# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs Rosslyn Green**

**Respondent:** **Consensus Community Support Ltd**

**Heard at:** **Southampton** **On:** **22 and 23 July 2019**

**Before:** **Employment Judge Hargrove**

**Representation**
**Claimant:** **Mr Green, Husband**
**Respondent:** **Mr J Platts-Mills, Counsel**

# RESERVED JUDGMENT

1. The Judgment of the Employment Tribunal is that the claimant's complaints of unfair dismissal and wrongful dismissal are not well founded.

# REASONS

1. The claimant was employed by the respondent as a Support Worker from 2012, and latterly as a Senior Support Worker up to 28 August 2018 when she was summarily dismissed allegedly for gross misconduct namely sleeping on duty, by Terina Noke (TN).

2. On 31 August 2018, she submitted a lengthy letter of appeal. The appeal was heard by Simon Kezic-Williams on 20 September 2011 but was unsuccessful. The claimant presented an ET1 on 1 November 2018 which was initially rejected, the name on the EC Certificate (Consensus) not matching that on the ET1 (Caring Homes), but was accepted on reconsideration on 26 November 2018. The respondent submitted a response.

3. Issues arose whether the claimant, in addition to claiming unfair dismissal and breach of contract, was also making a claim for disability discrimination. Such a claim was dismissed on 4 April 2019, however, because the claimant

failed to comply with an unless order for the provision of details of her impairment and their affect on her normal day-to-day activities, made on 22 March 2019. Nonetheless, there are medical issues which arose for consideration at the tribunal hearing, but the claimant expressly denied in her evidence to the tribunal that she had any medical conditions constituting a disability as defined in Section 6 of the Equality Act 2010. A list of issues was submitted to the tribunal shortly before the hearing.

4. The respondent's case is that the reason or principal reason for dismissal was the belief on the part of the dismissing officer and at the appeal that the claimant had been asleep during a day shift at the respondent's residential home at East Hill Place where there were at any one time about six residents with extremely challenging behavior some with physical and/or mental issues, all of them funded by local authorities. At least two of the residents, RC and GS required 2:1 cover over a substantial part of a 24 hour period. This was required for the protection of the individuals, and of other residents and of the staff themselves.

5. The Employment Tribunal's directions on the law:

(1) Unfair dismissal. It is for the claimant to establish that he or she was dismissed. That is not in dispute in this case.

(2) If there was a dismissal, the burden lies on the respondent to establish a reason for dismissal of a kind identified in Section 98 of the Employment Rights Act 1996. Amongst the reasons for dismissal within Section 98(1) is a reason connected to conduct. If the respondent establishes the reason for dismissal, the tribunal then has to consider whether or not the dismissal for that reason was fair or unfair applying Section 98(4) of the Employment Rights Act 1996. That Section provides:

> "The determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer)
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> (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
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> (b) shall be determined in accordance with equity and the substantial merits of the case".

(3) In the case of a conduct dismissal the employer has to establish that belief in misconduct was the reason or principal reason for dismissal. In considering the fairness of the dismissal and applying Section 98(4), the tribunal has to consider the three stage process set out in British Home Stores v Burchell as explained in later authorities including J Sainsbury Plc v Hitt [2003] ICR Page 111, Court of Appeal. The tribunal has to consider

(a) Whether there was as much investigation as was reasonable in the circumstances.

(b) Whether based on that investigation the dismissing officer at the first stage of the process, and at any appeal, entertained a reasonable belief in the misconduct alleged based on that investigation;

(c) Whether the decision to dismiss fell within a band of reasonable responses.

(4) It does not follow that if one employer might have decided not to dismiss on given facts that a decision to dismiss by another employer would be unfair. There is a range of responses which may be reasonable. In addition, the range of reasonable responses test applies to each of the three elements as was stated by Lord Justice Mummery in J Sainsbury Plc v Hitt

> "The range of reasonable responses test (or to put in another way the need to apply the objective standards of the reasonable employer) apply as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason".

(5) The tribunal is not entitled to substitute its own view for what would be reasonable for that of the hypothetically reasonable employer.

(6) If the tribunal finds that the dismissal was to any extent unfair, the tribunal has to issue to consider the issue of compensation. There are two particular circumstances when the compensation may be reduced or indeed no compensation awarded.

(7) Section 123 of the Act states that "the amount of the compensatory award shall be 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 insofar as that loss is attributable to action taken by the employer".

(8) In assessing the compensatory award the employer may be able to prove – and the burden lies on the employer – that notwithstanding the unfairness of the dismissal, the employer would have dismissed fairly at some stage in the future. This is called the Polkey test (Polkey v A E Dayton Services Ltd [1988] ICR Page 142). What are the chances, usually expressed in percentage terms, that the claimant's employment would have come to an end fairly in any event and if so when? The percentage reduction may be anything up to 100%, in which event the compensatory award may be reduced accordingly.

(9) The second circumstance in which a reduction in the compensatory award and indeed the basic award may be made occurs if it is established that there has been contributory fault on the part of the employee. In relation to basic award, the amount may be reduced under Section 122(2):

> "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would

be just and equitable to reduce or further reduce the amount of the basic award to any extent the tribunal shall reduce or further reduce that amount accordingly".

(10) In relation to the compensatory award Section 123(6) provides:

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding".

(11) Wrongful Dismissal. Here the burden falls upon the respondent throughout to prove that the claimant was guilty of gross misconduct or such misconduct as to cause a breakdown in Trust and confidence in the employee by the employer.

Chronology

6. Although the claimant did not dispute the reason for her dismissal was at least the respondent's belief that she had been asleep and was guilty of misconduct, the respondent began and the respondent called only the dismissal officer JN but notably did not call the investigating officer Vicky Rendell (VR) or the appeals officer, SKW.

7. The claimant gave evidence and all witnesses relied upon witness statements referred to within the joint bundle of some 160 pages to which additions were made during the hearing. The claimant did not rely upon a witness statement which had also been provided by Mr Green.

(1) The claimant had been initially employed as a Support Worker and latterly a Senior Support Worker for at least eight years – and possibly – it is a matter of dispute - for as long as seventeen years if service with an associated employer is included under the provisions in Section 218 (9) of the 1996 Act.

(2) The claimant does not have an entirely unblemished record because on 29 March 2018 she was issued with a letter of concern for falsifying information that a fire drill for which she was responsible had taken place on a particular date when it had not. I reject the claimant's evidence that the drill had in fact taken place and that the claimant had not falsified the record. That explanation, given at the tribunal hearing led me to question her reliability as a witness in general. Nonetheless, despite this warning it appears that the claimant was otherwise considered to be a valued member of staff.

(3) The respondent treated sleeping on duty as capable of amounting to gross misconduct. Clause 1.47 in the disciplinary policy gave as an example of gross misconduct "professional misconduct, contravention of professional codes of conduct or acting in series breach of a resident's care/support plan". An extract from the respondent's policy

document "Learning from the adult care sector" at pages 88 – 89 identified it as being capable of leading to a nurse being struck off. The respondent's handbook stated that sleeping on duty was strictly forbidden (see page 57). I accept TN's evidence that she had summarily dismissed support workers found to have been asleep particularly on night shifts. I did not find it significant that a particular named individual had not been dismissed for such an offence in the past. I accepted TN's evidence that she was unaware of that case and the limited details given by the claimant were insufficient to establish that the facts of that case were sufficiently similar to the facts of the claimant's case as to be able to draw any conclusions that the dismissal of the claimant was inconsistent or that the dismissal of the claimant was not within a band of reasonable responses.

(4) Prior to the events in question, in a medical assessment of the claimant in April 2016 (page 53) it was identified that she had borderline diabetes, diet controlled, and that there was a long list of medication, although the conditions for which she was being treated were not identified. The claimant stated that in December 2016/2017 she started medication specifically for type 2 diabetes. I have no reason to doubt her evidence at least in this respect.

(5) On 22 March 2018, in the course of a supervision by VR, it is noted that the claimant had recently "had some health issues with her asthma and diabetes" but it was under control. It was agreed that she needed to be aware of her limits due to her health and reduce her overtime hours (see page 94).

(6) Despite the fact VR has not been called to give evidence, there is documentary evidence of the product of her investigation.

(7) Lee Creighton provided two written statements in which he described finding the claimant apparently asleep on a sofa in a service user's (GS) flat, and waking her up at about 3.00pm on 31 July (see pages 99 – 101).

(8) Ethan Walker (EW) provided to VR a lengthy handwritten statement in which he described the claimant falling asleep on a chair in the service user RC's flat at 11.00am on 8 August, waking up after five minutes and then going to sleep again at 11.15am. At that stage he took a photograph of her on his mobile phone (see page 1019).

(9) At about 11.25 he had started to bang and crash in the kitchen but she had not woken up. He had reported it to Ali (AJ) who emailed the VR on 10 August (page 110) describing her observations when she arrived on the scene. AJ noted that the claimant had not woken up when AJ shouted at her and that the claimant had only woken up on being tapped on the shoulder twice and that the claimant had then said "I had a rough last night I couldn't sleep". The claimant does not dispute this account. AJ told the claimant that it was unacceptable to be asleep while supporting tenants; and that she would inform VR about the incident.

(10) At midday on 8 August the claimant texted VR in the following terms (see page 102):

> Hi Vicky just to let you know I fell asleep when I was with RC. Sorry, I was not asleep long but I know its wrong, sorry".

(11) It would have been reasonable for a dismissal officer to believe that the claimant had sent the text in these terms in response to AJ's notification that she would be reporting the incident to VR.

(12) VR spoke to the claimant on 9 August 2018 and suspended her (see proforma at page 103). In her investigation report at page 105, she catalogued that RC had been a resident at East Hill Place since 2012 and had severe learning difficulty, epilepsy and autism and there were incidents of regular challenging behavior such that she needed 2-1 support from 7.00am – 22.00. At page 106 she catalogued the evidence and described how, when asked to come to the office to meet with VR on 9 August at 11.30, the claimant had immediately said she was sorry and that she knew it shouldn't have happened and that there was no excuse. The claimant raised the issue that her blood sugar had been very high when leaving work. The note records that the claimant was then suspended. It is claimed by the respondent that the notice of suspension was sent to the claimant in writing on that day but the claimant disputes it.

(13) The claimant was invited to a disciplinary hearing on 23 August by TN by letter of 20 August which identified the allegations of sleeping on duty on 31 July and 8 August 2018. The statements from witnesses were enclosed.

(14) The disciplinary hearing was chaired by TN. VR also attended to outline the allegations and then left. Notes were taken electronically on a laptop by Sandra Newell. The claimant complains that the notes were unsigned. There is nothing in that complaint because it is not in dispute that they were recorded contemporaneously and in any event, there is no substantial area of dispute about the accuracy of the note which is at pages 113 – 118. The claimant referred to diary notes which she had with her but which were only disclosed on the direction of the tribunal during the hearing. There was an entry for the 31 July which did not refer to any incident on that day or being woken up. The claimant said that she did not remember that incident at all. In the event, the dismissed found that complaint unproven. As to the events of 8 August, she agreed she was woken up by AJ stroking her arm. She then said that she had since been to the doctors, had been referred to hospital overnight and that she had PTSD which had been diagnosed by a blood test. She raised that it was because of her daughter's sudden death (from SADS) exactly ten years before. At this point TN asked the claimant if she was ok to continue. The claimant responded that she wanted it over and done with. The claimant then stated that she had had had episodes of

falling asleep which had started on 8 August and had occurred regularly since, at least up to 20 August.

(15) The claimant then produced a hospital discharge note at pages 151 – 154. At page 151 of the note, which was addressed to her GP, it is recorded that the claimant was admitted to hospital on 13 and discharged on 14, being seen by a consultant.

Under the paragraph headed "diagnosis" there is the entry "stress induced absence episode", co-existing medical conditions asthma, trigeminal neuralgia, migraines, depression. There is then a list of her medications which she was receiving and at page 154 under the paragraph headed History – reason for admission: "patient admitted with six episodes of absent episodes. Occurs six times daily. No pre-syncopal symptoms. Partner able to arouse patient during episode with no ;incontinence during. Very stressful and emotional period as young daughter died in pregnancy 28 years ago at this this time of year with SADS."
Patient spoke with Dr Hedger (Consultant) this afternoon. Explained diagnosis. Discharged to go home."

(16) The claimant insists that she was told at hospital that she had PTSD but it is not mentioned in the notes anywhere. She also mentioned at the disciplinary that she had asthma, diabetes and depression. There is a clear note that the claimant produced a letter from her husband. That is not in dispute, but the note has not been produced in particular by the respondent on discovery. The claimant claims that it described the claimant's absence episodes; she also (page 115) agreed that the attacks resulted in her falling asleep. She stated that the doctor at the hospital had said that she did not have epilepsy but did have PTSD, which is not described in the note. Finally, of relevance, the GP said that she was now fit to work and she produced a fit note to that effect dated 16 August 2018. She disclosed that her medicines were working but that she had not been able to drive for three to four days. She said at the end "I am sorry it has happened it is the time of year and it made me depressed. I admit I was asleep".

(17) TN notified the claimant of the decision to dismiss summarily by telephone, followed by a outcome letter dated 28 August (pages 119 – 120. TN found that the allegation of sleeping on 8 August was proved but did not uphold the allegation of 31 July. TN referred to the episodes of absences reported in the hospital discharge note, noted that she had not experienced these prior to being observed asleep on 8 August. She also referred to the fact that the hospital had not stated that she had had epileptic signs and that she had been signed fit for work by her GP and had resumed driving a car. She referred to mitigating factors in relation to her health. She referred to the position in which the claimant appeared to be asleep, which she interpreted as being as a result of preparing for sleep, and thus deliberate. TN notified the claimant that she was summarily dismissed with effect from 28 August. She also notified the right of appeal.

(18) The claimant appealed to SKW in a lengthy letter of 31 August 2018 in which she raised a whole series of procedural and substantive issues. The letter was accompanied by a summary sheet (pages 121 – 128). Mr Green wrote in support of his wife's appeal in similar format (pages 128 – 139). SKW invited the claimant to an appeal meeting on September by letter of 4 September. There are no notes of the appeal meeting. Nor has SKW been called to give evidence as to what occurred at the appeal or to support the grounds for rejecting the appeal which are however, set out in the outcome letter of 27 September 2018 (page 145).

> "Your appeal centered on the following points
>
> That you were not asleep but experiencing an episode of PTSD which you were diagnosed with following admission to hospital on 13 August 2018.
>
> A due process had not been followed from the point of your suspension.
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> The photographic evidence used at your hearing is illegal and in breach of the data protection act.
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> EW left you and RC alone unsupported on 8 August and no action was taken against him.
>
> In support of your appeal you gave the following explanation that it looked like you were asleep but in fact you were having an episode of PTSD. You stated you were not aware that this was what you were experiencing on the day. However, you had a doctor's letter and discharge letter from the hospital confirming his diagnosis. In setting out his reasons he described the photographic evidence and witness statements from EW and AJ confirming that you were asleep in a laidback manner on an armchair in flat 5. This was according to the statements for a period of thirty minutes and several attempts were made to wake you. Also confirmed by a text message to VR. In addition, when Ali finally woke you up on 8 August you stated you had a rough night and couldn't sleep.
>
> I have reviewed the paperwork and your personnel file at East Hill and confirmed that the correct process has been followed from the point of your suspension until your dismissal on 28 August.
>
> I feel the photographic evidence taken is legitimate and was necessary to demonstrate the serious nature of you being asleep whilst on duty during the day time on 8 August. Whilst I note your point that EW left the room, this was for a short period of time and to alert Ali of the situation. I cannot find any evidence that EW wanted your job (as you state in your letter)".

(19) That concludes the chronology of the main events.

8. The tribunal needs to mention that the claimant sought to rely at the hearing upon medical evidence which was disclosed late in the proceedings. The first is a letter from the claimant's GP dated 29 March 2019, which listed the claimant's illnesses including type 2 diabetes, asthma, hypertension disease and trigeminal neuralgia. She also had migraines and depression. Significantly, the letter does not mention PTSD. The letter also stated that he had presented in surgery with increasing episodes of absence from which she had to be woken and had had hospital treatment for six episodes of stress induced absence episodes from which it was possible to arouse the patient but during it appeared that she was absent. Unhelpfully the letter does not specify when these had occurred.

9. There is a second and much more recent letter from a psychotherapist dated 4 July 2019 which confirmed that she was attending sessions to work on PTSD relating to the death of her daughter while pregnant. This referred to the claimant starting to dissociate, "a zoning out of consciousness which is a common coping mechanism especially when suffering with trauma. This was reportedly mistaken for being asleep on the job".

10. The letter does not state when the claimant started attending sessions nor when and over what period the episodes of dissociation were alleged to have occurred. The claimant stated that she had not had any episodes of absence after 20 August 2018.

Conclusions

11. The reason or principal reason for dismissal. In the event it is not disputed that TN and, it must follow SKW at the appeal, dismissed the claimant because of a belief that she had been asleep while on duty on 8 August 2018. The claimant has not alleged that the respondent had some other undisclosed reason for dismissal.

12. The tribunal has then to consider the three stage Burchell test set out above. There are issues raised by the claimant about the fairness of the procedure followed by the respondent. As to the adequacy of the VR investigation, the claimant has raised a series of issues. It is disputed that the respondent acted reasonably in suspending the claimant on the basis that the respondent did not investigate the properly before suspending; that the claimant was not interviewed about the allegation; and that the suspension letter was not received by her. Insofar as the investigation by VR is concerned, I conclude that this was an investigation which satisfied a band of reasonable responses test. Statements were taken from relevant witnesses. The claimant was asked to attend on 9 August and was asked questions by VR at least sufficient to ascertain that she admitted to being asleep at least on 8 August, and this was corroborated by the text the claimant had sent to VR on 8 August. There is a complaint that the taking of a photograph by EW amounted to a breach of data protection on the basis presumably that the photograph constituted personal information. Even if that were correct, it is the processing of that information which may amount to a breach, but the Data Protection Act does not apply to disclosures in the course of legal proceedings (Section 35 of the Act).

13. The Employment Tribunal does not have power to consider whether there has been a breach of the Data Protection Act or make a finding in that respect and a breach does not render the evidence inadmissible. Whether EW may have had a personal motive for making the disclosure is not relevant in assessing, so far it is relevant, the reliability of the evidence that the claimant was asleep because in this respect the claimant did not deny at the time that she had been asleep. The claimant's evidence that she did not receive the suspension letter is contradictory. It was alleged that it was not seen by her until disclosure in the course of the Employment Tribunal proceedings but the claimant admitted in evidence to the tribunal that the letter was in the pack for the disciplinary hearing. The respondent asserts that it was sent by post and registered post. In any event, the claimant knew that she had been suspended and the ACAS Code does not require it to be notified in writing.

14. I conclude that the investigation by VR was in the circumstances a reasonable investigation. That is not the end of the matter however, because the Employment Tribunal has to consider the matter against any explanation offered by the employee in the subsequent disciplinary hearing and at any appeal. What is clear, is that the claimant did raise at the disciplinary hearing and at the appeal stage that the claimant had had episodes of "absence" and the essential issue arises whether the allegation was investigated; and if it had been what the conclusion would have been and whether in that respect the investigation as a whole was reasonable and dismissal was within a band of reasonable responses.

15. The tribunal was concerned that the dismissing officer TM did not refer the claimant to Occupational Health for advice as to whether there was a medical component to the claimant's apparent sleeping once it was raised at the disciplinary hearing. The same applies to the appeal process because the point was clearly raised at the appeal stage. The respondent has not called the appeals officer. This was, in the view of the tribunal, the only valid point raised by the claimant in the course of these proceedings. In response to questions from the tribunal JN did at least concede that a reference to Occupational Health might have been helpful; and I note that the respondent is a reasonably relatively large organization with over 1,500 employees and access to Occupational Health services. It is Mr Platts Mills's submission to the Employment Tribunal that the circumstances were such that TN was entitled to conclude that the claimant had been asleep on the basis that the claimant had asserted that the explanation was that she had had an episode of absence caused by PTSD detected by a blood test. TN had been trained as a nurse and claimed that PTSD was not detected by a blood test. That may well be correct, but it is important to note that the diagnosis of PTSD was also not confirmed by the hospital note and there was no suggestion of a diagnosis of PTSD until the much later report of July 2019, which does not identify when it was diagnosed.

16. The evidence that the claimant was in fact asleep, at least from the claimant's point of view, was overwhelming. The claimant did not deny it at the time and the PTSD explanation was not supported in any way by the hospital note. I consider it highly unlikely that the claimant would have been told that she had PTSD when there is no suggestion of such a diagnosis in the hospital notes,

and TN was entitled to reach the same conclusion in those circumstances without referring the claimant for an Occupational Health report.

17. In all of these circumstances I conclude the decision to dismiss did fall within a band of reasonable responses notwithstanding the claimant's length of service. I accept that it was a harsh penalty for a single act of misconduct but the dismissing officer was entitled to take the view that the act of sleeping on duty was an act of gross misconduct and to dismiss for it having regard to the potential risk not only to the health and safety of the individual service user but also to other service users and to the claimant's colleague who had only left the room for a short period of time in order to report that the claimant was asleep for a second time. Even if I had found the failure to refer the matter to Occupational Health had been a failure to conduct a proper investigation, there was very substantial chance that the investigation would have revealed nothing relevant, in which event, a fair dismissal would have taken place within a relatively short period of time. Even if some medical component had been identified to explain why she was asleep, a decision to dismiss could still have been fair as falling within a band of reasonable responses. The claimant was not wrongfully dismissed.

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Employment Judge Hargrove
Date 14 August 2019.