EMPLOYMENT TRIBUNALS

Claimant:	**Miss Chinoye Udi**
Respondent:	**Lifeways Community Care Limited**
Heard at:	London South Employment Tribunal
On:	19th February 2021
Before:	Employment Judge A. Beale
Representation	
Claimant:	Mr A. Udi (lay representative)
Respondent:	Miss J. Wilson-Theaker (Counsel)

RESERVED JUDGMENT

1. The Claimant's claim of unfair dismissal fails and is dismissed.

2. The Claimant's claims for unlawful deductions from wages and breach of contract fail and are dismissed.

REASONS

INTRODUCTION

1. By an ET1 presented on 27 March 2020, the Claimant brought complaints of unfair dismissal, unauthorised deduction from wages and breach of contract (including a failure to pay holiday pay). The claim form also stated that a claim was made for compensation for failure to make provision for a shift rest break over 10 years of employment, and that the Claimant was owed notice pay.

2. The hearing was conducted by CVP. At the outset there were some technical difficulties which prevented the parties accessing the virtual hearing room, meaning that the hearing could not commence until 10:45 a.m. These were

ultimately resolved, and all parties and witnesses were able to be present throughout.

3. The Respondent had prepared a list of issues, which the Claimant and her representative had seen prior to the hearing. This list included issues relating to unfair dismissal and unauthorised deduction from wages, and was agreed at the outset, subject to the additional points set out in paragraph 5 below. The list did not include, and the Claimant and her representative did not raise or pursue:

   3.1 any claim for wrongful dismissal; or
   3.2 any claim relating to non-provision of a shift rest break.

4. The Claimant's representative did briefly refer to a shift rest break at the conclusion of his submissions. However, this claim played no part in the hearing before me; no evidence was adduced in support of it in the bundle or in the Claimant's witness statement, and insofar as it is pursued, it therefore fails and is dismissed.

5. Following discussion of the Respondent's list of issues at the outset of the hearing, it was amended and augmented as set out below. It was also agreed that this hearing would initially deal only with the issues set out at sub-paragraphs 5.1 – 5.5, 5.8(a) – (d) and 5.9 below, and that pure remedy issues would be dealt with, if necessary, following determination of those issues.

Unfair Dismissal

5.1 Was the Claimant dismissed for a potentially fair reason pursuant to s. 98(2)(b) ERA 1996, namely conduct?

5.2 If so, did the Respondent act reasonably in treating that conduct as a sufficient reason for dismissing the Claimant pursuant to s. 98(4) ERA 1996?

5.3 In particular:

(a) Did the Respondent form a genuine belief that the Claimant was guilty of gross misconduct? The acts relied upon by the Respondent in making a finding of gross misconduct were that the Claimant had: failed to follow the health & safety procedure in relation to fire safety for Nightingale House; falsified records by completing the waking night checks records before the end of her completed shift and failed to maintain confidentiality in accordance with the suspension rules.

(b) Did the Respondent have reasonable grounds for that belief?

(c) Was the Respondent's belief based on a reasonable investigation in all the circumstances?

5.4 Was the dismissal of the Claimant fair in all the circumstances (having regard to equity and the substantial merits of the case)? In particular, was the dismissal within the band of reasonable responses available to the Respondent?

5.5 Did the Respondent follow a fair procedure when dismissing the Claimant?

Remedy (unfair dismissal)

5.6 If the Claimant was unfairly dismissed, should compensation be awarded to the Claimant?

5.7 If so, what level of compensation should be awarded to the Claimant?

5.8 In particular:

(a) Did the Claimant's conduct cause or substantially contribute to her dismissal? If so, by what proportion would it be just and equitable to reduce the compensatory award?

(b) If the Respondent failed to follow a fair procedure, can the Respondent show that following a fair procedure would have made no difference to the decision to dismiss? If so, by how much would it be just and equitable to reduce the compensatory award?

(c) If the Respondent failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures ('the ACAS Code'), was its failure reasonable? If the Respondent's failure to comply with the ACAS Code was unreasonable, is it just and equitable to increase any award made to the Claimant? If so, by how much should the award be increased?

(d) Has the Claimant complied with the ACAS Code? If not, should any compensatory award made to the Claimant be reduced to take into account the Claimant's unreasonable failure to comply with the ACAS Code? If so, by how much should the compensatory award be reduced?

(e) To what extent, if any, has the Claimant mitigated her losses?

Unlawful deductions from wages (s.13 ERA)/Breach of Contract

5.9 Did the Respondent make an unlawful deduction from the Claimant's wages/act in breach of the Claimant's contract by not paying her in respect of her salary for the months of December 2019 and January 2020 and in respect of her accrued but untaken annual leave from 2019 and January 2020? The Claimant accepts that she was overpaid between 1 July and 13 November 2019, in that she was paid for 37.5 hours per week instead of the 20 hours per week to which she was

entitled. The Claimant does not seek to recover the monies overpaid over that period that were deducted from her wages. The matters remaining in dispute between the Claimant and the Respondent are:

(a) Was the Claimant entitled to be paid at the rate of £8.50 per hour during her suspension rather than at the rate of £8.21 per hour which was used by the Respondent? If so, did the Respondent deduct from the Claimant's wages a sum greater than the sum of the overpayments made between 1 July and 13 November 2019?

(b) Did the Claimant suffer consequential financial loss attributable to an unauthorised deduction from wages (within the meaning of s. 24(2) ERA 1996) in the form of:

i. loss of housing benefit;
ii. loss of council tax benefit;
iii. overpayment of national insurance contributions,

and if so, in what sum?

(c) Did the Claimant suffer financial loss as set out at 5.9(b) above consequential on a breach of her contract of employment, and if so, is such loss recoverable under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994?

DOCUMENTS

6. I was provided with an electronic bundle numbering 178 pages, which both parties had before them. The Claimant's representative had sent to the Tribunal an alternative p. 136 of the bundle, showing that her email of 30 October 2019 notifying the Respondent of the overpayment issue had been received, acknowledged and passed on to one of the Respondent's HR Managers. I had sight of the email and the Respondent's counsel accepted its content as correct.

WITNESSES

7. On behalf of the Respondent, I heard evidence from Venise Browne, Senior Service Manager, who dismissed the Claimant, and David Butler, Office Manager, who dealt with the overpayment issue. I heard evidence from the Claimant on her own behalf.

8. At the outset of the hearing, the Claimant's representative raised a concern that the Respondent had not exchanged witness statements in accordance with the Tribunal's order on 23 December 2020. The Respondent's solicitors indicated that they were ready to exchange during working hours on 23 December. The Claimant's witness statements were sent to the Respondent at 23:59 on 23 December. I was told, and accept, that the Respondent's solicitor was on annual leave on 24 December. It was agreed that the Respondent's witness

statements were sent to the Claimant at around 16:30 on 24 December. I have reviewed the witness statements and there was no indication that the Respondent's statements in any way took advantage of the slightly earlier receipt of the Claimant's statement (which was in any event very similar to her Grounds of Complaint in content). I accept that the Respondent's witness statements were not exchanged on 23 December because the Claimant's statements were not sent until 23:59, and in the circumstances, the Claimant was not prejudiced by the fact that the Respondent's statements were sent the day after the ordered date for exchange, which was still almost two months before the hearing.

FACTS

9. The Respondent is a company that provides support services for people with learning disabilities and mental and physical health issues in residential and community settings.

10. The Claimant was employed by the Respondent in the role of Support Worker from 12 November 2009. At the time of the relevant events, she had been working at Nightingale House in Balham, a site providing supported living accommodation to service users who reside in individual flats, for over five years. The Claimant had been on permanent night shift since 2016. Her main responsibility was to ensure the health and safety of the service users at the property during the night.

11. At the time of the relevant events, the Claimant had a clean disciplinary record.

12. As described in the Claimant's witness statement, and in Mrs Browne's oral evidence, Nightingale House is a block of nine flats distributed over five floors. Each flat has its own lounge, bedroom, kitchen, bathroom and toilet. Flat 1 on the ground floor is used by the staff, and other flats are occupied by the service users. The service users are able to move in and out of their individual flats independently and without restraint. The entrance doors to the flats are fire doors, and all parties are agreed that they must be kept closed at night.

13. The Claimant was working the night shift on 10 – 11 June 2019 with another member of support staff, JP. The Claimant was the waking night duty member of staff, and JP was the sleeping staff member, which the parties agreed meant she would only be required to wake up and undertake active duties if the Claimant required assistance.

14. The Claimant's evidence was that, by 01:15 on 11 June, she had completed most of her normal round of duty tasks in accordance with her regular work schedule, and the service users were all settled in bed. She had then gone to the staff lounge, where she switched off some of the lounge lighting, but not the light in the kitchen, to reduce the lighting in the sitting area to avoid triggering a migraine, as she had suffered a migraine for which she had attended her GP on Friday 7 June 2019. She undertook a check on the residents between 01:45

and 01:50 and they were all fine. She then returned to the staff lounge and completed some paperwork as she had already completed most of the night duty tasks. This paperwork included a document headed “Night Duties – Nightingale House” which takes the form of a checklist setting out tasks to be completed.

15. I have seen two copies of the checklist, one of which is the one completed by the Claimant on the night shift in question (p. 68); the other is the same document which has been added to by the staff on some of the subsequent night shifts (p. 69). On the second version, there are entries on Monday (the Claimant’s shift), Tuesday, Friday and Saturday. Some of the tasks listed are in generic terms, such as handover of service users, completing attendance register, checking all tenants at intervals, checking security and various domestic tasks. Others refer to specific service users by way of their initials. It was the Claimant’s evidence, which I accept, that some of the tasks on the printed sheet referred to individuals who were no longer present at Nightingale House, and that those tasks were now required for new residents whose initials were not given.

16. It is not in dispute that at some point prior to the arrival of the managers referred to below on 11 June 2019, the Claimant had filled out all of the boxes on the check list, in that she had either (a) placed a tick in the relevant box; (b) placed a cross in the relevant box or (c) written initials in the relevant box, and had also signed the list at the bottom. This included three boxes which related to tasks that were to be performed in the morning. Two of those boxes (relating to supporting tenants in the morning and recording hot water temperatures for those supported) had been filled out with the initials RW and LH. The third box, which was for handing over all information to the morning team, had been ticked. There is some dispute both as to the purpose of the checklist, and the meaning of the entry of initials into the boxes, with which I deal in subsequent paragraphs.

17. At around 02:00 or 02:15 on 11 June 2019, the Claimant’s Service Manager, Hana Hrabalova, and the Area Manager, Karen Campbell, attended Nightingale House to conduct a spot check. There was no dispute that the Respondent undertakes such checks from time to time to ensure that service users are being supported to the required standard.

18. Ms Hrabalova produced an Accident/Incident Report on 12 June 2019 (p. 72 – 75), and Ms Campbell produced a witness statement on 1 July 2019 (p. 71). Both describe that they entered the property, Ms Hrabalova says using a key fob, and went to the staff flat, which they found locked. There is no dispute that the bell to the staff flat was not working. Ms Campbell says that they knocked on the door; this is not recorded in Ms Hrabalova’s statement. The Claimant’s evidence was that she heard no knock on the door. Both managers recorded that they went out of Nightingale House to look through the windows, and observed that the light in the staff lounge was off.

19. The managers then re-entered Nightingale House and walked through the building from the ground floor up to each flat, to see whether they could find the Claimant. Both managers noted that the entrance (fire) doors to the service users' flats were slightly open or ajar. After checking each of the flats, the managers went into flat 7, which was empty as the service user had recently died, and pulled the emergency cord.

20. The Claimant's evidence was that she was coming out of the toilet at the time the intercom help buzzer came on. She rushed to the hallway to determine which flat the buzzer was coming from. She was surprised and distressed to find that it was flat 7, given that the flat was empty. She spoke to JP, who had been woken by the buzzer alarm and was concerned, and told her to wait downstairs whilst the Claimant checked on the service users. The Claimant then went through the property to check the service users were safe, and met the managers on the third floor, where flat 7 was situated.

21. Ms Hrabalova's account states that it took around 4 minutes from the time the cord was pulled before the Claimant arrived. Ms Campbell states that a period of 20 minutes elapsed. All parties agree that when asked about the delay, the Claimant explained that she had felt the need to check on other service users first as she was aware that flat 7 was empty.

22. The Claimant and the managers went down to the staff lounge. Both managers record that they found the lights off, the television on silently and that a heater was on making the room warm. The Claimant was asked whether she had been sleeping, and the lights were switched on. The Claimant explained that the lights hurt her eyes because she had, or had had (on the Claimant's account) a migraine.

23. JP, who was still awake, was instructed to go back to bed.

24. The managers then noticed the completed and signed night checklist on the table, and queried why it had been completed before the end of the shift. Different explanations have been given by the Claimant as to how she responded, which are recorded in subsequent paragraphs.

25. Ms Campbell informed the Claimant that she would be writing to her formally, which the Claimant took to refer to possible disciplinary action. The Claimant was distressed and Ms Hrabalova offered to remain with her; however Ms Campbell records that the Claimant was deemed capable to continue "for the next hour". The Claimant's case is that the managers left at 4 a.m., with four hours of her shift remaining.

26. The Claimant complains that Ms Campbell behaved in a "vexatious" and "derisive" way during these exchanges, turning on the lights after Ms Hrabalova had turned them down again, and in the tone of her questioning. The Claimant

also complains that the managers should have called her on the office landline or on her phone rather than frightening her by pulling the emergency cord in an empty flat.

27. Later on 11 June, the Claimant attended for her next night shift as normal at 21:55. The Claimant's case is that she was told by FM, the sleeping staff member on duty that night, that he had been instructed by Ms Hrabalova not to let the Claimant in as her shift had been cancelled, and cover had been arranged as the Claimant was suspended. The Claimant had not been made aware of her suspension prior to that point, although it is the Respondent's case (not supported by any evidence from Ms Hrabalova) that Ms Hrabalova had tried to contact the Claimant throughout the day. The Claimant then spoke to Ms Hrabalova on the office phone and was informed of her suspension.

28. The Claimant made an entry in the handover notes sheet stating that she had come on duty as usual at 10 p.m., and had been telephoned and asked by Ms Hrabalova to go home as she had been suspended (p. 70).

29. As noted above, an Accident & Incident Form was completed by Ms Hrabalova in connection with the events of 11 June 2019 on 12 June 2019.

30. On 13 June 2019, Ms Hrabalova wrote to the Claimant (p. 76) suspending her from duty on basic pay on the basis of the following allegations:

    (1) that during a spot check, she had failed to safeguard people the Respondent supported by not providing the waking night support in accordance with the support plan on 11 June;
    (2) that on 11 June she had failed to follow the Health & Safety procedure in relation to fire safety for Nightingale House;
    (3) that on 11 June she had falsified records by completing the Waking Night checks records before the end of the completed shift;
    (4) that on 11 June she failed to maintain confidentiality in accordance with her suspension rules.

    The Claimant was informed that these matters were being fully investigated and that she would remain on suspension until further notice.

31. On 14 June 2019, the Claimant submitted a grievance (p. 93 – 4) about the way in which Ms Hrabalova and Ms Campbell had treated her in the early hours of 11 June 2019, including in particular Ms Campbell's tone, and the use of the buzzer in flat 7. She also complained about the way in which she had been suspended.

32. On 27 June 2019, the Claimant was invited to an investigatory meeting to take place on 7 July by Lesley Atherton, Registered Manager, to consider the same allegations as were set out in the suspension letter (p. 77).

33. On 2 July 2019, the Claimant wrote to Ms Atherton requesting clarification, in the form of identification of the specific acts alleged, of all allegations other than that relating to the falsification of records (p. 77A – B). It is acknowledged by the Respondent that the Claimant received no response to this letter.

34. The investigation meeting in fact took place on 9 July 2019 at 11:15 a.m., and notes were taken which were signed by both the Claimant and Ms Atherton (p. 79 – 91). During the meeting, the Claimant produced a copy of the waking night checklist as she had completed it on 11 June 2019, which she said she had copied at Nightingale House the evening after the events in question. Ms Atherton told her that she should not have taken the form from Nightingale House.

35. In response to the allegations which ultimately resulted in her dismissal, the Claimant gave the following explanations:

    (a) In relation to allegation (2), the Claimant said that all doors to flats were shut closed. She confirmed that she was aware the doors should always be shut as they were fire doors.

    (b) In relation to allegation (3), the Claimant said that she had completed the waking night checklist at some point coming up to 1:30 a.m. She said she had written in the initials to show what needed to be done in the morning when the service users awoke. She would have ticked the initials off in the morning after the task had been completed. She had ticked the handover to morning staff in error, then she had gone to the toilet, and then the intercom had gone off and the managers were there. The Claimant said staff used to fill out what they had done within time periods, but the paperwork had changed.

    (c) In relation to allegation (4), the Claimant said that she had written in the communication book that she was suspended because she did not want anyone to think she had not turned up for her shift.

36. By email dated 10 August 2019, Sue Edwards, HR Manager South, acknowledged receipt of the Claimant's grievance, informed her that it had been passed on to the Regional Director for South England, and offered to meet with the Claimant to talk through her grievance on 27 August (p. 92).

37. On 16 August 2019, Ms Atherton produced an investigation report (p. 95- 99) in which she recommended that allegations 2 – 4 should proceed to a disciplinary hearing. She did not consider the detail of allegation 1 to be sufficiently specific to substantiate it. Her conclusions in relation to the other allegations were:

    "Allegation 2 Failed to follow Health and Safety procedure in relation to Fire Safety, there is corroborated evidence that the fire doors to the flats were not

closed securely, [the Claimant] is aware they need to be closed, there is sufficient evidence to substantiate this allegation.
Allegation 3 There is sufficient evidence to prove that the handover sheet was filled in prematurely and hence falsely. [The Claimant] has admitted to completing the record in error and signing the form. She states the initials on the form indicate who she was going to support, not that she had supported them, and that a tick would indicate a completion of the task. However no tick was placed next to the initials later. There is substantive evidence to support this allegation.
Allegation 4 Failure to maintain confidentiality in accordance with the suspension rules. [The Claimant] certainly wrote the message in the communication book, there is no physical evidence to indicate that she knew this was against suspension rules. There was a breach of confidentiality in her copying the handover sheet and taking it home. This is in breach of records and information policy and she should be aware of this policy. Therefore this allegation is substantiated."

38. On 4 September 2019, the Claimant emailed two addresses at the Respondent to inform them that she had changed her address (p. 100).

39. On 23 September 2019, the Claimant attended a meeting with Alac Pengelly, Regional Operations Director – South, to discuss her grievance (p. 107 – 113).

40. On 4 October 2019, Venise Browne wrote to the Claimant to invite her to a disciplinary hearing (p. 114 – 115). The allegations against the Claimant were:

    (1) The Claimant failed to follow the Health & Safety procedures in relation to fire safety for Nightingale House on 11 June 2019.
    (2) The Claimant falsified records by completing the waking night check records before the end of the completed shift on 11 June 2019.
    (3) The Claimant failed to maintain confidentiality in accordance with suspension rules on 12 June 2019.

41. The letter enclosed the documentation provided to Mrs Browne, which included the Accident & Incident form, Ms Campbell's statement, the Claimant's investigation interview, the communication book entry and the two waking night checklists (p. 68 – 69), as well as the investigation report and the disciplinary policy. The letter informed the Claimant that the allegations could constitute gross misconduct, and could result in her summary dismissal. The Claimant was informed of her right to be accompanied, and advised that if she wanted to have witnesses present at the meeting, she should confirm their names and contact details by 7 October 2019 so that they could be released from their duties.

42. The Claimant attended the disciplinary hearing on 11 October 2019. The meeting was conducted by Mrs Browne, accompanied by a note-taker. The Claimant attended with a colleague, Richard Akinlade. The hearing lasted from 11:20 – 13:35. Handwritten notes were taken, which were signed by the Claimant and Mrs Browne (p. 116 – 120).

43. The meeting notes are not verbatim. In response to the remaining allegations, the Claimant made the following relevant points:

    (a) Allegation 1: the Claimant said that the managers had not drawn to her attention the fact that the doors were open at the spot check. Her last check had been done before the spot check at 01:30 a.m., and she had not been aware the doors were open. The doors were self-closing fire doors which were always kept closed, and would close automatically. The Claimant and Mr Akinlade both made the point that service users could open the doors themselves and sometimes left them open when visiting other tenants.

    (b) Allegation 2: the Claimant denied falsifying the form and said Ms Cambell had given her no opportunity to explain. She had completed the document in error. She had no reason to forge the checklist. Mr Akinlade added that the checklist had no time frame.

    (c) Allegation 3: the Claimant said she had not received any information about suspension prior to attending her shift and that she had been called at the start of the shift by Ms Hrabalova to inform her. She was also asked about the copy she had taken of the waking night checklist, and agreed that she had photocopied it. She apologised for taking a copy and confirmed that she had not been aware that she should not take documents from the service.

44. The Claimant also provided a detailed written response to the allegations, which was provided to Mrs Browne (p. 121 – 125). In this document, the Claimant raised the following additional points of relevance.

    (a) Regarding allegation 1, the Claimant argued that the investigator had not inspected the condition of the doors, or looked into whether they were faulty. She noted that the statements from the managers did not state that there was any obstruction preventing the doors from shutting, in which case either all the doors were faulty, or all the service users had decided to open and not shut their doors. The Claimant also noted that no witness statement had been obtained from JP which could explain the nature of the doors, and asked who would have opened flats 2 and 7, which were empty, and should have been locked.

    (b) In relation to allegation 2, the Claimant stated that she had realised her error in completing the final boxes of the form before going to the toilet, and had taken out a blank second task list to complete, which was on the desk next to the erroneously completed form, and was seen by the managers when the came to the staff flat. She argued that the checklist was not intended to confirm that tasks had been carried out as the tasks relating to specific service users were recorded in their personal logs, which had not been completed. She pointed out that the waking night checklist produced by the Respondent (p. 69) had columns for Tuesday, Friday and Saturday but not Wednesday and Thursday completed, and argued that this supported her position on the limited importance of the document.

(c) Regarding the copying of the checklist, the Claimant argued the document did not contain any personal or medical details that could identify the service users to third parties, or any sensitive information. She considered copying the form to be justified given that she had been "harassed and accused vehemently of falsifying the record on the document".

(d) The Claimant also commented that the last substantive training she had received, apart from a course on capacity and decision making, was in 2014, and there was no record showing she had undergone record and information management training, or data protection training. I note that the Claimant's training record at p. 67 supports this position.

45. On 14 October 2019, Mrs Browne interviewed Ms Campbell and Ms Hrabalova in connection with the fire door allegation against the Claimant (p. 126 – 7). The notes of these meetings record that she asked for clarity on how the "bedroom doors" were found during the visit on 11 June 2019. Both managers responded that the doors had their latch opened, which meant they would not fully close. Ms Hrabalova confirmed that no staff had reported maintenance issues regarding the bedroom doors.

46. On 21 October 2019, FM, the sleeping member of staff who was present on the evening of 11 June 2019 when the Claimant was suspended, wrote in response to an email from Mrs Browne that Ms Hrabalova had asked him to tell the Claimant that her shift had been cancelled, but that he was unable to recall anything else.

47. On 21 October 2019, Mr Pengelly dismissed the Claimant's grievance by email. The letter informed the Claimant of her right to appeal within five days of receiving the outcome (p. 130 – 131).

48. On 24 October 2019, the Claimant emailed the Respondent's HR department and Head Office to inform them that she had been overpaid in August and September 2019, and that this had not been rectified despite repeated phone calls to the Croydon office (p. 132).

49. On the same day, the Claimant emailed Sue Edwards a letter for Mr Pengelly indicating her disappointment at the outcome of the grievance and stating her intention to appeal, but requesting a record of the interview statements before doing so (p. 133 – 134). On 30 October 2019, Ms Edwards wrote back to the Claimant to advise her that the appeal would be forwarded to another Regional Director in the group who would contact the Claimant in due course to arrange a hearing (p. 135). It is common ground that no appeal ever occurred, on the basis, the Respondent says, that the Claimant was dismissed shortly thereafter.

50. On 30 October 2019, the Claimant again wrote to the Respondent's HR department and Head Office regarding the overpayment of her wages (p. 136). She stated that, as a consequence of the overpayments, she would have to refund the local council and HMRC, and that she would be doing so if she received no written correspondence from the Respondent of the overpayment by 6 November 2019. She explained that such payments would not be

refundable, and said that in such circumstances she would not be refunding any overpayment to the Respondent. The Respondent acknowledged this email on the same day, as noted above.

51. On 13 November 2019, Mrs Browne wrote to the Claimant at her old address to inform her that she had decided summarily to dismiss the Claimant for gross misconduct, with effect from 13 November 2019. In summary, her conclusions were as follows:

    (a) Allegation 1: Mrs Browne stated that both managers had confirmed that the "bedroom doors" were found to be ajar, as the door latches were left open, and that it was apparent that this would be possible if the latches were deliberately left open on each door. There were no outstanding health and safety concerns relating to bedroom doors, and in any event it would have been the Claimant's responsibility to report these. The allegation was upheld in full and breached the Respondent's Health and Safety Procedure in relation to Fire Safety, and the Claimant's obligations to ensure service users were safe.

    (b) Allegation 2: Mrs Browne concluded that it was clear that information seen in the records at the time of the spot check was not accurate, and the allegation was upheld in full as a breach of the Respondent's Records and Information Management policy. In this connection, Mrs Browne noted that in the investigation meeting, the Claimant had said that initials were put on the form to indicate residents who would be supported and that a tick would be placed when this had been done, but no tick had been put on the form by the Claimant. She also noted that the Claimant had worked in Nightingale House for over four years and would be familiar with the documentation yet had signed the documentation before her shift and tasks were completed.

    (c) Allegation 3: Mrs Browne concluded that there was evidence to substantiate that the Claimant had written in the communication book about suspension and copied the handover sheet. She noted that the Claimant had said she had no information about her suspension and the need for confidentiality, but that the Communication Book Guidance clearly stated no personal information should be written in the book, and that the Claimant had apologised for copying service documents. She recorded that this allegation was partially upheld as the Claimant was not given full information with regard to her suspension and the need to ensure confidentiality.

52. The letter informed the Claimant of her right to appeal within 7 days of receipt of the letter.

53. Track and trace documents from Royal Mail show that the letter was not delivered and was forwarded to the National Returns Centre on 18 January 2020 (p. 140 – 141).

54. On 13 January 2020, the Claimant emailed the Respondent noting that her address had not been updated on its systems (p. 142).

55. On 21 January 2020, the Claimant emailed Ms Hrabalova to ask why she had not been paid that month, and why she had not received payment for her annual leave in 2019. Ms Hrabalova requested that David Butler look into the matter. On the same day, Mr Butler emailed the Claimant to explain that there had been a discrepancy in her final pay and confirming that she would be paid 56.5 hours annual leave on 12 February 2020 (p. 151). The Claimant queried why there was a reference to final pay, and why she had received nothing for January 2020 (p. 150). On 22 January 2020, Mr Butler emailed the Claimant attaching the dismissal letter (p. 149). The dismissal letter was sent to the Claimant by post on 22 January 2020, with a covering letter informing her that the time for her to appeal the outcome had been extended to 7 days from the date of the letter (p. 143).

56. On 27 January 2020, the Claimant emailed Mr Butler requesting a copy of her contract of employment to help her in preparing the appeal. The Claimant also sent an email to the same effect to HR on 28 January 2020, to which a response was received on the same day explaining that the contract was not held centrally and should be held locally in the office that produced it (p. 145).

57. On 29 January 2020, Mr Butler emailed the Claimant with PDF documents (which do not appear in my bundle) in response to her query (p. 147). It is the Claimant's case that these were not the correct documents. However, there is no further communication from the Claimant to this effect. The Claimant said that at the time of eventually receiving the dismissal letter, she was very upset and it took her a few days to be able to deal with the issue. She was asked why she needed her contract to be able to appeal and she could not explain anything specific with which it would have assisted, but said she wanted to know how she could help herself further. It is common ground that the Claimant did not appeal against her dismissal, or request an extension to allow her to appeal.

58. On 29 January 2020, Mr Butler wrote to the Claimant setting out an explanation of the overpayments that had been made to her, and a calculation of the total hours for which she should have been paid and the hours for which she had been paid. He explained that the Respondent had taken the decision to pay the Claimant until 22 January 2020, even thought it was the Respondent's position that the Claimant had not correctly informed the Respondent of her change of address. He stated that the Respondent would write to her with a final figure and instructions on how she could repay the money once her tax and national insurance had been recalculated. The Respondent did not in fact contact the Claimant with this information.

59. The situation at the date of the hearing was that no further payment had been made to the Claimant in respect of the period between 14 November 2019 and 22 January 2020, or in respect of her accrued annual leave, on the basis that the overpayments made to her between 1 July and 13 November 2019 more than covered these amounts. The Respondent included in the bundle a payslip showing that the Claimant continued to owe £640.38 in order fully to refund the overpayments, but this has not been recovered or sought from the Claimant (p. 161).

THE LAW

Unfair Dismissal

60. Pursuant to section 98 Employment Rights Act ('ERA') 1996, it is for the employer to show the reason for dismissal, and that it is a potentially fair reason within the meaning of section 98. A reason relating to the conduct of an employee is a fair reason within section 98(2)(b) of the Act.

61. If a fair reason can be shown, section 98(4) ERA 1996 provides that the Tribunal must consider whether the dismissal was fair or unfair, which will depend on whether in the circumstances (including the size and administrative resources of the employer), the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

62. Where the reason for the dismissal is conduct, as is alleged in the present case, it is established law that the guidelines contained in *British Home Stores Ltd –v- Burchell* [1980] ICR 303 apply. An employer must (i) establish the fact of its belief in the employee's misconduct, that the employer did believe it. There must also (ii) be reasonable grounds to sustain that belief, (iii) having carried out such investigation into the matter as was reasonable in all the circumstances of the case. A conclusion reached by the employer on a balance of probabilities is enough. Point (i) goes to the employer's reason for dismissal (where the burden of proof is on the Respondent) and points (ii) and (iii) go to the general test of fairness at section 98(4) (where there is a neutral burden of proof).

63. The Tribunal must further determine whether the sanction imposed by the employer fell within the range of reasonable responses.

64. At the stages set out at points (ii) and (iii) in paragraph 62 above, as well as paragraph 63 above, the Tribunal must consider whether the employer's conduct fell within the range of reasonable responses open to it (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439; and see *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111, where it is confirmed that this principle also applies to the investigation carried out and procedure adopted by the employer). It is not open to the Tribunal to substitute its view for that of the employer.

Unlawful Deductions from Wages

65. Section 13 ERA 1996 provides as follows:

> (1) An employer shall not make a deduction from wages of a worker employed by him unless –
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised –

(a) in one or more written terms of the contract, of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied, and if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section, an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

66. Section 14(1)(a) ERA 1996 provides that section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is reimbursement of the employer in respect of an overpayment of wages made for any reason by the employer to the worker.

67. An employee has the right to complain to an Employment Tribunal of an unlawful deduction from wages made in contravention of s. 13 pursuant to section 23(1)(a) ERA 1996.

68. Where an Employment Tribunal finds a complaint under section 23(1)(a) well-founded, it is required under s. 24(1)(a) ERA 1996 to make a declaration to that effect and order the employer to repay the amount of the deduction. Section 24(2) provides:

"Where a tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of."

Breach of Contract

69. A claim for breach of contract may be brought in the Employment Tribunal by virtue of article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, where the claim arises or is outstanding on the termination of an employee's employment.

70. The test to be applied in determining whether a particular kind of loss is too remote a consequence of a breach of contract is whether, at the time of contracting, a loss of that kind was within the parties' reasonable contemplation as a not unlikely result of a particular breach (see *Chitty on Contract*, 33rd ed., paragraph 26-121 and the cases referred to therein).

71. The burden of proof in respect of claims for unlawful deductions from wages and breach of contract lies on the Claimant.

CONCLUSIONS

The Reason for the Dismissal and "genuine belief"

72. I conclude that the reason for the Claimant's dismissal was the conduct set out in Mrs Browne's dismissal letter dated 13 November 2019. The Claimant did not put forward any other reason as to why Mrs Browne should have dismissed her, and I found Mrs Browne in general to be a credible and honest witness.

73. I further accept Mrs Browne's evidence that she genuinely believed that the Claimant had committed these acts of misconduct. Again, the Claimant did not suggest otherwise, and her witness statement and cross-examination were directed primarily at the adequacy of the investigation and the severity of the sanction, rather than the genuineness of Mrs Browne's belief.

74. Mrs Browne stated in her witness statement, and I accept, that she concluded that the Claimant had deliberately left the doors to the service users' flats open. Whilst the Respondent's counsel argued in submissions that a conclusion that the Claimant had failed to notice the open doors when checking would be sufficient to justify dismissal, that was not the conclusion Mrs Browne reached. It was clear from Mrs Browne's oral evidence that she considered this to be the most serious aspect of the Claimant's conduct. In response to a question from me about which factors she took into account in making her decision, she said *"because of the risks posed to health and safety with all the doors open, all the risk that posed at night, that's why I felt it was gross misconduct and that led me to make my decision to dismiss."* Mrs Browne says in her statement, and I accept, that she would have dismissed for this allegation alone.

75. Similarly, Mrs Browne states in her statement, and I accept, that she would have dismissed for the second allegation of falsifying the waking night checklist alone.

76. I find that Mrs Browne regarded the third allegation relating to confidentiality as less serious, and as bolstering her decision to dismiss based on the other two charges, rather than as necessarily constituting gross misconduct in its own right.

Reasonable Grounds and Reasonable Investigation

77. I deal with the issues of whether Mrs Browne had reasonable grounds for her conclusions, reached after the Respondent had carried out as much investigation as was reasonable in the circumstances, together in respect of each allegation below.

Allegation 1: fire doors left open

78. Mrs Browne had evidence from two managers who reported that, during their spot check in the early hours of 11 June, the fire doors to all the service users' flats had been found ajar or not fully shut. The Claimant agreed that the doors were fire doors, that they were self-closing and that they should always be closed at night.

79. During the disciplinary hearing, the Claimant raised legitimate questions about how the self-closing doors could have been kept open when neither manager's statement mentioned an obstruction. Mrs Browne therefore spoke to both managers, who stated, as recorded above, that the latches on the doors had been left open so they remained ajar. One of the points made by the Claimant in cross-examination was that in these interviews and indeed in the dismissal letter, Mrs Browne referred to "bedroom doors" rather than "entrance doors" to the flat, meaning that the allegation for which she had been dismissed was different from the one she thought she was answering. Whilst it is unfortunate that the wrong word was used in both the interviews and the letter, I accept Mrs Browne's evidence that this was a semantic error, and that both she and the managers were referring to the entrance doors to the flats, as the bedroom doors are not (as the Claimant agreed) fire doors, and do not have latches. The Claimant at all times prior to receiving the dismissal letter, correctly understood the allegation to relate to the flat entrance doors. I agree with the Respondent's submission that the Respondent investigated, and the Claimant had a full opportunity to respond to, the allegation for which she was in fact dismissed.

80. The Claimant also argued that a statement should have been obtained on this issue from JP, the sleeping night staff member on the shift. I accept the Respondent's position that the Claimant was given the opportunity to call witnesses, as clearly set out in the letter inviting her to the disciplinary hearing. Further, I accept Mrs Browne's evidence that there was no useful evidence JP could have given. There was no suggestion that she would have witnessed the state of the flat doors prior to or during the managers' spot check.

81. The Claimant's position in the investigation and the disciplinary hearing was that the doors were self-closing, and that she had done a check on all the service users' flats shortly before the spot check commenced and was not aware that they were open. The potential explanations for the open doors were therefore that the doors were all faulty; that all the service users had themselves opened the doors some time after the Claimant's last check; that the Claimant had not noticed all the doors being left open; that the Claimant had deliberately left the doors open, or that the managers were both somehow mistaken or lying. It was in my view reasonable for Mrs Browne to conclude, as she did, that the Claimant had deliberately left the doors open. The other explanations were highly unlikely, and Mrs Browne had checked with Ms Hrabalova that no report of a fault with the doors had been made.

82. I therefore find that Mrs Browne had reasonable grounds, reached following a reasonable investigation, for her belief that the Claimant had deliberately left the flat entrance doors open.

Allegation 2: falsifying the waking night checklist

83. There was no dispute at the time of the disciplinary hearing that the Claimant had completed and signed the checklist in the form set out at p. 68 of the bundle. This clearly did not accurately represent the tasks the Claimant had performed. However, the charge against the Claimant, which I understand Mrs Browne to have found proven, was that she had "falsified" the document. A charge of falsification would in my view require a conclusion that the Claimant intended to mislead in completing the document in the way she did.

84. I accept that it was reasonable for Mrs Browne to reject the Claimant's explanation that the initials in the two boxes relating to individual service users were filled out because she intended to tick off the initials the next day once the tasks had been completed. As was noted in the investigation, the Claimant had not in fact ticked off the initials after completing the tasks in the morning, despite remaining on site to finish her shift. There are also other examples of initials entered on the form later in the week by other staff members, which have similarly not been ticked off, indicating that the purpose of filling out the initials was to demonstrate that the tasks had been completed.

85. However, the Claimant also maintained during the investigation and the disciplinary hearing that she had completed the full form in error. She gave further detail of this in her written response to the allegations, stating that she had realised her mistake and taken out a blank checklist to start her record again, which was on the table and seen by the managers when they came into the staff lounge.

86. I understand why Mrs Browne was sceptical of the Claimant's explanation in view of the length of time she had been working for the Respondent and filling out checklists. However, it would have been a simple matter for Mrs Browne to

have asked Ms Campbell and Ms Hrabalova, when interviewing them about the doors, whether they had seen a blank checklist on the table as the Claimant asserted. It is not implausible that a night worker carrying out a routine task such as filling out a checklist could accidentally fill it out to the bottom. Mrs Browne did not ask this question, and in her oral evidence, was unable to explain why she had not done so.

87. An allegation that a document has been falsified in a care context is an extremely serious matter for the employee concerned, and it is vital that a full and fair investigation is carried out, including consideration of the employee's explanation. Thus whilst Mrs Browne had at least some reasonable grounds for reaching the conclusion she did, I find that her conclusion was not reached following as much investigation as was reasonable in the circumstances.

Allegation 3: breach of confidentiality

88. There was no dispute that the Claimant had referred to her suspension in the handover document, although Mrs Browne accepted that the Claimant had not known that this should be kept confidential. There was also no dispute that the Claimant had removed a copy of the waking night checklist from Nightingale House. In relation to both of these allegations, the issue was whether these actions constituted misconduct at all, or serious misconduct. I find that Mrs Browne had reasonable grounds, reached following a reasonable investigation for finding that the allegations were made out.

Did the Respondent follow a fair procedure?

89. The Claimant complained that the allegations made against her in the initial letter inviting her to an investigatory meeting were vague and unspecific, and that the Respondent did not respond to her email requesting clarification. I agree with these criticisms of the Respondent; however, the allegations were clarified and discussed at the investigatory meeting before the Claimant was invited to a disciplinary hearing. I do not consider that the Claimant was disadvantaged as a result of the initial lack of specificity.

90. More seriously, the letter inviting the Claimant to a disciplinary hearing referred, in relation to allegation 3, only to "failing to maintain confidentiality in relation to suspension rules". It did not reference the other alleged breach of confidentiality by the Claimant in removing a copy of the waking night checklist from Nightingale House. I have carefully reviewed the notes of the disciplinary hearing and the Claimant's response to the allegations, and I note that the Claimant was given the opportunity to, and did, respond to both aspects of this allegation both at the hearing and in writing. I therefore conclude that the Claimant was not disadvantaged by the apparent error in omitting the second part of this allegation from the invite to the disciplinary hearing.

91. As a result of the Respondent's failure to update her address in its records, the Claimant did not receive a copy of the dismissal letter until 22 January 2020, over two months after it was initially sent. The period for appealing against her dismissal had long since passed by that point. However, the Respondent offered the Claimant a further seven days to appeal, which is the period allowed in the Respondent's disciplinary policy (p. 56). I accept that the Claimant requested her contract of employment on 27 January, and did not receive a copy of it prior to the last date of the period within which she could appeal. However, I do not accept that this prevented her from appealing, and she did not in any case request an extension of time in which to do so. I find that the Claimant was offered but failed to take up the opportunity of appealing against her dismissal.

92. I find that the procedure followed by the Respondent was fair, in the sense that it fell within the range of reasonable responses.

Did the sanction of dismissal fall within the range of reasonable responses?

93. As set out above, I have found that Mrs Browne reasonably concluded that the Claimant had deliberately left open the fire doors at the entrance to the service users' flats in Nightingale House, and that she would have dismissed for this allegation alone. I accept Mrs Browne's evidence that in reaching that conclusion, she took into account the Claimant's length of service and previous good record, but in view of the severity of the potential consequences of such a breach, she decided that dismissal was the only option.

94. Taking into account all the circumstances of the case, including the fact that the Claimant denied having left the doors open, I find that the sanction of dismissal for this allegation fell within the range of reasonable responses. Although the Claimant argued that she had not received up to date training, she was clear throughout the disciplinary process that fire doors must be closed at night. The Respondent's disciplinary policy gives serious breaches of health and safety policies and procedures as an example of gross misconduct (p. 59). It was reasonable for Mrs Browne to conclude, in circumstances where the Claimant did not accept that she had committed the misconduct alleged, that her continued employment would pose an unacceptable risk to the vulnerable service users in the Respondent's care.

95. I have found that Mrs Browne's conclusion that the Claimant had falsified the waking night checklist was not reached following a reasonable investigation, and therefore dismissal for that reason would not have fallen within the range of reasonable responses.

96. Mrs Browne's own evidence was that allegation 3 was less important than the two preceding allegations. As Mrs Browne accepted that the Claimant was not aware that she should not have referred to her suspension in the handover book, it must be the case that any culpability attaching to this conduct was

limited. I also conclude that it would not have been reasonable to regard removal of the copy of the waking night checklist as gross misconduct, in circumstances where Mrs Browne appears to have accepted that the Claimant took a copy as part of her defence in the likely disciplinary proceedings, and the document does not clearly identify any service users, or contain any specific personal information.

97. However, as I have found that the Respondent's decision to dismiss for allegation 1 fell within the range of reasonable responses, the Claimant's complaint of unfair dismissal must fail.

Unlawful Deductions from Wages/Breach of Contract

98. As set out above, at the start of the hearing, the Claimant accepted that she had been overpaid by the Respondent between 1 July and 13 November 2019, and did not seek to recoup the money deducted from her final salary payment.

99. Initially, the parties remained in dispute as to whether the Claimant was entitled to be paid the waking night rate of £8.50 per hour during her suspension, rather than the £8.21 per hour basic rate she was in fact paid. However, during the course of the hearing, the Claimant's representative conceded that even if the higher rate was applicable, the Claimant had still received more than she was entitled to, as set out in the Claimant's calculations at p. 167. I did my own calculation and calculated that a gross difference of £0.29 per hour, over 20 hours per week for the period from 1 July 2019 to 22 January 2020 (29.43 weeks) would have produced a shortfall of £170.69, significantly lower than the £640.38 which the Respondent claims it is still owed. I therefore do not need to make any finding on this issue.

100. The only remaining issue is whether the Claimant has suffered consequential losses arising from an unlawful deduction from wages and/or from a breach of contract, and if so, whether she can recover such losses.

101. It is easiest to consider the second of those questions first.

102. The Claimant contends that she suffered financial losses, namely a loss of housing and council tax benefits, and a loss sustained through overpayment of national insurance, because she was overpaid between July and November 2019 and the Respondent did not rectify its error sufficiently quickly. In broad terms (without going into the detail of the Claimant's losses), I accept that position. However, those losses were sustained not as a consequence of any deduction from the Claimant's wages within the meaning of section 13 ERA 1996, but as a result of an overpayment which the Respondent was entitled to recover. Even had the Respondent not been entitled to recover the sums ultimately deducted from the Claimant's wages as an overpayment, the cessation of the Claimant's benefits and the excess national insurance did not flow from the deductions, but from the initial overpayment. The Claimant did not

therefore suffer any financial loss attributable to a deduction as defined in section 13 ERA 1996, and cannot make any claim for these losses under section 24(2) ERA 1996.

103. A similar analysis must apply to any claim for breach of contract in respect of these losses. The Claimant was paid the sums to which she was entitled – and more – over the period between 1 July and 13 November 2019. The Respondent did not act in breach of her contract by paying the excess sums which resulted in her losses. Furthermore, even had the losses flowed from a breach of contract on the part of the Respondent, cessation of housing benefit and overpayment of national insurance (which would normally be refunded by HMRC) cannot be regarded as losses that would have been within the reasonable contemplation of the parties as a not unlikely consequence of an overpayment at the time of making the contract.

104. The Claimant's claims for unauthorised deductions from wages and breach of contract must, therefore, also fail.

105. However, I note, as I did during the hearing, that the Respondent's error in overpaying the Claimant has caused her hardship through no fault of her own. The Claimant made every effort to draw the Respondent's attention to its error and it failed to act upon her emails. It would no doubt be of great assistance to the Claimant if the Respondent could set out in detail the payments actually received by the Claimant in respect of the period 1 July - 13 November 2019, as promised in Mr Butler's letter of 29 January 2020, so that the Claimant can make any necessary representations to the relevant authorities.

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Employment Judge A. Beale
Date: 25 February 2021