



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Forrest

Respondent: Elysium Healthcare Limited

Heard at: Manchester (by CVP)

On: 25 and 26 March 2021

Before: Employment Judge Leach
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Ms Carin Hunt (counsel)

JUDGMENT

The judgment of the Tribunal is that whilst the claimant's complaint of unfair dismissal is well founded, it is just and equitable to reduce the amount of a basic award and compensatory award by 100%. This means that the claimant is not entitled to any remedy.

REASONS

Introduction

1. The claimant is a Registered Nurse. The respondent is a private healthcare company which operates a hospital in Atherton near Manchester called The Spinney, where the claimant was employed. The claimant's role required her to look after patients who had been detained under the Mental Health Act 1983.
2. The claimant worked nights at the hospital. On the nightshift of 20/21 November 2019 it was alleged that the claimant fell asleep, particularly when undertaking observations on a vulnerable patient.
3. The claimant was dismissed from her employment following a disciplinary hearing. Her appeal against dismissal was unsuccessful.

4. The claimant denies that she was asleep and complains that that the respondent did not properly investigate the allegations against her and that her dismissal was unfair.

The Hearing

5. The Tribunal hearing took place by CVP to which the parties consented. The hearing took place during the ongoing COVID-19 pandemic. The connections were good. All participants had a bundle of documents and copy witness statements available to them. I am satisfied that a fair hearing took place.

6. The parties had prepared and provided a bundle of documents for use at the hearing. When I refer below to page numbers these are references to this bundle.

7. I heard evidence from the following:

- The claimant;
- Alexander Kachepa (“AK”) – the claimant's supervisor and the person who investigated allegations of misconduct;
- Donna Mead (“DM”) – also employed at the Hospital as a Clinical Nurse Manager, and the person who made the decision to dismiss the claimant having chaired the disciplinary hearing;
- Sandy Adams (“SA”) – Hospital Director of The Spinney, who heard and rejected the claimant's appeal against dismissal.

8. On day one I viewed around 50 minutes of CCTV footage. Both parties wanted me to view the footage. I was able to do so via the screen sharing facility in CVP.

The Issues

9. The respondent had proposed a draft List of Issues which I discussed with the parties, and particularly with the claimant who was unrepresented. It was agreed that the list provided was appropriate, and I set this out below.

Liability

- (1) *What was the reason for the claimant's dismissal under section 98 Employment Rights Act 1996 (“ERA”)? Was it one of the fair reasons falling within section 98(2) of the ERA or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which she held? The respondent asserts that the reason for dismissal was conduct.*
- (2) *If the reason for the dismissal was conduct, was the dismissal fair within the meaning of section 98(4) ERA? In particular:*
 - (a) *Did the respondent have a genuine belief that the claimant was guilty of misconduct?*

(b) *Were there reasonable grounds upon which to base that belief?*

(c) *Did the respondent carry out a reasonable investigation?*

(3) *Was the dismissal procedurally unfair?*

(4) *Was the claimant's dismissal within the range of reasonable responses open to the respondent?*

Remedy

(5) *If the claimant's dismissal was procedurally unfair, would she have been dismissed in any event had a fair procedure been carried out? If so, to what extent should the claimant's compensation be reduced to reflect that?*

(6) *Was the claimant's conduct before the dismissal such that it would be just and equitable to reduce the amount of the basic award to any extent under section 122(2) ERA?*

(7) *Was the dismissal to any extent caused or contributed to by any action of the claimant? If so, to what extent?*

Findings of Fact

Relevant terms of employment and policies applicable to the claimant's employment.

10. The claimant was employed as a Grade 3 Staff Nurse in a Senior Ward Nurse position.

11. The respondent has a role profile for Staff Nurse Grade 3 which includes the following:

"As a staff nurse you will be working within a team that includes a range of professionals. You will be central to providing high quality care within a medium secure forensic setting. The patient group consists of personality disorders and enduring mental illness."

And:

"You will be expected to adhere at all times to the NMC Code of Professional Conduct."

12. I note the following extracts from the NMC Code (specifically referred to me by SA) at page 62 of the bundle:

"You must make sure that you deliver the fundamentals of care effectively."

And:

"You must take account of your personal safety as well as the safety of people in your care."

“Tell someone in authority at the first reasonable opportunity if you experience problems that may prevent you working within the Code or other national standards, taking prompt action to tackle the causes of concern if you can.”

13. At page 63:

“Act without delay if you believe there is a risk to patient safety or public protection.”

14. At page 66:

“Take measures to reduce as far as possible the likelihood of mistakes, near misses, harm and the effect of harm if it takes place.”

Respondent's Disciplinary Policy

15. A disciplinary policy applicable to the claimant sets out a number of examples of what would be considered gross misconduct in the respondent's setting. This includes *“sleeping on duty”* (page 48).

The task of carrying out observations

16. The following facts are not in dispute:

- (1) Patients at the hospital include patients detained under the Mental Health Act 1983, including patients who are at risk of harming themselves and others.
- (2) Observations are an important task on the respondent's wards. A patient can be placed on a level 2 or level 3 observation, with level 3 being the more serious.
- (3) A level 3 observation requires one-to-one observation even when a patient is asleep; such is the risk of harm to the patient and to others. The observer needs to engage in constant observation, updating patient records every 15 minutes.
- (4) Patients can sometimes pretend to be asleep to detract an observer's attention, making the observer think they are not a risk.
- (5) Observations are not easy. That is why staff are only asked to undertake level 3 observations for up to an hour or occasionally two hours. However, observers also know that within the period of observation they can access temporary cover/relief so that they can for example get a drink or stretch their legs.

17. I accept the evidence of SA as follows:

“It is therefore extremely important that observations are undertaken properly. Not doing this would amount to a serious health and safety and safeguarding issue which could lead to the death of a patient in a worst-case scenario. In this instance we as an organisation would be deemed to be negligent.”

SA was asked what nurses should do if feeling sleepy when undertaking observations and she provided straightforward and sensible responses such as stand up, move about or ask to be temporarily relieved whilst you take 5 minutes away from the observation for example to make a drink. These are easily achievable steps.

Events of 15 November 2019

18. When working a nightshift on this date the claimant was spoken to by her supervisor, AK. Although AK does not normally work nights he arranged to attend the hospital to speak with the claimant and some other employees early on the morning of 15 November.

19. The reason that AK went in so early was because he had received information from more than one source that the culture of the staff group working nights on the respondent ward for which he was responsible (the Hulton ward) was not good. He had been informed about concerns that the claimant had been seen sleeping on duty when undertaking observations. He had also received concerns about other staff, including concerns about sleeping and using personal mobile phones when they should not have been. The outcome of AK's discussion with the claimant early on this morning was a file note and a supervision note which are at pages 74 and 75. I quote from the file note because this is a document that the claimant agreed and signed in agreement:

“During managerial supervision [the claimant] was interviewed about recent concerns raised about her sleeping on observations. I reminded her of her responsibilities as a Registered Nurse, how this could impact her career and that this could potentially lead to an NMC referral. I highlighted the importance of maintaining safe and effective observations and leading by example as a senior nurse. I informed [the claimant] that she would be issued with a file note which she accepted.”

20. Although the claimant signed this supervision note she did not sign the file note that then went to her some days later. In fact, the claimant did not receive the file note until on or shortly after her suspension from employment on 26 November 2019.

21. I find that the discussion between AK and the claimant on 15 November was effectively a reminder or confirmation about what was expected of the claimant when carrying out her role. Although other employees were also spoken to by AK on the same morning (but in separate meetings), this was a discussion and file note specifically to address concerns raised about the claimant. The claimant can have been in doubt therefore (if she was ever in doubt before) about the importance of staying alert when undertaking observations of vulnerable patients at The Spinney.

22. I find that AK acted in the way he did because general concerns had been raised. There was no specific allegation about the claimant's conduct on any particular time of date. No formal disciplinary steps were taken but the importance of

undertaking observations properly and in an alert state was made clear. The file noted the possibility of an adverse impact on the claimant's career, not just her employment with the respondent.

Events of 20/21 November 2019

23. The claimant worked a nightshift beginning on 20 November and ending on the morning of 21 November 2019. During the shift she worked on the Hesketh ward. This was not the ward the claimant generally worked on (which was the Hulton ward as noted above). The claimant did not want to work on the Hesketh ward and tried, unsuccessfully, to be moved onto the Hulton ward at the start of the shift.

The claimant's concerns that she was unwell when attending for work on the evening of 20 November

24. The claimant's evidence to the Tribunal was that she told her employer (the Day Site Coordinator called Sharon and the Night Site Coordinator called Mark) that she was not well and she should go home. The claimant said that she was told by Sharon that she could not do this as there was not sufficient qualified cover that night. Having reviewed the various documents in the bundle, and particularly a number of documents which set out version(s) of events provided by the claimant during the internal proceedings, I note that in the statement prepared for the appeal hearing the claimant stated:

"I requested to go back to Hulton ward which I made the day and night coordinators know before going on Hesketh that I was unwell and even offered to go home. However I was told I was needed as Geoffrey couldn't hold the keys. Hulton is a completely different ward to Hesketh and although it has more enhanced observations it has much busier ward dynamics plus there was an admission so I would have taken an active role in that". (See page 113)

25. I also note the following statement from the notes at the appeal hearing:

"I should have phoned in sick. I was alright but then I felt worse after my break, I did an hour of observations and realised I wasn't as alert. I took myself off observations for the rest of the night and completed work in the office."

26. The claimant's account provided by her at the investigation stage did not note an offer to go home on attending work. She noted this:-

I was on overtime on a night shift on Wednesday the 20th November 2019. I hadn't booked the shift through Temp Employer but through Alex my ward manager to work on Hulton, which is my regular ward. If I had been aware earlier that I was to be moved and that there was enough time to cover the shift, I would have cancelled as I was unwell. - However I only found out once I had arrived at work that I was on Hesketh ward. I was admittedly unhappy but not because I didn't want to work on the ward but because I was unwell and did not know any of the patients. I am not trying to give excuses, but I would have

felt more comfortable working on Hulton, especially with not feeling myself as it's my regular ward.

I expressed this to the site co-ordinator and he informed me that the nurse I was on duty with (Geoff) was unable to hold the nursing keys, so currently I couldn't be moved. However, he did. advise that if I completed the patient's medication then later he would swap me to Hulton, bringing Ernest onto Hesketh as he knew all the patients.

27. I find as follows:-

- (1) The claimant turned up for work on the 21 November 2019
- (2) When the claimant found out that she had not been assigned to the Hulton ward, she expressed dissatisfaction. The claimant's strong preference was to work on Hulton.
- (3) The preference to work on Hulton was a personal preference, not because the claimant felt unwell. I accept the findings made by DM at the disciplinary hearing on this point *"You advised me that on this nightshift you were unwell and had requested to move back to your own ward. You reported that it is busy and you thought it would keep you more motivated. I did not accept this explanation as Hulton ward has a highly level of observations and would therefore be more demanding in terms of times you were expected to monitor patients closely."*

The claimant's duties between approximately 2.00am and 3.00am

28. An important role for the claimant on this shift was to undertake observations for a level 3 patient. As noted above, level 3 means that the patient is at significant risk of harming themselves and others. The patient needs to be constantly observed, even through the night. Whilst they sleep in their own room, the door to that room is kept open and an observer is located just outside the door ensuring they can see and observe the patient.

29. I viewed CCTV footage between approximately 2.10am and 3.10am on the morning of 21 November 2019. I note the following from the footage:

- (1) The Hesketh ward is not a hospital ward in the traditional sense. What I observed was a long windowless corridor with doors off the corridor which, in the main, appeared to lead to patients' bedrooms.
- (2) The claimant is seen sitting on an easy chair in the corridor opposite a doorway. Although I could not see this from the footage I know that the door was open. The level 3 patient was asleep in the room opposite where the claimant was sitting.
- (3) Another staff member is a few yards further down the corridor. That staff member was Emma Wilde ("EW").

- (4) Occasionally a third staff member is seen who I know to be Tracey Drew ("TD").
- (5) TD is seen to arrive at 2.10am. It is apparent from the claimant's movements whilst sitting that the claimant notices TD. TD leaves very shortly after arriving.
- (6) What is then apparent over the next 20 minutes or so is that the claimant was sitting continuously in her chair and was in a state of some slumber. Her head is either resting or sometimes slumping heavily, very much giving the impression of being asleep. It is apparent to me that the claimant was in and out of sleep. She did "stir" on occasional activity in the corridor (and see (7) below) but activity was infrequent.
- (7) At 2.24am and 2.25am there was some interaction between EW and the claimant. The claimant remained in her seat but turned and appeared to say something to EW.
- (8) At 2.31am TD took over from EW for a short time.
- (9) At 2.33am it is apparent that TD and the claimant spoke with each other.
- (10) At 2.35am TD stood up to undertake observations, walking down the corridor (I was told and I find that EW and TD were on level 2 observations rather than the more severe level 3). When TD returned to her chair two minutes later the claimant was still in a state of slumber.
- (11) At 2.38am EW returned. She handed the claimant a pullover and the claimant then stood up to put this on. This was the first time that I saw the claimant getting up from the chair.
- (12) At 2.40am TD returned and took over from the claimant. The claimant then left for some seven minutes.
- (13) At 2.47am the claimant returned with food and drink and took over again from TD.

30. For the final 15 minutes or so that I viewed it was apparent that EW and the claimant sat and engaged in some discussion, each with a hot drink and the claimant also having something to eat.

31. At 3.02am EW undertook a further observation round. At the same time the claimant picked up what appeared to be some sort of pad to write some notes, although I did not observe the claimant getting out of her seat to observe anything. I note, however, that the patients that the claimant was observing will have been in the claimant's view. This was the first occasion that I observed the claimant make any notes.

The claimant's evidence about her state of alertness in the period 2.10am to 2.35am

32. In her evidence to the Tribunal the claimant stressed how cold she was in this period. She used the term "freezing" and explained that was why she was sitting as

she was. As stated above, I observed her sitting in an easy chair for most of the time, her head resting and sometimes dropping heavily. The claimant explained that when someone is cold they close their body rather than sit upright.

33. I note the following evidence provided by the claimant in her first statement at the investigation stage. I quote from the statement because it was one written by the claimant herself rather than a note taken of a hearing:

“After my break I was on level 3 observations and I will be totally honest and admit I was struggling. However I can confidently say that at no point do I remember falling asleep. If this was the case, I apologise. As I was aware that I was struggling, I was actively trying to keep awake by changing position in the chair and moving my leg. Emma then appeared to be supportive as she knew I wasn’t feeling well and gave me her hoodie as I was cold.”

Other issues arising on the shift of 20/21 November 2019

34. I refer to these briefly as it is clear from the terms of the dismissal letter and the evidence of the dismissing manager that the reason or principal reason for the claimant's dismissal was her conduct on this particular occasion when undertaking the level 3 observations.

35. The first complaint about the claimant's conduct on 20/21 November came from a patient. The complaint was made to the supervisor of Hesketh ward called H A Nkundhtande (“HN”). The supervisor note records the following:

“Discussed an alleged sleeping on duty. It is alleged by a patient on Hesketh ward that [the claimant] was observed asleep in the office. [The claimant] has denied these allegations stating that she was indeed in the office but doing some work on the computer. She states that the patient forewarned that he was going to report her for sleeping. Intention unknown. [The claimant] states that she documented the details of what transpired on the night in question in the care notes. According to [the claimant] there was no-one who witnessed this incident.

Discussion on role and expectations

Expectations and accountability on duty was emphasised to [the claimant]. The risk and repercussions which come with sleeping on duty were also reiterated to [the claimant]. Ways of alleviating tiredness on night duty was also highlighted, which includes standing up and drinking coffee. This is not to say the allegations are true but this acted as a reminder in [the claimant's] role as a qualified nurse.”

36. I note that the respondent was not quick to judge the claimant here. An uncorroborated complaint at that stage had been made by a patient. However, the supervisor in question took the opportunity to emphasise how important it was within the respondent's setting that the claimant, as a senior nurse, did not fall asleep on duty, and how serious the repercussions could be if she did.

37. I note that after the concerns/complaint from EW had been received (see below) the incident reported to by the patient was also investigated, but that no

finding was made that the claimant fell asleep on other occasions during this nightshift.

The claimant's suspension

38. The claimant was suspended after EW's complaint had been received. This was on 26 November 2019. EW provided a written complaint document to her Ward Manager (page 90). This document is undated and during the Tribunal hearing the claimant wanted to understand what the date of this document was, when and how it had been received. The respondent was unable to provide this information. The instruction received by Ms Hunt was that the complaint was initially "posted" under the door of EW's manager. I note, however, that AK interviewed EW during his investigation. The interview took place on 26 November 2019, which was the same date that the claimant was suspended. I am satisfied that the initial complaint was received between 21 November and 26 November 2019 and that the respondent acted with reasonable haste.

Respondent's investigation

39. AK's investigation noted the following:

- (1) Review of initial concern/complaint statement from EW and interview with her on 26 November;
- (2) Interview with claimant on 3 December 2019;
- (3) Receipt and review of the claimant's three-page statement with which she attended the investigation interview;
- (4) Request for a version of events by Tracey Drew (TD). I note here that the version of events provided by TD only focussed on events later in the evening and made no comment on the events between approximately 2.10am and 3.10am (i.e. the period I viewed the CCTV footage for);
- (5) Request for a version of events from two other employees working on that 20/21 November shift – Pedege Tshishimbi and Geoffrey Emajemite. Again no interviews took place. These employees provided evidence about events at a different stage of the shift, noting that they did not witness the claimant as being asleep. Neither provided evidence about the events between 2.10 and 2.35am (nor could they as they were not with the claimant between those times);
- (6) Review of the CCTV footage. I note here that AK (and also DM, the dismissing manager) gave evidence that they reviewed an enhanced version of the CCTV footage in a security room. This enhanced version was described as being of much higher quality and definition and also enabled a viewer to zoom in.

Disciplinary Hearing

40. The disciplinary hearing took place on 7 January 2020. It was chaired by Donna Mead (DM), Clinical Nurse Manager. Notes of the disciplinary hearing are at

pages 98-102. The claimant was accompanied by her union representative called David Boyle (“DB”). The claimant attended with a statement which she and DB read out at the start of the hearing. I note the following from the notes of the hearing:

- (1) The claimant stated that she had flu on 20/21 November 2019 shift;
- (2) The claimant said that she wanted to work on Hulton rather than Hesketh ward because of the patients there and it was busier;
- (3) The claimant clarified what she meant by “struggling” in an earlier statement – see above. She says she was struggling to keep going, “I was struggling that hour”. The claimant was asked why EW would report her if she had not done anything wrong, and the claimant did not know.
- (4) There was a reference to the respondent receiving information that the claimant had been suspended from previous employment because she was sleeping on duty. Although this was referenced, the notes do not record that it was discussed.
- (5) The notes record the claimant stating the following, *“I know it doesn’t look good and I’d think the same in your position. I wasn’t asleep in the office, I was struggling in the corridor but not asleep”*.
- (6) DM asked the claimant why she worked nights and whether she felt that she got enough sleep before attending nights. She asked the claimant whether there were any “worries”. The claimant’s response was that there were no issues in relation to her home and family life but on that night she was genuinely unwell.
- (7) DM asked the claimant about the time between 2.20am and 2.30am particularly and asked for the claimant’s explanation, having viewed the CCTV. The claimant’s response was, *“I was freezing and struggling”*. DM noted that from her perception she looked asleep, her eyes were closed, but the claimant denied that she was asleep.

41. At the Tribunal hearing we learned that DM had observed the claimant’s eyes being closed as she had seen the enhanced CCTV footage (referred to above). The claimant was not shown this. The claimant rightly pointed out at the Tribunal hearing that it was not possible to see the claimant’s eyes closed from the CCTV footage that we viewed. The resolution simply was not good enough.

42. The claimant was asked about other employment and she told DM that she did feel rested between shifts, including those from her other bank role (other employment with a different employer).

Claimant’s dismissal

43. DM decided to dismiss the claimant and wrote the letter of dismissal dated 9 January 2020.

44. That DM was not satisfied with the claimant’s explanation about her conduct on the shift of 20/21 November and she believed that she had no alternative other

than to summarily dismiss on the grounds of gross misconduct. The dismissal letter includes the following (pages 103-4):

- *“On the evening of 20 January [this is a typing error, it should have said November] you worked a nightshift as overtime on Hesketh ward. Following this shift, it was reported by both a patient and a staff member that you were asleep whilst on duty, including whilst conducting the observations of a patient that was on enhanced observations.*
- *You advised me that you did not know why the member of staff would make such an allegation and that you cannot remember falling to sleep. You stated that you have been told that the patient makes a number of allegations about people.*
- *On review of CCTV footage between the hours of 02:00 and 03:00 when you were assigned to conduct enhanced observations, there are a number of periods during this time when you appear to be asleep and at times certainly appear to have your head down and your eyes closed. You did agree that you may have dropped off, but on review of CCTV this is not on just one occasion. During this period it is clear that the patient was not observed safely.*
- *You advised me that on this nightshift you were unwell and had requested to move back to your own ward. You reported that it is busy and you thought it would keep you more motivated. I did not accept this explanation as Hulton ward has a highly level of observations and would therefore be more demanding in terms of times you were expected to monitor patients closely.*
- *This is not an isolated incident nor only reported by one person. On 15 November Alex Kachepa had supervision with you and issued you with a file note after a number of staff had raised concerns about you sleeping on duty on Hulton ward. It is disappointing that only five days later further concerns were raised. This also gives substance to the reports from the staff and patient on 20 November 2020. [this should have said 2019]*
- *During the disciplinary meeting I felt that you lacked an understanding of the risk that you put to both yourself, the patient and the other members of the team. The patient that you were meant to be monitoring was on observations due to risk of self and others. During this time you failed in your duty as a registered nurse to ensure safe management of the management and ward.*

- *By your own admission you were aware that the other nurse on duty was unable to hold keys and as a staff 3 nurse were the most senior nurse on duty. I am not satisfied that you fulfilled nor took seriously the level of accountability that you held on this evening, nor did you act as a positive role model to the junior staff that you were leading.*

Claimant's Appeal

45. The claimant appealed this decision and that appeal was heard on 20 January 2020. The appeal hearing was chaired by Sandy Adams (SA), Hospital Director. I note the following from the appeal notes:

- (1) The claimant stated she wanted to appeal as she felt that the decision was too severe. The notes record the claimant as saying, *“the CCTV may look like I wasn’t awake but I was alert and attentive. I could see the patient at one point, when I was alleged to be asleep, I went closer to the room. I recognise I wasn’t as alert as usual as I was unwell”*. (I note here that, having reviewed the CCTV footage, it is very clear that the claimant was not alert and attentive)
- (2) Although it was recorded in the dismissal letter that the claimant had said she was “dropping off”, in her appeal she stated that she did not say that.
- (3) That although she understood that the CCTV footage may make it look as if the claimant had fallen asleep, she had not. She was struggling because she was ill but she was not asleep. She accepted that the CCTV footage shows that she was not as alert as she should have been.
- (4) That because the claimant felt worse she decided that she would take herself off observations for the rest of the night and complete work in the office.

46. The appeal was unsuccessful. I note the following from the appeal decision letter dated 31 January 2021:

“The evidence presented supports a reasonable belief that you were asleep whilst on duty and is supported by CCTV footage. Despite your assertion that you were alert and attentive to movement and noise, this does not appear to be the case throughout. As such it is evident that safe patient observations were not maintained.

You question the truthfulness and accuracy of the statements given by staff and the patient. I cannot find any reason to uphold your position that the report was inaccurate, nor could you offer any reasonable explanation as to why this would be the case. It is held in conjunction with CCTV evidence. It is my reasonable belief that the report was accurate. Additionally I am mindful that this is not an isolated report nor incident. Like conduct was addressed with you on Friday 15 November 2019 and memorialised in a file note issued by your Ward

Manager, Alex Kachepa, and signed by you. There is a pattern to your conduct.”

Falling asleep whilst undertaking observations.

47. I am satisfied, having heard evidence particularly from DM and SA, about how important patient observations are in healthcare and the crucial role that nursing professionals play in these observations. I am satisfied that the act of falling asleep whilst undertaking an observation is potentially gross misconduct. In addition to the evidence provided by DM and SA I note:-

- (1) The terms of the respondent's disciplinary policy
- (2) The terms of the communications provided to the claimant (see paragraphs 19 and 35 above)
- (3) That the claimant's colleague, EW decided that it was appropriate to raise a complaint about the claimant's behaviour in falling asleep.

What did the enhanced CCTV footage show?

48. I did not see the enhanced CCTV footage. Nor did the claimant. DM has explained that she viewed the enhanced footage and could see the claimant had her eyes closed.

49. Whilst the claimant disputes that her eyes were closed, having considered the evidence of DM on the point I believe DM's account of what the enhanced footage showed. Having viewed the (unenhanced) CCTV footage I am not surprised that the enhanced footage showed the claimant's eyes as closed. On a balance of probabilities, I find the claimant did fall asleep (but not continuously) between 2.10am and 2.30am on 21 November 2021.

The Law

50. In a case such as this, a respondent bears the burden of proving, on the balance of probabilities, the reason why it dismissed the claimant and that the reason for dismissal was one of the potentially fair reasons stated in s98(1) and (2) ERA. If the respondent fails to persuade the Employment Tribunal that it had a genuine belief in the reason and that it dismissed him for that reason, the dismissal will be unfair.

51. The reason for dismissal is a set of facts known to the respondent or a set of beliefs held by it, which caused it to dismiss the claimant.

52. If the respondent does persuade the Employment Tribunal that it held that genuine belief and that it did dismiss the claimant for one of the potentially fair

reasons, the dismissal is only potentially fair. Consideration must then be given to the general reasonableness of that dismissal, applying section 98 (4) ERA.

53. Section 98 (4) ERA provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing him. This should be determined in accordance with equity and the substantial merits of the case.

54. In considering the question of reasonableness of a dismissal, an Employment Tribunal should have regard to the decisions in *British Home Stores v. Burchell* [1980] ICR 303 EAT; Iceland **Frozen Foods Limited v. Jones** [1993] ICR 17 EAT; **Foley v. Post Office, Midland Bank plc v. Madden** [2000] IRLR 827 CA and **Sainsbury's Supermarkets v. Hitt** [2003] IRLR 23 ("Sainsbury")

55. In summary, these decisions require that an Employment Tribunal focuses on whether the respondent held an honest belief that the claimant had carried out the acts of misconduct alleged and whether it had a reasonable basis for that belief having carried out as much investigation in to the matter as was reasonable. A Tribunal should not however put itself in the position of the respondent and decide the fairness of the dismissal on what the Tribunal itself would have done. It is not for the Tribunal hearing and deciding on the case, to weigh up the evidence and substitute its own conclusion as if the Tribunal was conducting the process afresh. Instead, it is required to take a view of the matter from the standpoint of the reasonable employer.

56. The function of the Tribunal is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses. This band applies not only to the decision to dismiss but also to the procedure by which that decision was reached.

57. In relation to the adequacy of investigation, I note the following guidance :-

- (1) *"To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole"* **Shrestha v. Genesis Housing Association Limited** [2015] IRLR 399;
- (2) In relation to a misconduct dismissal *"the employer has to act fairly, but fairness does not require a forensic or quasi-judicial investigation, for which the employer is unlikely in any event to be qualified, and for*

which it may lack the means.” Santamera v. Express Cargo Forwarding [2003] IRLR 273.

58. I also note (and have taken account of) the ACAS Code of Practice on Disciplinary and Grievance Procedures and the ACAS Guide on Discipline and Grievances at work 2015.

59. When determining compensation for unfair dismissal, employment tribunals must apply s123 ERA

“s123(1)the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant n consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

....

S123(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”

60. Compensation is often (but not exclusively) reduced under just and equitable principles under s123(1):-

- (3) Where the employer can show that the employee was guilty of misconduct which would have justified dismissal, even if the employer was not aware of this at the time of the dismissal.
- (4) Where it is just and equitable to apply a “Polkey” reduction (applying the case of **Polkey v. AE Dayton Services Limited 1988 AC 344**) **s123(1).**

The second category potentially apply here as does s123(6) ERA.

61. The Polkey case made clear that where there were flaws in the processes followed by an employer leading up to dismissal then an Employment Tribunal should make a finding of unfair dismissal, even where those flaws may not have made a difference to the overall outcome (ie the employee would or may have been dismissed in any event). However, having made a finding of unfair dismissal, an Employment Tribunal must then apply section 123(1) ERA and decide what is just and equitable to award as a compensatory award, having regard to the circumstances of the particular case.

62. Provisions providing for an adjustment to the basic award are at section 122(2) ERA which requires a tribunal to reduce the amount of a basic award where it is just and equitable to do so, having regard to the claimant’s conduct before the dismissal.

Discussion and Conclusions

63. I set out below my conclusions in relation to the unfair dismissal claim as broken down into the List of Issues as identified.

64. What was the reason for the claimant's dismissal? I am satisfied that the claimant was dismissed by reason of misconduct, which is a potentially fair reason under section 98(2) of the ERA.

65. Did the respondent have a genuine belief that the claimant was guilty of the misconduct? Yes, I find that the respondent genuinely believed the claimant was asleep on observations between 2.00am and 3.00am.

66. Were there reasonable grounds upon which to base that belief? I find that the investigation was lacking in the following ways:-

- (1) TD was not interviewed even though it had decided that it was important to obtain TDs events of the night of 21/22 November 2019. Instead TD was asked to provide a written record of events, yet that written record did not make reference to events between 2.10am and 3.10am. TD should have been interviewed and specifically asked about those events
- (2) The claimant was not provided with an opportunity to review the enhanced CCTV footage at the disciplinary hearing. DM discussed the events of 21 November 2019 (including making reference to what she saw on the enhanced CCTV footage) without the claimant having seen this.

67. I have considered whether these matters impacted sufficiently to make the dismissal unfair under s98 ERA. I have decided that they did. In doing so I considered and took account of:-

- (1) the significance of the allegations against the claimant and this investigation. As the respondent made clear on a number of occasions, the matters being investigated might have impacted, not just on the claimant's employment with the respondent, but on her career as a nurse.
- (2) The fact that the respondent considered both of these lines of inquiry and evidence to have been significant enough to have followed them.
- (3) The ease with which these matters could have been dealt with by the respondent.
- (4) The fact that the claimant disputed that she was asleep- there was further evidence available, in relation to the key issue in dispute.

68. Was the dismissal procedurally fair or unfair? However, I note again my decision that the failure to undertake the 2 steps noted at 65 above impacted on the fairness of the dismissal.

69. Was dismissal within the range of reasonable responses open to the respondent? I am satisfied that the response of dismissal for the act of falling asleep whilst undertaking patient observations at the respondent hospital was within a range of reasonable responses.

Remedy

70. If the claimant's dismissal was procedurally unfair, would she have been dismissed in any event if a fair procedure had been carried out? If so, to what extent should the claimant's compensation be reduced to reflect that? (Polkey reduction) I have concluded that the procedural failings noted above would have made no difference to the outcome of the dismissal. I include here the failure to allow the claimant to review the CCTV footage and the failure to undertake an interview with TD. These are my reasons:-

- (1) I accept the evidence of DM about what the enhanced CCTV footage showed (see paragraphs 48,49 above)
- (2) TD was not in the ward/corridor for most of the time between 2.10 and 2.30am on 22 November 2019 (this is clear from the CCTV footage that I saw).

71. Applying "Polkey," section 122(2) and section 123(1), it is just and equitable to reduce by 100% the amount of a basic award and compensatory award.

72. Was the claimant's conduct before the dismissal such that it would be just and equitable to reduce the amount of the basic award to any extent under section 122(2) ERA? Was the dismissal to any extent caused or contributed to by any action of the claimant? If so, to what extent?

73. I have made a finding of fact that the claimant fell asleep whilst undertaking observations. That, in the context of the claimant's role at the respondent's hospital, was very serious misconduct. The claimant's dismissal was caused by this and, applying sections 122(2) and 123(6) it is just and equitable to reduce by 100% the amount of a basic award and compensatory award.

Employment Judge Leach
Date: 27 April 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

28 April 2021

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