



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4107412/2019**

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**Held in Glasgow on 21 and 22 October 2019**

**Employment Judge L Doherty**

10 **Miss R Shand**

**Claimant  
In Person**

**Quarriers**

**Respondent  
Represented by:  
Mr C Ashbury -  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that the claimant was not unfairly  
20 dismissed, and the claim is dismissed.

### **REASONS**

1. The claimant presented a complaint of unfair dismissal on 19 June 2019. The claimant appeared in person, and the respondents were represented by their solicitor, Mr Ashbury.
- 25 2. The claim is resisted by the respondent. They accept the claimant was dismissed but deny that the dismissal was unfair.
3. The hearing was fixed over two days to consider both merits and remedy. At the beginning of the second day of the hearing, it became apparent that there were issues arising from remedy which may take some time to consider,  
30 including determination of the claimant's pre- dismissal earnings and issues arising from arguments about mitigation of loss. The hearing was therefore split into one of merits and remedy, and this hearing was convened for

consideration of whether the claimant's complaint of unfair dismissal should succeed.

4. The issues for the Tribunal were firstly to determine whether the respondents established a fair reason for dismissal, and secondly, in the event that the Tribunal is satisfied that the respondents have established such a reason, to consider if the dismissal was fair or unfair in terms of section 98 (4) of the Employment Rights Act 1996 (ERA).
5. For the respondents, evidence was given by Ms Hattie, Operational Manager, and Carol Russell, the Head of Service. The claimant gave evidence on her own behalf. The parties lodged a joint bundle of documents.

### Findings in Fact

6. From the information and evidence before it, the Tribunal made the following findings in fact.
7. The respondents are a social care charity engaged in the provision of care and support for vulnerable children, adults, and families. Because of the nature of work which the respondents do they are heavily regulated, and are regulated by a number of bodies including the Care Inspectorate.
8. At the relevant time, the respondents provided services via three Care Homes; Davidsons House, Parklands, and Kelly's, all of which were located within close proximity to each other.
9. Davidsons Care Home had capacity to accommodate nine service users; at the material time, it accommodated six service users. Most of the service users required 24-hour support, and two service users had complex needs. Two of the service users required to be PEG fed. All but one service user had mobility problems, and the service user who did not have mobility issues was visibly impaired.
10. The care inspectorate made provision for the staffing levels which were required at Davidsons, Kelly's and Parklands Home (pages 141 to 142 of the bundle). For Davidsons Home the staffing requirement imposed by the Care

Inspectorate assuming full occupancy, was three staff members plus additional care staff from 2pm until 5pm. The respondents maintained their staffing level at three for Davidsons House, when the service users' numbers dropped from 9 to 6 (page 143).

- 5 11. The claimant, whose date of birth is 18 June 1958, commenced employment with the respondents as a support worker on 11<sup>th</sup> August 2014. The claimant had had previously worked with the respondents on an agency basis. The claimant's contract of employment is produced at page 34 to 41.
12. The claimant's contract provided under the heading 'Health and Safety';
- 10 13. *'You are expected to take reasonable care of your own health and safety in the workplace and for the health and safety of your colleagues, the people who use Quarriers services and visitors. You are expected to read and carry out the requirements of the Health and Safety Policies and participate in associated training as required and appropriately report any concerns you may have with regard to health and safety.'*
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14. The contract also provided; *'Quarriers has adopted a code of conduct which set out the minimum standard expected of all employees. All employees are expected to comply with all aspects of the code.'*
15. The contract provided that Quarriers as an employer, had a duty to adhere to the Scottish Social Services Council Code of Practice, and *'...it is imperative that you work in line with this code of practice'*
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16. The contract provided under the heading *'Standards of Behaviour'*
17. *'You are required to follow management instruction and are expected to comply with all Quarrier's policies, procedures and practices which include policies of misuse of internet and email. You have a duty and responsibility to protect and to uphold the interpretation of Quarriers at all times. You are required to report to your line manager any wrongdoings of other employees, external contractors, or yourself promptly.'*
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18. The claimant signed this contract, which included a declaration to the effect that she had read over and understood the terms and conditions of employment; that she had read the Quarriers Professional Code of Conduct, and the Scottish Social Services Council code.
- 5 19. At the relevant time, the claimant was employed as a support worker, working in Davidsons House. The claimant had commenced working in Davidsons House (Davidsons) but had been transferred from Davidsons to the other residential homes and was then transferred back to Davidsons.
- 10 20. The respondents undertake a regular review process with members of staff which was referred to as 'Supervision'. This is a forum for discussion between an employee and manager about professional development or wellbeing matters. The claimant had Supervision meetings in March, July and October 2018, and minutes of those supervision meetings are produced at pages 119 to 132 of the bundle.
- 15 21. The claimant also along with other members of staff undertook manual handling training and gained a Safe Handling of People Theory certificate and a Safe Handling of People certificate in March 2017 and March 2015 respectively.
- 20 22. Care plans and Handling summaries are produced for the service users. The claimant was an experienced member of staff and was familiar with the fact that service users had care plans and handling summaries, and the need to adhere to these.
- 25 23. The respondents had a care plan and risk assessment in place in relation to J, a service user at Davidsons, which sets out the protocols which had to be followed when staff were supporting J. This included a requirement that two members of staff to move J. The risk identified was that there was an increased risk of injury when transferring J who could be uncooperative. (page 109).
- 30 24. The claimant signed this risk assessment, confirming that she was aware of it. The activity identified was transferring J from her wheelchair to her bed

and transferring from wheelchair to toilet. It identified that J required two members of staff at all times when transferring her from her wheelchair to the toilet or to bed (a 2:1 transfer).

5 25. The claimant attended work on 26 January 2019, her shift commencing at 8am. The claimant was working alongside two other support workers on that day, Margaret Love, and James Gavin. The claimant was late for work on the morning of 26 January; she telephoned and spoke to Mr Gavin to advise him of this. She also spoke to Ms Love and advised that she was going to be late for her shift. The claimant arrived for her shift at around 9am.

10 26. The morning is a busy period on shift, when service users are getting up for the day, being given breakfast, and medication. When the claimant arrived on shift, she began by looking at the rotas, which one of the support workers, James, found frustrating as he did not consider it to be a work priority. She was asked to support J

15 27. The claimant then went to support J. She transferred J from her bed to her wheelchair and carried out this task herself. In doing this the claimant was in breach of the respondent's protocol which required a 2 to 1 transfer.

20 28. When the claimant returned to the dining room, she asked James what he wanted her to do now, and he responded to do what she usually does, not a lot.

29. The claimant was asked to get another resident (J1) up. The claimant decided not to do so.

25 30. Mr Gavin and Ms Love were supporting another service user, T, who requires two to one care, when the claimant approached them and told them that she was leaving the shift. This was around 9.45am. The claimant said something along the lines that she was '*out of here*'.

31. When a member of staff has an emergency, which requires them to leave their shift at short notice, they are required to advise their direct line manager, or contact the manager of a sister service to Davidson House, being either

Kelly or Parklands House, or contact the local on call service. When the claimant left the shift, she did not take any of these steps.

32. The claimant was subsequently contacted by Jane English, her team leader, who made a number of telephone calls to her that day. The claimant telephoned her back and left a message that she had done so but did not return any of the further call Ms English made to her.
33. When the claimant returned to work the following day, she was met by Ms English and sent home. The events of 26 January 2019 had come to attention of management, and a decision was taken by the Head of Service to suspend the claimant pending a disciplinary investigation. Ms Hattie was appointed as the disciplinary officer, and Frances Fulton, the investigating officer.
34. The claimant was contacted by Ms Fulton, who carried out an investigation, which included an interview with the claimant. Interview notes are produced at 154 to 158. During the course of the interview, Ms Fulton asked the claimant to explain what made her decide to leave work. The claimant responded that she had been crying and that she had a lot of stress with work colleagues that she had a sick line with her. She said that she informed James and Margaret that she was leaving.
35. An allegation had been made by James and Margaret that they could smell alcohol from the claimant's breath, and she was asked about this, but denied it. During the course of the interview, the claimant said that she had been in Davidsons House for three years ago, and had been bullied, and had been moved to Kelly House.
36. Ms Fulton also asked the claimant about moving J on her own. The claimant said that she knew it was not right, but she just needed to do something to keep herself busy.
37. Ms Fulton also interviewed Mr Gavin, Ms Love and Jane English, the team leader, and obtained statements from them (149 to 152).

38. The statements from Ms Love and Mr Gavin set out their version of what happened that morning, to the effect the claimant was late for work, moved J on her own, did not assist J1 although asked to do so, and abruptly left the shift with no explanation. The statements also contained the allegation that they could smell stale alcohol from the claimant's breath. Jane English's statement stated that she had called the claimant's mobile several times, and that the claimant had later contacted Kelly House. Ms English said that she had tried to call the claimant several times, and again left a message for her.
39. During the course of the investigation, Ms Fulton obtained copies of the claimant's training records, which showed she had received manual handling training. She made enquires of the claimant's previous line managers, Mr Gatland, Ms Wiseman, Kim McKay, and Lorna Gordon, to ask if they had received complaints by the claimant to the effect that she had been bullied by anyone. All of the managers confirmed that they had received no such complaints. Kim McKay reported the claimant had been annoyed at various team leaders over the years that she had worked across the service and this had related directly to occasions when they had addressed practice issues with her.
40. Ms Fulton compiled a report in which she made findings under the following allegations:
- (i) That the claimant was late for her shift on Saturday 26 January 2019.
  - (ii) That the claimant could smell alcohol on her breath when she attended her shift.
  - (iii) That the claimant had left the service unexpectedly before the end of her shift.
  - (iv) That the claimant had transferred a service user in a manner which breached the agreed protocols and guidelines.
41. Ms Fulton set out her conclusions on each of these, which were essentially, the claimant was late for her shift, that her work colleagues said that they could smell alcohol on her breath; the claimant had left the service, leaving

her shift early, leaving them short staffed, and did not follow the protocol to contact an on-call manager, and that she said the reason for this was that she was upset and depressed. Ms Fulton concluded it was most likely the claimant had left understanding the protocols and the position she put her colleagues in.

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42. Ms Fulton concluded that the claimant did not follow J's risk assessment by supporting her alone, and in doing this put herself and a service user at risk, despite her training.

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43. Ms Fulton also noted in her conclusions that the claimant stated she had been stressed and claimed that she had been bullied at work but that the claimant not discussed this with a line manager or reported it through the respondent's whistleblowing policy, and that she had been unable to give an example of bullying by other members of staff. Ms Fulton concluded that other colleagues had ongoing issues with the claimant in terms of their perception of her quality of work which led to frustration.

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44. Ms Fulton in her investigation report made a reference to a number of the respondent's Codes of conduct. She included a number of Appendices which comprised of the emails from the claimant's team leaders: the claimant's training records: the staff rota: the claimant supervision records: J's risk assessment: and statements from Margaret Love and James Gavin.

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45. On receiving this investigation report, Ms Hattie, the appointed disciplinary officer, convened a disciplinary meeting. The claimant was invited to attend this in a letter dated 7th February 2019 (185). The letter set out the allegations in the following terms:

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*You were late for your shift.*

*Your colleagues believed they could smell alcohol on your breath.*

*You left the service unexpectedly and before the end of your shift.*

*The manner which you transferred a Person We Support was in breach of agreed protocols and guidelines.*

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46. The letter calling the claimant to the disciplinary hearing advised that the basis of the allegations was detailed in the investigation report, and a copy of this was sent to her the following day. The letter advised that if the claimant was found guilty of misconduct, the respondents could decide to issue her with a final written warning or dismiss her with notice or pay in lieu of notice. It also advised that if she was found guilty of gross misconduct, she may be dismissed without notice or pay in lieu of notice.
47. The letter advised that if there were any other documents which the claimant wished to be considered, she should provide Ms Hattie with copies as soon as possible.
48. The claimant was advised of her right to be accompanied at the hearing.
49. The disciplinary hearing took place on 15 February 2019, and notes of the meeting are produced at page 175 to 183 of the bundle. The meeting was attended by the claimant and her work colleague, Ms Hattie, Ms Fulton, and a note taker from HR.
50. Ms Hattie began by asking the claimant to clarify the reason for her lateness, as felt that there was an inconsistency with the reasons which she gave for being late.
51. The claimant said her partner was at hospital, and that she was having a bad morning, and that she was up all night, and tried to set her alarm. Ms Hattie put to the claimant that her behaviour had been erratic, and she asked the claimant what the cause of that was. The claimant responded that it was her mental state, and that she suffered from depression. Ms Hattie said that had not been mentioned previously.
52. Ms Hattie asked the claimant to explain how she got the service user, J, who is a 2:1 transfer, up. The claimant said she supported her out of her bed and confirmed that she did this on her own. When Ms Hattie asked why she did this, the claimant responded that she was trying to keep busy as she could hear the others on the shift talking about her. The claimant confirmed that she knew that J had to be moved with a 2 to 1 transfer, and she accepted that

she had been trained in manual handling. The claimant said she was upset, and that she suffered from depression.

53. Ms Hattie put the events of the day to the claimant, to which the claimant responded that she was anxious. Ms Hattie put to her that was not what her colleagues had said, and it was not mentioned in the investigation that she was tearful. She asked the claimant what made her walk off the shift; the claimant responded that she was upset. Ms Hattie put to her that her colleagues had not seen her upset shift Ms Hattie put to the claimant that she had left the service understaffed, which showed a lack of concern for the health and safety of her colleagues and service users. The claimant said it was she mental state, and 'it goes right over her'. Ms Hattie asked if that was her normal behaviour and the claimant said no and that she had a bad morning.

54. Ms Hattie put to her that the claimant had left the service and made no voluntary contact to the manager or her team leader, despite the team leader trying to make contact with her. She asked the claimant what was causing the bad morning. The claimant responded that she was having palpitations and felt anxious which she gets a lot, and she was trying to keep going.

55. Ms Hattie put to the claimant that for her the biggest thing was moving the service user J, in breach of the protocol in place. She asked the claimant what assurances she could give that it would not happen again. The claimant said that she would do training, and Ms Hattie asked what training she would do, as she was currently trained, and she had taken the decision to go against the training. The claimant accepted this was the case.

56. The claimant said that both her work colleagues were talking about her. Ms Hattie said they were frustrated with her; she asked where they were in relation to the claimant. The claimant confirmed they were next door to her. Ms Hattie put to the claimant that her actions were not justified on the basis that someone was talking about her and questioned why she could not have dealt with it more constructively. She put to the claimant that her colleagues were annoyed with her because she came in late, and then sat at the table

reviewing the rota rather than giving support to service users which was required. The claimant said she was anxious, and that she had a condition which comes and goes. Ms Hattie asked the claimant if the condition ever been brought to the respondent's attention or had been raised with a line manager. She also asked the claimant why she returned the next day if she was feeling anxious. The claimant responded to the effect that she took her medication.

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57. Ms Hattie then adjourned the meeting to consider her decision. She decided to take the decision to dismiss the claimant, and she confirmed that to her after the adjournment. She gave the claimant a summary of her reasons, which indicated that she considered there was no mitigation put forward on behalf of the claimant as to why she breached health and safety both in moving J1, and leaving the service unmanned.

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58. Ms Hattie then wrote to the claimant, on 19 February, confirming her decision, and the reasons for it. (P184 – 185). Ms Hattie upheld the fact that the claimant was late for her shift. She expressed concern that the claimant was unable to give a clear reason for her lateness.

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59. The claimant's lateness was not a reason which would have caused Ms Hattie to dismiss the claimant. Ms Hattie however also concluded that the claimant had left the service unexpectedly before the end of her shift. She found the claimant's rationale for taking that course of action unacceptable, in that she said it was due to her perception that her colleagues were talking about her. Ms Hattie concluded that it was unacceptable that the claimant had not sought guidance or alerted her line manager when she was leaving, nor had she answered their calls when they were trying to establish her whereabouts. Ms Hattie concluded that the claimant's actions resulted in her wilfully leaving the service with an unsafe support level, which could have put both colleagues and the service users at risk and she found this allegation upheld against the claimant.

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60. Ms Hattie also concluded that the manner in which the claimant transferred J was in breach of agreed protocols and guidelines. The claimant accepted

that she had done this during the course of the investigation and disciplinary hearing, and Ms Hattie found there was no clear rationale or justification for the claimant's actions in doing so. She concluded the claimant wilfully disregarded the wellbeing and safety of the vulnerable person who was in her care. She concluded this act was a significant breach which could have caused harm both to service users, and to the claimant herself.

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61. Ms Hattie did not sustain the allegation that there was a smell of stale alcohol on the claimant's breath when she attended the shift.

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62. Ms Hattie concluded that the claimant's conduct on leaving the service unexpectedly before the end of her shift, and in transferring J1 in breach of the agreed protocols, amounted to conduct which justified the claimant's dismissal. She was not satisfied that there was any evidence of the claimant having informed her employer of her depression or of being bullied at work. She concluded that there was no justification for the claimant's actions, and in the circumstances, considered given the sector in which the respondents work, and the vulnerable people in her care, that the claimant could not continue to work for the organisation. She did not consider that retraining was a realistic option, as the claimant had already been trained, and she did not consider that moving the claimant to another part of the organisation, which would involve her in providing one to one support, was sustainable. In the circumstances, Ms Hattie considered that dismissal was an appropriate sanction, as she had no confidence in the claimant's suitability as a social care practitioner.

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63. Ms Hattie confirmed the claimant's right to appeal against the decision. The claimant appealed the decision in a letter of 26 February 2019 (187).

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64. The claimant set out six grounds of appeal, as follows. Firstly, she said that she phoned to say that she would be late for her shift, and that during her five years of employment, she had always been punctual. She said the reason for her lateness was the setting of her alarm. The claimant stated that she refuted categorically that she had left her colleagues and patients at risk. She stated that on a regular basis, the staffing levels were two individuals. The

claimant stated that she suffered from depression which resulted in an absence in September 2018. She stated that her depression led to her walkout, due to detrimental staff comments that day.

- 5 65. The claimant accepted she had transferred a patient on a one- to -one basis which was unsatisfactory. She said however that the procedure was not always condoned by management when staff numbers were compromised.
66. The claimant refuted the accusation of having alcohol on her breath.
67. The claimant stated she believed the penalty was too harsh, and that a transfer to another position would have been more acceptable or a final  
10 written warning.
68. Lastly, the claimant said that she believed there were factors which contributed to the offence which would not have been properly taken into consideration, for example harassment from work colleagues.
69. Ms Carol Russell, the Head of Service, was appointed as the appeal officer,  
15 and was passed on the papers which had been made available to the claimant and Ms Hattie at the disciplinary hearing, including the investigating report with its appendices and also notes of the disciplinary hearing.
70. An appeal hearing was convened for 13 March 2019 which was attended by  
20 the claimant and a work colleague, Ms Russell, Ms Hattie, and an HR business partner, as a note taker.
71. In line with the respondent's procedure, Ms Hattie attended in her capacity as the disciplinary officer, in order to answer questions of either Ms Russell or the claimant.
72. Notes of the appeal hearing are produced at 192 to 196. In relation to the  
25 second point of the claimant's appeal, Ms Russell asked the claimant if she had been formally diagnosed with depression. The claimant said she started talking palpitations in September due to something which had happened with her line managers. Ms Russell asked the claimant if her managers were

aware of this. The claimant replied that her team leader was aware that she had a change of medication.

73. Ms Hattie said that the claimant was off in September 2018 with low mood for a period of nine days. On her return to work, she had discussion with her line manager, but she had not discussed depression and it had not brought to the manager's attention that she had depression.
74. Ms Russell said that she would look at the claimants return to work form, but said in terms of palpitations, she would expect to see something done which might support the claimant.
75. The claimant said that she took palpitations because her manager took her keys from her. There was then a discussion about this during which Ms Hattie, said that drugs and money had gone missing, the police had been called and that all members of staff were under investigation. There had been conversations about staff with keeping the keys in their possession. The managers discovered unattended keys, and therefore kept them, and it took a considerable amount of time before the claimant came to her manager to inform them that her keys were missing. The managers had been frustrated with the staff practice with keys, because of money and drugs going missing and there had been consultations with staff about the importance of keeping the keys, but keys had again been left unattended.
76. There was then a discussion about how the claimant had transferred J. She she accepted that she should have done it with two people, she said that however that J had a toilet sling which she had never seen used. Ms Hattie responded to the effect that there was a risk assessment in place and there was no evidence that it had not been common practice to follow it, and if it there been such a practice, then it should have been raised by the claimant with management earlier. The claimant said that it was not common practice but that it had happened.
77. After the appeal hearing, Ms Russell decided to carry out further investigations.

78. From her consideration of the rotas, Ms Russell concluded that there were three people were always on shift.
79. Ms Russell took into account that all of the team leaders with whom the claimant had worked confirmed that there had been no report of bullying and harassment of the claimant against other staff during the course of her employment. She did not consider the incident of not giving the claimant the keys which her managers had found unattended amounted to bullying in the circumstances in which this had occurred.
80. Ms Russell looked at the claimant's Supervision records from March, July and November 2018. There was nothing in these records which Mr Russell considered gave notice of the claimant being bullied or suffering from depression. Under the heading *Personal Health and Wellbeing*, the record of the November meeting states that the claimant '*feels fine and doesn't have any issues*'.
81. The November record under discussion points states the following; '*JMCLPWS Ruth feels she doesn't like her although she has tried several different approaches to alleviate this, Ruth feels it is getting worse.*
- Ruth has some issues with a new colleague, Ruth feels she is able to challenge inappropriate actions or comments by a fellow member of staff and has had to challenge new staff members regarding inappropriate comments, behaviours and actions. This was raised with BM on 3 October.'*
82. Ms Russell considered there was nothing arising from this Supervision which indicated that the respondents had to adopt in order to support the claimant as a result of her health, or issues with other colleagues.
83. Ms Russell also had a discussion with the claimant's line manager. He indicated that they were not aware that the claimant had any underlying health issues and he confirmed to her that the claimant had transferred across to Davidson House as part of a regular staff transfer, and her transfer was unconnected to any allegations of bullying or harassment.

84. Ms Russell considered the claimant's return to work interview with John McGartland (page 133) which confirmed the claimant had been absent for a period of 9 days with low mood. The form indicated that there had been a change in the claimant's medication. The return to work form indicated that it was not anticipated that the claimant would have further time off or that she required to be referred to occupational health, or that counselling was appropriate, or that there was no other support which Quarriers could provide. This form was completed and signed by the claimant on 15 October.
85. Ms Russell did not conclude that the contents of this form substantiated the claimant's claim that she suffered from a depressive illness and that as a result of this, that she had walked off her shift, and breached the protocols in relation to the transfer of J. She also took into account that the claimant did not have a history of absence and had been fit to attend work the following day, and did not consider these factors were consistent with the claimant suffering from depression.
86. Ms Russell considered the risk assessment in place for J, which identified the protocols in place (which required a 2:1 transfer), and the risks from breaching those protocols.
87. Having carried out these further investigations, Ms Russell decided that the decision to dismiss the claimant should be upheld. In reaching that decision, the two main points which she took into consideration were that the claimant had walked off her shift and that she had transferred a service user in breach of the risk assessment protocol. In reaching her conclusions Ms Russell did not feel there was any evidence to support the mitigation which the claimant advanced about her conduct on both of these matters.
88. Ms Russell concluded that the claimant in transferring the service user in this manner, comprised the health and safety of the service users and staff. She also concluded that the claimant left her shift early and made no contact to on call or management about this, and she acted in a way which compromised the Service. Ms Russell concluded the claimant had been late but would not have dismissed her for this reason. Ms Russell did not conclude the penalty



was too harsh and concluded that the claimant's actions amounted to a significant breach of what was required of her. Taking that into account and taking into account the vulnerability of the respondent's service users, Ms Russell did not consider that the claimant could be transferred elsewhere within the organisation. A transfer to a care house, would put the claimant in a position where she was required to provide one to one working, and Ms Russell did not feel she could consider this.

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89. Ms Russell wrote to the claimant confirming her decision on 20 March 2019 (195 to 196). In relation to the second allegation, the claimant left the service unexpectedly, Ms Russell concluded that by leaving the shift early, the claimant put her colleagues and service users at risk by leaving the service in this way.

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90. Ms Russell confirmed that she read the last four supervision notes for the claimant and her return to work interview, and at no point had there been any conversation about the claimant suffering from depression and that when she returned to work, she said she was well and did not need any adjustments to the workplace.

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91. Ms Russell concluded that the claimant had failed to seek guidance from any of her managers when she was leaving and had failed to answer calls from managers seeking to establish her whereabouts, and she concluded the claimant failed in her professional responsibilities by walking out of her shift in that way.

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92. In relation to the allegation that the claimant had transferred J in breach of the protocols, Ms Russell concluded that the claimant had done this, and in fact had admitted to doing so. She concluded that the claimant had been trained in the requirements of moving J. In view of the fact that Ms Russell had found nothing to substantiate the claimant's actions had been caused by her depression, or bullying and harassment by other members of staff, she concluded that there was no significant mitigation that would allow her to overturn the decision to dismiss, which was upheld.

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93. For the purpose of this tribunal, the claimant submitted a letter from her doctor, dated 11 October 2019 (p197), which states:

*'Ms Shand has suffered from low mood and depression for several years, long before her recent illness and absence from work.'*

5 *I believe that Ms Shand's current condition would improve if she could get back to work.'*

#### **Note on Evidence**

94. There was not a great deal of factual dispute on relevant matters in this case, albeit there were some points on which the Tribunal had to make an  
10 assessment of credibility.

95. The Tribunal formed the impression that the respondent's witnesses were both credible and reliable. There was nothing to suggest that they had not taken the steps which they gave evidence about in the course of conducting the disciplinary process, or that they had not reached the conclusions which  
15 they did for the reasons which they gave evidence about. The issue for the Tribunal was principally around whether the respondent's witnesses acted reasonably.

96. In relation to the claimant's evidence, again there was not a great deal which was relevant in terms of credibility or reliability, however there were on  
20 occasions where the claimant's evidence did lack credibility. The Tribunal did not form the impression that the claimant deliberately sought to mislead, and it was persuaded that the claimant gave evidence as to what her perception genuinely was.

97. One relevant point of dispute related to whether the claimant had the  
25 opportunity to make representations during the course of the disciplinary and appeal hearings. The claimant said that in relation to both these hearings, she did not have an opportunity to put her case across. The Tribunal was not satisfied that this was the case. The notes of the disciplinary Hearings, which the claimant accepted were accurate, record that the claimant was  
30 invited to provide an explanation of matters and was asked questions

throughout both hearings. This is inconsistent with the notion that the claimant was unable to put her claim across. The inability to put her case across at the disciplinary hearing did not form part of her appeal against dismissal. Taking these factors into account, and the credibility of the witnesses generally, the the Tribunal was not persuaded the claimant was denied the opportunity to state her case during the course of the disciplinary process at either the disciplinary or appeal stage.

98. In the Bundle for the hearing, the claimant produced a statement in which she provided an explanation as to why she acted as she did in the morning of the incident which led to her dismissal. The claimant stated that two staff members were assisting a service user; they directed the claimant to attend another service user (J1). The claimant went to J1, but another service user, J, became agitated and began shouting to be cared for urgently. The claimant said that she knew that by moving J1, her bed alarm would go off. The claimant said that she knew that attending to J1 and waking her from her sleep would have taken up to 45 minutes to complete, and she stated neither of the other the two members of staff were in a position to leave the service user they were attending to disable the alarm. In this event, the alarm would be ringing for a considerable amount of time which would cause a considerable disturbance to the rest of the service users and staff members. Therefore, the claimant who had worked this shift many times, and was aware of J's capabilities and took the decision to move J from her bed to her wheelchair first. She stated this did not require a lot of time and enabled the service user to get them to the dining room to eat. The claimant stated that it was also her experience that it was more than necessary for two people to deal with J1, who she was first directed to help, then it was to move J. She said as the most practiced worker of the team she moved J safely and cause minimal distress to that service user. While she might have been uneasy with a less experienced colleague acting on their own, the claimant maintained that she acted safely in the interests of the service user.

99. This was not a position which was put to the respondent at any point during the course of the disciplinary process. The Tribunal was satisfied that there

was a disciplinary hearing and an appeal hearing at which the claimant was given an opportunity to state her case, as well as an investigating interview in which she was offered the opportunity to put forward this explanation. There was no explanation before the tribunal as to why she had not done so at any of these stages.

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100. The fact the claimant had set out a position which was inconsistent with that which she advanced in the course of the disciplinary process, where she explained she had moved J because she needed to keep busy and because of her mental state, impacted adversely on her credibility.

10 101. During the course of the hearing, the claimant also put to the respondent's witnesses that there were other members of staff who had acted as she had, in particular moving J without assistance, but remained in employment. The claimant named another member of staff in her statement, at page 32 but again this was not information which was put to the disciplinary or appeals officer, and there was no explanation for this.

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## Submissions

### *The respondent's submissions*

102. Mr Ashbury provided written submissions which he supplemented by oral submissions. He set out the issues for the tribunal, and then went on to make submissions as to the findings in fact which the Tribunal should make which included the findings as to the decisions taken by Ms Hattie, and Ms Russell. These included that the claimant wilfully disregarded the wellbeing and safety of a vulnerable person in her care, and this was a significant breach which could have caused the person, the respondent and the claimant harm, and that the claimant gave no clear rationale or justifications for her actions.

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103. Mr Ashbury then referred to the cases of *British Homes v Burchell* 1978 IRLR 380. The tests set out in that case, which was confirmed in the case of *Post Office v Foley* 2000 IRLR 827 and *Whitbread v Hall* 2001 ICR 699. He also referred to the test which the tribunal must apply as set out in the case of *Iceland Frozen Foods Ltd v Jones* 1982 IRLR 43.

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104. Applying the *Burchell* test, Mr Ashbury firstly dealt with whether the respondents had a genuine belief in the reason for dismissal and submitted that they had. He referred to the evidence before the disciplinary hearing, and the conclusions reached during the disciplinary process which included the  
5 conduct of an investigation and the production of an investigation report. Mr Ashbury reminded the Tribunal that the question to be determined is whether the employer believed that the employee was guilty and was entitled to so believe in regard to the investigation carried out – *Scottish Midland Incorporative Society Ltd v Cullion 1991 IRLR 261*. The investigation  
10 supported the fact the claimant was late for her shift, had left early without contacting her managers, and has supported the service user in breach of the required protocol.
105. Mr Ashbury then submitted that the respondents had carried out as much investigation into the matter as was reasonable in all the circumstances. He  
15 referred to the case of *Sainsburys Supermarket Ltd v Hitt 2003 IRLR 23*; the test was reasonable responses which applies to the investigation. Mr Ashbury took the tribunal through the steps of the investigation and submitted that the *Burchell* tests had been satisfied.
106. Mr Ashbury then dealt with whether her dismissal fell within the band of  
20 reasonable responses and the range of responses open to her employer (*Boys and Girls Welfare Society v McDonald 1965 IRLR 129*). He submitted that a key question in determining the substantive fairness of the dismissal was the nature of the conduct committed by the claimant in the context of the respondent's business. He submitted that in this case, in the context of a  
25 social care environment, housing vulnerable people in an older age range, it was especially important. Mr Ashbury submitted that the claimant knew of the seriousness and the potential consequences of her actions and she was fully trained in this respect. The claimant was in an important position as a support worker, and she had a position of real responsibility and trust. Mr  
30 Ashbury referred to the case of *Neary & Neary v Dean of Westminster 1999 IRLR 288* which states that gross misconduct can and will vary according to the character of the employer concerned.

107. In relation to the points made the claimant as regards lack of consistency, Mr Ashbury referred to the case of *Hadjiannou v Coral Casinos Limited 1981 IRLR 352*, and the judgment of the EAT in that case, which stated that employment tribunals should scrutinise arguments based upon disparity with particular care and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for an inconsistency argument. It is of the highest importance that flexibility should be retained and employers and tribunals should not be encouraged to think that a tariff approach to industrial misconduct is appropriate.

108. Mr Ashbury submitted that the respondents had carried out a fair procedure and complied with the terms of the ACAS code. If there were any procedural defects during the course of the disciplinary hearing, these in any event were cured by the appeal (*Sharkey v Lloyds Bank plc 2005 HWLUK 21*, and *Whitbread v Hall 2001 IRLR 275*) which the authority of the proposition of the band of reasonable responses test is applicable not only to the substantive decision to dismiss, but also the procedural steps taken by the employer.

*The claimant's submissions*

109. The claimant submitted that she was doing the best that she could on day in question. She knew that J would be safe and therefore she acted as she did, rather than get J1 up. Had she got J1 up, this would have taken 45 minutes, her bed alarm would have gone off, and this would have caused a disturbance with the other service users and therefore she acted in the best interests of the service users and it was not the case that she deliberately did not get J2 up because the bed was wet.

110. The claimant submitted that if investigating disciplinary officer had actually asked staff about the staffing rota, they would have discovered, as was often the case, that only two staff were on that shift. The claimant submitted that the shift worked better with two staff rather than three.

111. The claimant submitted that the respondents had no understanding of mental health and failed to take her mental health into account.

112. Further, the claimant's submitted that other members of staff were in breach of the protocol but remained in the respondent's employment.

**Consideration**

5 113. Section 94 of the ERA provides that an employee has a right not to be unfairly dismissed.

114. Section 98(1) of the ERA 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 –*

10 (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 –*

15 (a) *relates to the capability or qualifications of the employee for performing the work of the kind which he was employed by the employer to do,*

(b) *relates to the conduct of the employee...*

Section 98(4) of the ERA provides;

20 (4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

25 (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.

The burden of proof rests with the employer to establish the reason for dismissal. In the event that the respondents discharge this burden, the Tribunal has to consider whether the dismissal was fair or unfair with regard to the test at Section 98(4) ; at this stage the burden of proof is neutral.

This is a dismissal which is said to relate to the conduct of the claimant, and therefore the Tribunal has regard to the test set out in the case of *British Home Stores Limited v Burchell*.

In that case the EAT held that in a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is fair or unfair an Employment Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, it must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief, and third, the employer at the stage which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

115. The Tribunal firstly considered whether the respondents had established the reason for dismissal. The reason for dismissal has been described as a set of facts known to the employer or beliefs held by them, which caused him to dismiss the employee. The burden of proof on the employer at this stage is not a heavy one. It is not necessary that the employer prove that the reason actually did justify dismissal, that is a matter to consider when considering the question of fairness. It is sufficient the employer genuine believes on reasonable grounds the employee was guilty of the conduct for which she was dismissed.



116. Albeit the respondents upheld the finding of lateness, the Tribunal accepted that the reason for dismissal was because the respondents upheld allegations that the claimant had left the service unexpectedly before the end of her shift, and that she had transferred a service user in breach of agreed protocols and guidelines. The claimant accepted this behaviour, and therefore the Tribunal was satisfied that the respondents genuinely believed that she had been guilty of this conduct and the reason for dismissal was made out.
117. The Tribunal then went on to consider whether a dismissal for that reason was fair or unfair, with regard to the test at Section 98(4) of the ERA, set out above.
118. The Tribunal reminded itself that the objective test applies to the consideration of whether a reasonable investigation was carried (*Sainsbury's Supermarket v Hitt*).
119. The Tribunal began by considering the second stage in the Burchell test, which was whether the respondents had reasonable ground for which to sustain the belief in the misconduct for which the claimant was dismissed.
120. The Tribunal considered whether the disciplining officer or the appeals officer had reasonable grounds for which to conclude that the claimant had unexpectedly left the shift early.
121. In light of the claimant's acceptance that she had done so, and the fact that she had done so was clearly supported by the statements of her colleagues working alongside her on the day of the incident, objectively there were reasonable grounds upon which both managers could conclude that the claimant was guilty of this conduct. Furthermore, there were reasonable grounds to conclude that the claimant had not contacted her line manager or the emergency on-call service, albeit it was accepted that she had responded to a telephone call from her line manager by calling back and leaving a message. This conclusion was supported by the statement of Jane English, which was available in the course of the disciplinary hearing, and there was no material to dispute as to that by the claimant in the course of the disciplinary process.

122. Applying an objective test there were reasonable grounds upon which the respondents could conclude that the claimant had transferred J in a manner which was in breach of the agreed protocols and guidelines. There was no dispute that the transfer of J was a two to one transfer in compliance with a risk assessed protocol, and there was no dispute that the claimant was aware of that. The claimant accepted that was the case in the course of the disciplinary investigation. The explanation which the claimant put forward for the purpose of the tribunal, is produced in a statement at page 30 of the Bundle, but this was not something which was before the disciplinary officers.
123. The tribunal then considered whether at the point when the respondents formed their belief on those grounds, they carried out as much investigation into the matter as was reasonable in the circumstances. There was little factual dispute as to what had actually occurred, however the Tribunal considered whether applying an objective test, the respondents had carried out a reasonable investigation into the claimant's explanation as to why she had acted in the way that she did. Her explanation was that she had acted in the way that she did was because she was suffering from depression, and that she had been bullied by other members of staff. As part of the initial investigation enquiry was made through a series of emails of the claimant's line managers as to whether she had reported being bullied. All the managers confirmed there was no reported bullying by the claimant.
124. Ms Hattie did not speak to the claimant's managers nor she did make any particular enquiry into the claimant's medical history. At the appeal however, Ms Russell did speak to the claimant's manager. She also looked back on the claimant's last three Supervisions to ascertain whether there was anything to indicate there was bullying or health issues. Applying an objective test, these were reasonable steps which were taken in the course of her investigation.
125. The Tribunal takes into account that part of those investigations showed that in the claimant's most recent Supervision, she stated that she did not think that another member of staff liked her, and that she had some issues with a new college but that she felt able to challenge inappropriate comments or conduct. The claimant did not identify specific conduct complained of and did

not state that bullying was an issue and Ms Russel was reasonably entitled to attach weight to that in reaching her conclusion that the Supervision record did not disclose a complaint of bullying.

5 126. The Tribunal also take into account that there was information that one of the claimant's work colleagues made a comment to her in the morning of the incident, to the effect that she should do what she always does, which was nothing. Both Ms Hattie, and Ms Russell took this comment into account, and concluded that this comment was borne out of frustration with the claimant for being late, and then not carrying out the direction given to her to  
10 assist with a particular service user.

127. The investigations which Ms Russel carried with the claimant's team leader demonstrated that there had been no previous allegations of bullying and that the claimant had not been moved to Davidson because of bullying.

15 128. While some issues about staff had been raise by the claimant, and there was a degree of friction on the morning of the incident, it could not be said, applying an objective test of reasonableness that it was unreasonable for Ms Russell to conclude that this was insufficient evidence of the claimant being bullied, such as to justify her actions in breaching J risk assessed transfer protocol, and leaving her shift early and failing to reporting this to management.

20 129. The Tribunal also considered the decision reached by Ms Russell about the claimant's mental state and whether this impacted on her actions on the morning of the incident. In considering this the Tribunal is mindful of the tests which it has to apply in an unfair dismissal calm, as set out above, and that this is not a disability discrimination case.

25 130. The claimant was invited to bring to the disciplinary hearing any additional documentation which she wished but did not do so. For the purpose of this hearing the claimant has produced a medical report from her GP, which states that she suffers from depression. This however was not made available to the respondents in the course of the disciplinary process

131. The information which Ms Russell obtained was that there was no record of the claimant having suffered from depression, and this was not something the claimant had raised with her employer at any point before the disciplinary hearing; the claimant had been absent with low mood for a period of nine days  
5 in October, but that on her return to work she had indicated she had no residual or ongoing issues which required any alteration of work pattern, or that there were any adjustments or measures on the part of the respondents necessary on her return to work. Ms Russel took this into account, together with the fact that the claimant had not had any other absences from work; that  
10 on her return to work on October she did not anticipate she would require any further time off work; and that she had managed to attend work on the day following the incidence. These were not unreasonable factors for Ms Russel to have regard to, and it was not unreasonable for her to conclude, having regard to these factors, that the claimant's actions in failing to adhere to J's  
15 transfer protocol and leaving her shift early, were not caused by her suffering from depression.

132. The Tribunal was therefore satisfied that the respondents had satisfied the three stages of the *Burchell* test and went on to consider whether the decision to dismiss was one which fell within the band of reasonable responses. In  
20 doing so the Tribunal had regard to the tests laid down in the case of *Iceland Frozen Foods Limited v Jones*. In that case the court laid down the approach the employment tribunal should adopt in answering the questions posed by section 98 (4) in the following terms:

25 [1] *The starting point should always be the wording of this section (section 98 (4))*

*(2) In applying this section, an employment tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the employment tribunal) consider dismissal to be fair;*

(3) *In judging the reasonableness of the employer's conduct, an employment tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*

5 (4) *In many (but not all) cases, there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*

10 (5) *The function of the employment tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls out with the band, it is unfair.*

15 133. For the reasons given above, the Tribunal was satisfied that it was not unreasonable for the respondents to reject the notion that the claimant's conduct was caused by her ill health or because she was bullied by other members of staff. It could be said that such a conclusion was one that no reasonable employer would have reached in the circumstances given the evidence which was available to the respondents.

20 134. It was not unreasonable for the respondents to place significant emphasis on the environment in which the claimant was working, and the vulnerability of the service users who they have care of, as factors which they were entitled to attach very considerable weight to in considering the claimant's conduct, and the sanction for that conduct.

25 135. The claimant argued that the respondents should have spoken to staff about the staffing levels. It was not unreasonable however for the disciplinary officers to rely on the information in the staff rotas in order to conclude that the staffing level in place was three members of staff for the claimants shift on the day of the incident. The claimant also said in her submission that the shift operated better with two staff members rather than three. This statement  
30 it appeared to the Tribunal was a matter of unsubstantiated opinion on the part of the claimant.

136. The claimant argued that others in her position had carried out similar actions but had remained in the respondent's employment. There was however no evidence before the Tribunal which allowed it to reach any factual conclusions about this, and there were no specifics put to the respondents during the course of the disciplinary hearing which would have allowed them to consider an argument that the claimant was being treated differently to others. As pointed out in the case of *Hadjioannou*, referred to by Mr Ashbury, the tribunal has to scrutinised argument based upon disparity with particular care. In order for her argument on inconsistency to succeed, the Tribunal would have to be satisfied that the claimant was treated differently to other cases which were truly similar or sufficiently similar to hers. The claimant made assertions in her questioning to the witnesses as to her the actions of other colleagues, but there was no evidence before the tribunal as to what exactly the circumstances pertaining to those colleagues were, which allowed the tribunal to reach factual conclusions on which to base a conclusion that the claimant's dismissal was unfair on the basis of inconsistently of treatment compared to other members of staff.

137. Given the nature of the conduct which the respondents found against the claimant, leaving her shift early without any explanation and breaching a risk assessed protocol for the care of a service user, and taking into account the environment which the respondents work, it could not be said that the decision to dismiss the claimant was one which fell out with the band of reasonable responses.

**138.** The effect of that conclusion is that the claim of unfair dismissal does not succeed and is dismissed.

Employment Judge:

L Doherty

Date of Judgement:

06 November 2019

Entered in Register,

30 Copied to Parties:

07 November 2019