



### Unfair Dismissal

- 1.1 What was the reason for dismissal?
- 1.2 Was it the potentially fair reason of misconduct?
- 1.3 Was the reason because of the Claimant's religion or belief or due to making a protected disclosure?
- 1.4 If the reason for dismissal was potentially fair, was the dismissal fair pursuant to S98(4)? In particular, did the Respondent have a genuine belief in misconduct, held on reasonable grounds after a reasonable investigation?
- 1.5 Was the Respondent's procedure fair?
- 1.6 Was it within the range of reasonable responses to dismiss?
- 1.7 If not, what remedy is due?
- 1.8 Should any compensation or basic award be reduced or eliminated due to the Claimant's contributory conduct?
- 1.9 Should any compensation be reduced or eliminated to reflect the chance there would have been a fair dismissal in any event?

### Religious Discrimination

- 1.10 The Claimant's religion is Christianity.
- 1.11 Was the Claimant discriminated against by the Respondent because of her religion or belief pursuant to S13 and/or S39(2)(c)or(d)?
- 1.12 Was the Claimant treated less favourably than the Respondent treats or would treat others because of her religion by in particular:
  - 1.12.1 The Deputy Manager and the Claimant's two colleagues accusing the Claimant of sleeping on duty when they knew in fact she was praying? and/or
  - 1.12.2 the failure in the disciplinary process to allow the Claimant to rely on evidence to support her contention that she had been praying not sleeping?
- 1.13 If so what remedy is due?

### Protected Disclosure Detriment

- 1.14 Did the Claimant make a protected disclosure when during a CQC visit she told CQC personnel that the Respondent was understaffed and was putting resident's lives at risk?
- 1.15 Did the Claimant suffer any detriment (including dismissal) as a result of making a protected disclosure?
- 1.16 The detriment(s) complained of are:
  - 1.16.1 The Deputy Manager saying to the Claimant she would get the Claimant out of the Respondent/ get her dismissed;
  - 1.16.2 The Deputy Manager looking for an excuse to cause the dismissal of the Claimant and using the fact the Claimant was praying to do so;
  - 1.16.3 accusing the Claimant of falsifying records as an excuse to ensure the dismissal of the Claimant;
  - 1.16.4 following the disciplinary process leading to the Claimant's dismissal.
- 1.17 If so what remedy is due?

### Hearing

- 2. At the request of the parties it was agreed that the witnesses would not be named. They are referred to here by their roles.
- 3. On behalf of the Respondent the Tribunal heard evidence from a Senior Carer (Bank staff), a Carer, the Deputy Manager, the former General Manager (also the Dismissal Manager) and the Divisional Support General Manager (also the Appeal Manager).
- 4. The Claimant gave evidence on her own behalf and a former colleague from the care team also gave evidence on her behalf.
- 5. There was an agreed bundle of 515 pages. A plan of the relevant floor of the building was also provided.
- 6. The representatives made oral submissions.
- 7. Based on the evidence heard and the documents before us the Tribunal found the following facts.

## Facts

8. The Claimant began working for the Respondent on 19 August 2014 as a Care Manager. By the relevant time she worked as a Senior Care Assistant.
9. The Respondent has a number of registered residential care communities throughout the UK. The Claimant was based at a location providing dementia care, assisted living and independent living as well as respite care. The home is a purpose built building with secure floors with each floor consisting of central communal living area surrounded by bedrooms around the edges. Residents are free to access the floor but cannot get out of the area. In the Respondent's disciplinary policy there are examples of gross misconduct which include: "sleeping, or similar, whilst on duty (this includes dozing or napping and being in a position conducive to sleep) (pages 49-50). Manipulation or falsification of records is also listed.
10. The Claimant and her witness gave some evidence about the staff relations in the care home which was disputed and not relevant to the issues we had to decide.
11. The Care Quality Commission attended on 22-23 March 2018 and the Claimant was one of the staff interviewed. She says she disclosed that the Home had been experiencing short staff, putting health of residents at risk. She says she also complained about staff not being given opportunities to exercise views on equality and diversity and some staff being favoured over others. That issues about short staffing were raised is supported by the subsequent report, which also reflected that the Respondent had addressed the problem (p321). The report does not reflect wider criticism of how staff are treated, on the contrary positive comments are recorded, for example at pages 328-329. The first time the Claimant referred to this in the paperwork is at page 211 in the email dated 15 April 2018. At that time the Claimant said she had told CQC the Respondent faced resourcing problems. She did not mention anything else. The same is the case in the Claimant's appeal at page 270, cited in the next paragraph below. We therefore accept that the Claimant raised "resourcing problems" or short staffing but not the wider issues about equality/fair treatment mentioned above.
12. The Claimant claims that shortly after the CQC visit she was "interrogated" by the Deputy Manager; that the Claimant told her what she had said to the CQC and then the Deputy Manager "was going about threatening how she would deal with me as she has dealt with other staff who crossed her path" (witness statement paragraph 12). In her oral evidence the Claimant said the Deputy Manager had directly said to her that she should not forget others had resigned and that she should be careful what she said as her case might not be different. In her claim form it was expressed differently again and she said there that the Deputy Manager kept on reminding her how staff had lost their jobs by crossing her path. When she first raised this issue with the Respondent in her email dated 15 April 2018 at page 211 the Claimant said only that she felt her disclosure to the CQC "may have reflected badly on [the Deputy Manager] and she has therefore retaliated". The implication is that the

- retaliation is the disciplinary allegation of sleeping. She gave a more detailed account in her appeal (page 270) where she said the Deputy Manager's attitude [had] "been indifferent since [the Claimant] honestly informed her that [she] admitted to the CQC inspector that Sunrise are experiencing staff resourcing pressure. Since then she has questioned [the Claimant] in an unfriendly manner why I should make sure disclosures to the CQC personnel. Since then she has been threatening and constantly reminding [the Claimant] of the number of staffs that have resigned for having crossed her path and [the Claimant's] case should not be different".
13. In fact the Deputy Manager was away during the inspection and there was only two days after the inspection (before the events of 2-4 April 2018 and the Claimant's suspension) when both the Claimant and the Deputy Manager were at work at the same time (2.08pm to 6.31pm on 26 March 2018 and 2.23pm to 16.52 pm on 28 March 2018) (pages 163-164) and the Deputy Manager worked at a different end of the building. She says no such conversation took place, nor were any threats made to the Claimant as a result. In any event she was not the manager responsible for staffing levels or the Claimant's unit and the Respondent's position is that staff always complain about issues like short staffing and that the CQC know that, the implication being a comment like this would not be a concern to them.
  14. On balance we prefer the Respondent's evidence that there was no such conversation about the CQC inspection between the Claimant and the Deputy Manager, nor any subsequent threats. The Claimant's account of what she says happened has changed more than once, whereas the rota and location where each worked show there was limited opportunity for the conversations to take place. We find it significant that the first account the Claimant gave, on 15 April 2018, said only that she had made the disclosure to the CQC and that she felt the disclosure may have reflected badly on the Deputy Manager and she had therefore retaliated (in targeting the Claimant for sleeping on duty). This falls short of saying either the Claimant told the Deputy Manager about her disclosure or that any actual threats of retaliation had been made.
  15. On 2 April 2018 the Claimant was on duty overnight to 3 April 2018. The shift started at 10pm. The Claimant says that her sister in Nigeria called her at 8.30 pm to say her niece was in a serious car accident. There is no time zone difference. There is medical evidence which confirms that the Claimant's niece had surgery that night. The Claimant still attended work as she said it was too late to cancel the shift (2 hours notice is normally required). She claimed in her oral evidence that she told her colleagues about this, but both colleagues who were on shift with her say she did not mention it to them (the Senior Carer (bank) and the Carer who gave evidence for the Respondent).
  16. We heard evidence about that shift from both the Senior Carer (bank) and the Carer (who was the floater on duty). They both gave evidence that they witnessed the Claimant sleeping on duty for four or more hours, and that they witnessed her snoring. We accept their evidence and find the Claimant slept on duty for four or more hours and did not perform her duties during that time.

17. The Floater raised her concerns about this with the Deputy Manager on 4 April 2018. Amongst other concerns she reported that the Claimant and two other colleagues had been sleeping on duty. She named both of the colleagues but those names are not repeated here. She said the Claimant had done it a few times. She said that both the Senior Carer (Bank) and herself had witnessed it on the night of the 2<sup>nd</sup> April 2018 which is why she decided to report it. She gave the Deputy Manager her motive for reporting it as being “I feel uncomfortable about such bad practises [sic]. These residents need our care and we are paid to do this job” (pp192-193).
18. The Deputy Manager met with the Claimant on 4 April 2018. She was asked about sleeping on the night shift generally, without any specific date, and she denied it. She said sometimes staff relax. She was suspended while further investigations took place.
19. The Deputy Manager then spoke to the Senior Carer (Bank) (page 199). She confirmed the Claimant had been sleeping on duty on 2 April 2018. She said she was sitting in the armchair, with eyes closed and snoring. She said it was for more than 2 hours. She said she slept from sometime after midnight until the Floater Carer came up to help her around 5am. She was challenged about why she had not woken her.
20. On 12 April 2018 one of the other Carers accused of sleeping on other occasions was also interviewed and denied sleeping (pages 204-205).
21. The Claimant was then invited to a disciplinary meeting to address a number of allegations including the sleeping on duty. The letter was dated 12 April but emailed on 13 April 2018. The letter included the hand written minutes of the investigation. This was therefore when the Claimant understood the date of the alleged sleeping was 2 April 2018 (page 206).
22. The Claimant sent a detailed email with her response on 15 April 2018 in order to ensure they were on record in case she had difficulty expressing herself. She complained about short notice and illegibility of hand written notes (page 210). She also said “...[the Deputy Manager] dislikes me and I am being unfairly targeted by her for a number of reasons including:
  - During our recent CQC anonymous call meeting and CQC inspection, an inspector engaged me in conversation about staff resourcing and I admitted that we were facing resourcing problems. I feel that this disclosure may have reflected badly on [the Deputy Manager] and she has therefore retaliated.
  - I refuse to be part of [the Deputy manager’s] clique at work and to become over familiar with her like others.....” (page 211)
23. In respect of the sleeping she said “ I deny ever sleeping at work. However, I accept that others may have mistakenly perceived me as sleeping for the following reasons:

- When not actively engaged in caring for residents, I may be seated in the old style armchair in the community which [reclines] to a degree. Although I may assume a comfortable/reclined position my eyes remain open and I am fully awake....
  - On 3 April 2018 my niece was rushed to hospital for surgery as a result of injuries sustained from an accident. I have photos of her injury....As a Christian I decided to say a few prayers for her. While praying in the community my eyes were closed...
  - At times I may mediate in the community when not engaged in delivering care which again involves closing my eyes....
24. The disciplinary hearing was dealt with by the then General Manager. He met with the Claimant on 16 April 2018 but decided to postpone the hearing in order for the Claimant to have the notes typed.
25. He instructed the Deputy Manager to take some further steps prior to the next hearing. He asked her to interview the other carer accused of sleeping. He asked for more night staff to be interviewed and for the call bell report to be checked (214).
26. The Deputy Manager had already interviewed the other accused carer in question as per paragraph 20 above. She interviewed the third carer that had been accused on 16 April 2018 who also denied sleeping (pages 215-216). Page 225 confirms that the delay in respect of this member of staff was that she had been on annual leave.
27. On 17 April 2018 the Deputy Manager reported back to the General Manager in relation to his instructions (page 217). She explained that she had interviewed the other two accused of sleeping but there was only one witness and they denied it so she sought advice and it was considered that those allegations could not be taken further. The difference with the Claimant was there were two witnesses.
28. She also completed an investigation report (dated 17 April 2018, pages 219-222). That confirms that the other two night shift staff were interviewed. Both denied seeing anything. She recommended the matter proceed to a disciplinary but also recommended steps to avoid a repeat of staff sleeping on duty, namely a general night supervision to be held for all night staff to remind them about responsibilities and expectations and increased night visits by managers (pages 221- 222).
29. Page 225 confirmed that the Bank Senior Carer was answering all the call bells (in response to the request to check the call bell record).
30. The Claimant's disciplinary hearing took place on 23 April 2018. She was represented by her union representative. Part of the Claimant's defence was that she was working with another colleague until 2am. She said she checked on particular residents at 12 midnight, 2am and 4am. She and her union representative said on 2 April 2018 niece had an accident. She was having surgery and that she was concerned for her sister and niece. She took a call

- from Nigeria and was praying. She was just sitting after she received a shock. She says she told the floating carer that she wanted to pray.
31. There were then follow up investigations by the Deputy Manager with the two witnesses. They were both asked if the Claimant had said she was going to pray or meditate. They both said she had not. The Bank Senior Carer confirmed the Claimant had been sitting, leaning back in the couch, with her head resting on the couch and both feet on a foot rest. She said she had been in that position a long while. The floater carer said she had walked right past the Claimant when she arrived on the floor to help at 4.40am and that the Claimant was fast asleep and snoring (pages 243-244 and 246).
  32. The rota was checked and the other carer mentioned by the Claimant was interviewed and it was confirmed she had not been on duty on the relevant night.
  33. On 26 April 2018 the charge of falsifying documents was added in a letter to the Claimant (page 251) as the records were checked in relation to 2 April 2018, as she had requested, and she had written that she was changing pads for three different residents at the same time (as explained in the disciplinary hearing which followed).
  34. On 27 April 2018 the Claimant's union representative wrote raising a number of issues. She said she had concerns that the General Manager's demeanour in the previous disciplinary hearing had been quite aggressive and it had caused the Claimant to become agitated and distressed. She acknowledged that breaks had been offered. She also explained that in the last meeting there had been confusion about the date of the night duty in question and the date of 2 April had only been mentioned in one statement. She said some answers may therefore need to be disregarded as they related to incorrect understanding of dates, times, and staff on duty. She also complained about a phone call between the Deputy Manager and the Claimant, accusing the Deputy Manager of being aggressive. She nevertheless did not press for a different investigation officer and is recorded as saying her intention was that the ACAS Code be complied with.
  35. Both allegations of aggression were checked with the note taker, who confirmed that neither were aggressive in her view (p258).
  36. The evidence of the other carer mentioned at paragraph 32 above was formally recorded in a witness interview on 27 April 2018 when it was confirmed she had been on duty the night of 3 April 2018 (page 257). She also said that resident records were written as the staff go into the resident and the actual time is recorded.
  37. The Claimant had a further disciplinary hearing on 30 April 2018. The falsification claim was explained as being that she had put that she was changing pads of three residents at the same time. Her union representative said that she had written roughly with the round start times not the exact attendance time. She said she wrote her resident notes as she had been

- shown when she started shadowing in November 2017. She said all staff do this, though the Respondent said other carers' notes do not show this. The General Manager explained he had looked through other carers' notes in the meeting. She explained again her niece was in hospital and said that she had shown a picture of her injured niece to the floating carer who was shocked and the Claimant had sat down (259C & H). She also said she was sitting to rest her back due to previous surgery. She said she does not put her feet up.
38. The Claimant was dismissed by letter dated 30 April 2018. The letter says she was dismissed for gross misconduct based on the allegations of sleeping and falsifying documents. It does not clearly set out the findings but does describe the "main areas of concern" which included that the sleeping was witnessed by two team members who "witnessed [the Claimant] sleeping with [her] legs raised and snoring".
39. It also stated, "it seems you have written the daily notes for all three residents at the same time without checking on them". It is not stated but the implication was that this was when she was sleeping. It records that she accepted this was an incorrect practice as she could not have provided personal care to three residents at the same timings. The letter said that consideration was given to the fact the Claimant had some bad news about her niece having surgery in Nigeria on the day in question but also that she had failed to inform her line manager before she started her shift. Consideration was also given to her good record and the seriousness of her actions.
40. The Claimant was given the right to appeal which she exercised on 10 May 2018. She said she had been praying for her niece who had been involved in a ghastly motor accident and was having life-saving surgery. She also mentioned an eye "problem" which made her eyes swell. She said proof of the niece's accident and injuries was not taken into consideration by the disciplinary hearing. She said again that the time recordings and resident checks was an existing culture in the home. She said the disciplinary hearing had failed to consider the issue of bullying and harassment she had raised against the investigating officer (the Deputy Manager).
41. It is here at page 270 she wrote the more detailed allegation recorded above at paragraph 12. She said the Deputy Manager's attitude [had] "been indifferent since [the Claimant] honestly informed her that [she] admitted to the CQC inspector that Sunrise are experiencing staff resourcing pressure. Since then she has questioned [the Claimant] in an unfriendly manner why I should make sure disclosures to the CQC personnel. Since then she has been threatening and constantly reminding [the Claimant] of the number of staffs that have resigned for having crossed her path and [the Claimant's] case should not be different. It was no surprise to me when these allegations of gang up [sic] against me with her conspirators came up against me. Her threat to me on 26<sup>th</sup> of April 2018 telephone call left me traumatized till date. The [disciplinary] hearing did not give me the opportunity to explain this in details [sic]. My only offence against [the Deputy Manager] was being frank to her on the information I gave to the CQC officer."

42. The appeal was dealt with by the Divisional Support General Manager. An appeal meeting was held on 23 May 2018. The Claimant was represented by her witness in these proceedings. The appeal officer declined to look into the CQC/Deputy Manager issue at paragraph 41 above as the Claimant had not raised it at the time. She said she would look further into the time recording/resident notes. She did explain that sleeping alone could warrant dismissal and the other allegations came as part of that.
43. The appeal manager investigated further the issue with the resident's notes and requested some of the daily notes for 2 April 2018 and 3 April 2018 (pp287-303). The cover email accompanying the notes drew attention that the Senior Bank carer was also putting the same type of times as the Claimant, but new staff like the Floater Carer were not. The appeal manager did not accept it was common practice.
44. She wrote to the Claimant with her investigation report (305-308 and appeal outcome pages 309-310. She upheld the decision to dismiss. Her reasons in brief were: "...two team members said you were sleeping, you have never brought any issues or concerns around bullying or harassment from [the Deputy Manager] prior to this disciplinary and both the accident on the night of the allegation to one of your family members and your working record were commented on in the outcome letter....and further investigation showed that it was not common practice to write daily notes for all residents with the same times written down for when personal care was delivered or residents were checked". In the investigation report there were wider recommendations which included the recommendation to review documentation practice to ensure delivering care is timely documented and to complete night checks more frequently.
45. We spent some time looking at the resident's notes in the hearing. The Claimant's notes for the relevant night are at pages 172-184. The General Manager explained that not only were the times the Claimant attended the residents the same but she also recorded identical care for each resident which was why he considered she had falsified the records. He accepted others also listed the same timings but although timing is similar the content tended to be different. If there were other examples similar to the Claimant's (as the Claimant suggested) then they had not been picked up but that would also be the basis for a disciplinary. In any event the main thing was the Claimant was sleeping when the identical activities were recorded to have occurred, as the Appeal Officer emphasized.

## **Relevant law**

### **Unfair dismissal**

46. In relation to ordinary unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

**(1) In determining for the purposes of this Part whether the dismissal of**

an employee is fair or unfair, it is for the employer to show-

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
- (b) relates to the conduct of the employee,
- (c) is that the employee was redundant, or
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) . . .

(4) Where the employer has fulfilled the requirements of subsection (1), the 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.

47. In considering reasonableness in cases of dismissal for suspected misconduct the relevant test is that set out in *British Home Stores Ltd v Burchell* 1978 IRLR 379, namely whether the employer had a genuine belief in the employee's guilt, held on reasonable grounds after carrying out as much investigation into the matter as was reasonable in all the circumstances of the case.

48. In applying section 98(4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer's decision to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances. The range of reasonable responses test applies as much to the investigation as to the substantive decision to dismiss *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23.

**Direct Religious Discrimination**

49. Section 13 Equality Act 2010 states that a person (A) discriminates against another (B) if, because of a protected characteristic (including religion), A treats B less favourably than A treats or would treat others.
50. Section 23 Equality Act 2010 provides that on a comparison for the purpose of section 13 there must be no material difference between the circumstances of the Claimant's case and any comparator's case.
51. The burden of proof is set out at section 136 Equality Act. This states that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that s 13 has been contravened by A then it must hold the contravention occurred unless A shows that it did not contravene the provision.

**Detriment/dismissal for making a protected disclosure**

52. A protected disclosure is defined in sections 43A and 43B Employment Rights Act 1996.
53. A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure (s47B Employment Rights Act 1996). It is for the employer to show the ground on which the act or deliberate failure to act was done (s48 (2)).
54. An employee shall be regarded as unfairly dismissed if the reason for the dismissal is that she made a protected disclosure (s103A Employment Rights Act 1996).

**Conclusions**

*What was the reason for dismissal? Was it the potentially fair reason of misconduct?*

55. We are satisfied that the reason for dismissal was misconduct, namely sleeping on duty and falsification of records to suggest the Claimant had checked on and provided care to residents at times when she was sleeping.

*Was the reason because of the Claimant's religion or belief or due to making a protected disclosure?*

56. These issues are addressed further below but we are satisfied the dismissal had nothing whatsoever to do with the Claimant's religion or making protected disclosure. She was dismissed because two colleagues said they had witnessed her sleeping and the Respondent, as a result of this, and the nature of the resident notes she made, believed she had falsified records to show she

provided care when she was asleep. She was not dismissed for praying or meditating. Nor was she dismissed for making a protected disclosure to the CQC during the inspection.

*If the reason for dismissal was potentially fair, was the dismissal fair pursuant to S98(4)? In particular, did the Respondent have a genuine belief in misconduct, held on reasonable grounds after a reasonable investigation? Was the Respondent's procedure fair?*

57. We accept the Respondent's witnesses all held a genuine belief that the Claimant was sleeping on duty. There were two witnesses to the allegation of sleeping. The Claimant herself accepted she was in a position conducive to sleep and might have appeared to be asleep.
58. It was in response to the Claimant saying she had done the work and asking that the resident's notes be checked that the Respondent checked her resident's notes and found that she had put the same time (the round start time) and identical activities for more than one resident. The additional charge of falsifying records emerged from this. The Respondent's witnesses genuinely considered this suggested the records had been falsified at a time when witnesses had seen the Claimant sleeping.
59. The Claimant was given an opportunity to comment on the allegation she was sleeping. She was provided with the witness statements. In due course these were typed up at her request. She did mention her niece's accident and that she said a few prayers. She denied she slept. She drew attention to the residents' records and that they would show she had provided care.
60. As the Claimant raised the fact she was praying or meditating the two witnesses were re-interviewed. They said the Claimant had said nothing about praying; they described the position she was in and it was emphasized that she had been sleeping for a long time; and that both had heard her snoring. The witnesses said the Claimant had not helped with their caring duties. Other members of staff were interviewed but had not witnessed anything as they had not been on duty or had been working downstairs.
61. The Respondent also took account of the fact that the Claimant had not said anything to her Line Manager about her niece.
62. The Claimant was given the opportunity to comment on whether she had falsified the records and said everyone did their records this way and that she had been instructed to. This was tested by looking at other carers' records and the Respondent formed the view they did not support the Claimant's suggestion, as not everyone recorded the round start time; though it was accepted at least one other person did.
63. The Claimant did make reference to the CQC disclosure and the Deputy Manager's possible reaction in the 15 April 2018 email but did not really explain how it might be relevant to the case. The Respondent considered it was not relevant.

64. The Claimant had the opportunity to appeal and further investigations into the practice in respect of residents' records continued at that stage. Although the initial decision was made prior to the Claimant providing evidence of her niece's accident, this evidence was before the appeal officer.
65. Overall, the charges were put to the Claimant and she had the opportunity to comment. The points raised by the Claimant about the substantive allegations were investigated further with the witnesses and by looking at residents' notes. The decision makers took into consideration her niece's accident but considered it was not sufficient mitigation when she had not raised it with her manager on the day. We are satisfied that the process and investigation was reasonable.
66. It was not unreasonable not to take the point about the CQC causing alleged issues with the Deputy Manager further at the disciplinary stage. The Claimant did not make the alleged connection to the case clear initially. It was not unreasonable to consider it irrelevant. The matter had been initiated by the Carer who reported the sleeping and she had mentioned others as well as the Claimant. The reason the Claimant was the only staff member facing a disciplinary was that she was the only member of staff accused as sleeping on a particular day, meaning there were two witnesses. The Senior Carer (Bank) was questioned herself about why she had allowed this to happen and not woken the Claimant or raised the issue. The General Manager was the decision maker and directed/oversaw the investigation. The Deputy Manager was only the investigating officer, she was not a witness herself and she also did not make the decision. The Deputy Manager also made recommendations going forward which were in relation to avoiding a recurrence with other staff, none of which suggest that the Claimant was targeted personally. Moreover, the Claimant's allegations about the Deputy Manager's conduct of a phone call were not supported by the notetaker, who was consulted. Although the Claimant's union representative raised a number of issues about the process she did not take issue with the identity of the investigating officer.
67. There were reasonable grounds to support the belief the Claimant had been sleeping. There were two witnesses who were very clear that they witnessed the Claimant sleeping for several hours and that they had to pick up the work. They said she had not said she was praying and the Claimant had not raised any issue about her niece's accident on the day. They described how she was positioned and they both said they could hear her snoring.
68. It was reasonable to question the Claimant's records when it transpired that witnesses said she had been sleeping and her colleagues doing the work at times she claimed to have done it in the records. In doing so the Respondent discovered further issues with her notes in particular that she had put that she had done identical tasks at the same times for three residents. She was given the chance to explain her records. Although the fact that it was the identical records as well as the timings that was the concern was not spelled out, it was put to the Claimant she could not have been doing the same thing at the same

time for three residents and it was implicit that these records said she was providing care when two colleagues said she was in fact asleep (and this was made clearer in the appeal). The finding that the Claimant was asleep itself provides reasonable grounds for finding the records were falsified.

*Was it within the range of reasonable responses to dismiss?*

69. We find it was well within the range of reasonable responses to dismiss. The Respondent considered the Claimant's mitigation but considered the allegations serious enough to warrant dismissal in any event. Both charges were charges of gross misconduct, justifying dismissal for the first offence, as the Claimant accepted in evidence.

*Should any compensation be reduced or eliminated to reflect the chance there would have been a fair dismissal in any event? Should any compensation or basic award be reduced or eliminated due to the Claimant's contributory conduct?*

70. We find the dismissal fair so it was not necessary to address these issues. However, for the avoidance of doubt, even if the investigation officer had been changed from the Deputy Manager on the basis of the allegation of the CQC disclosure, we find it would have made no difference. The witnesses were not influenced by the Deputy Manager. She did not initiate the allegations. The General Manager formed his own view. Had there been another investigating officer the witnesses would have said the same thing. Had the Respondent investigated the substance of the Claimant's suggestion that the Deputy Manager was retaliating for the CQC disclosure, then it would have found, reasonably, that the Deputy Manager did not know about the disclosure and had not retaliated.

71. Moreover, the Tribunal has heard from the Claimant and the two witnesses who claimed she was sleeping and we are satisfied that on the balance of probability the Claimant did fall asleep on the night of 2-3 April 2018, and did so for four or more hours from shortly after midnight to after 4.40 am and therefore did not do the checks on residents that she recorded that she had. She therefore did falsify the resident's notes. Therefore, had the Claimant been successful this would have been the basis for a significant reduction in any awards.

### **Religious Discrimination**

*Was the Claimant discriminated against by the Respondent because of her religion or belief pursuant to S13 and/or S39(2)(c)or(d)?*

*Was the Claimant treated less favourably than the Respondent treats or would treat others because of her religion by in particular:*

*The Deputy Manager and the Claimant's two colleagues accusing the Claimant of sleeping on duty when they knew in fact she was praying?*

72. We do not find that the Claimant was treated less favourably in this way. She was sleeping on duty and one of her colleagues reported this. The colleague's reason for doing so was set out in her interview at page 194. She said "As a night staff it concerns me and I feel uncomfortable about such bad [practices]. These residents need our care and we are paid to do this job". The other colleague was not going to say anything to her employer until directly asked in the investigation. She herself was questioned about not having woken the Claimant. The Deputy Manager was responding to the issues raised appropriately as a manager. She was not responsible for the colleague making the accusation.
73. None of them knew about the Claimant's case that she was praying not sleeping at the time of their initial involvement in making the allegation and being interviewed or investigating the allegation. The Claimant brought up the fact she said she was praying on 15 April 2018. This was then investigated by the Deputy Manager who explored with the witnesses whether the Claimant's position was correct. Both said the Claimant had said nothing about praying.
74. We are satisfied that the Claimant was asleep on duty for four or more hours and her colleagues' accusation that the Claimant was sleeping was made because of that fact, and appropriately investigated.

*The failure in the disciplinary process to allow the Claimant to rely on evidence to support her contention that she had been praying not sleeping?*

75. The Claimant was not prevented from relying on any evidence that she wished to in the process. She was able to say that she was praying in the disciplinary. This was investigated but it was not supported by the witnesses who confirmed she had said nothing about praying and described in some detail why they maintained she had been sleeping, including that she was snoring. Her case was therefore rejected and the General Manager decided she had been sleeping. He took into account the Claimant had some bad news about her niece having surgery in Nigeria on that day but did not consider that to be sufficient mitigation when the Claimant had not informed her Line Manager. To the extent that the decision was made before the Claimant supplied further details of the accident this was remedied on appeal and she was able to provide the evidence that she wanted to. The decision to make the initial decision to dismiss before she provided that evidence had nothing to do with the contention that the Claimant was praying. The General Manager accepted what she had said about her niece's accident, but nevertheless found she had been sleeping based on the witness evidence.

### **Protected Disclosure Detriment**

*Did the Claimant make a protected disclosure when during a CQC visit she told CQC personnel that the Respondent was understaffed and was putting resident's lives at risk?*

76. We accept that the Claimant told the CQC that the Respondent was understaffed. The Respondent did not really challenge that this type of

disclosure has the potential to be a protected disclosure. In any event, we did not need to finally determine this issue given the findings below that the detriments alleged had nothing to do with this disclosure.

*Did the Claimant suffer any detriment (including dismissal) as a result of making a protected disclosure? The detriment(s) complained of are:*

*The Deputy Manager saying to the Claimant she would get the Claimant out of the Respondent/ get her dismissed.*

77. We do not accept this occurred. We found that the Claimant did not have the conversation she alleges she had where she informed the Deputy Manager about what she said to the CQC. Nor were there any retaliatory threats. The Claimant's own evidence about what the Deputy Manager did or said changed more than once as set out in paragraph 12 above. We preferred the Deputy Manager's evidence that these conversations did not occur, which was in fact consistent with the Claimant's first account (page 211) which said only that the Claimant felt her disclosures might have reflected badly on the Deputy Manager and that she had therefore retaliated (with the sleeping allegation). She did not say there that she had told the Deputy Manager or that the Deputy Manager had made any threats. There was very little opportunity for the alleged conversations between the Claimant and the Deputy Manager about the CQC disclosure or any retaliatory threats, given that the Deputy Manager was away for the CQC inspection and the rosters show there was then only a limited time when both were present at work at the same time (in different parts of the building) before the meeting between the Deputy Manager and the Claimant on 4 April 2018 about the sleeping and her suspension. Our reasons for our findings of fact in relation to this are given more fully in paragraphs 11-14 above.

*The Deputy Manager looking for an excuse to cause the dismissal of the Claimant and using the fact the Claimant was praying to do so;*

78. We have found the Claimant was sleeping for several hours whilst at work and that was why she was subject to the disciplinary process and dismissed. The origin of the accusation was not the Deputy Manager. The Carer concerned raised the allegation because the Claimant was sleeping and her motive, which we accept, was recorded in her interview as follows "As a night staff it concerns me and I feel uncomfortable about such bad [practices]. These residents need our care and we are paid to do this job".
79. The Claimant was not the only person reported for sleeping. The Deputy Manager investigated once the issue was raised. The allegation against the Claimant proceeded to disciplinary because in her case there was a specific date which meant there were two witnesses. The other two staff accused (without specific dates) denied it and there was no other witness to back up the Carer's allegation. In those circumstances those allegations were not taken forward. The Deputy Manager's emails to the General Manager show she was consulting and seeking advice and did not make that decision alone.

80. In any event, we have not accepted that the Deputy Manager knew about the Claimant's disclosure to the CQC.

*Accusing the Claimant of falsifying records as an excuse to ensure the dismissal of the Claimant;*

81. We do not accept that the Claimant was accused of falsifying records as an excuse to ensure her dismissal. Moreover, the addition of that charge had nothing to do with the Claimant's disclosure to the CQC. The Claimant was accused of falsifying records following her own request that the General Manager check the records to check she was working. The General Manager considered the records were dubious due to the repetitive timing and repetition of content across three residents. He considered she could not have been looking after all the residents at the same time and the wording for the care given for each was also the same. The Respondent checked and did not consider the records showed that other staff were keeping records in the same way as the Claimant. Moreover, the Respondent considered the Claimant had in fact been sleeping when she claimed she had done the work, based on the evidence of the two witnesses. The sleeping alone would have been sufficient to dismiss the Claimant.

*Following the disciplinary process leading to the Claimant's dismissal.*

82. For reasons already set out above the disciplinary process was followed because a Carer reported that the Claimant was sleeping on a particular date and another witness supported that. The Respondent considered that sufficient evidence to proceed to disciplinary. It had nothing to do with the Claimant's disclosure to the CQC.

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Employment Judge Corrigan  
9 October 2019