lied to cause her damage. The most extreme instance which I heard was her reply to the allegation of working at Watford General Hospital.

144. I reject that whole line of argument for three reasons. First, there was no evidence of it; secondly each of the matters on which a colleague or colleagues reported the claimant was on its face, an objective professional issue which could legitimately be reported; and thirdly because it runs contrary to human experience and the work place experience of the tribunal to show that a large number of colleagues knowingly fabricate allegations for a spiteful motive. It would require compelling evidence to make good such an argument, and I find that there was no such evidence. I do not go so far as to say that by making that allegation the claimant does serious damage to her underlying credibility; I accept that such allegations may be made in self-defence and in distress.

Alternative findings

145. Although I heard alternative submissions on contribution and Polkey it is not necessary for me to make those findings and I decline to do so.

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Employment Judge R Lewis

Date: ……22/7/19……..

Sent to the parties on: ..20/8/19...

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For the Tribunal Office