



EMPLOYMENT TRIBUNALS

Claimant: Miss S Flanagan

Respondent: ZMA Manchester Ltd

HELD AT: Via Cloud Video Platform (Manchester) **ON:** 5, 6, 7 April 2022

BEFORE: Employment Judge Mellor

REPRESENTATION:

Claimant: In person (assisted by her McKenzie Friend)

Respondent: Mr Roddy (advocate)

WRITTEN REASONS

1. This is a claim brought by Miss Susan Flanagan for unfair dismissal and wrongful dismissal against her former employer ZMA Manchester Ltd. Miss Flanagan has been assisted in this hearing by her sister who put the questions and made submissions on behalf of the claimant.
2. Mr Roddy represented the respondent.
3. This hearing has been conducted via CVP. I have heard live evidence from Mrs Christine Thorpe, and Mrs Rizvi for the respondent and the claimant and Ms Connell for the claimant. I have also read two additional statements produced for the claimant but not challenged by the respondent – Debra Reed and Sandra Cheedle.

The claims and issues

4. The claimant brings two claims: unfair dismissal and breach of contract/wrongful dismissal. The issues that I have to determine were set out in the list of issues at the case management hearing before EJ Leach on 13/8/21. That full list is (as set out at page 47):

Unfair Dismissal:

Reason

5. Has the respondent shown the reason or principle reason for the dismissal? The respondent says the reason was the claimant's misconduct.

6. Was it a potentially fair reason under section 98 Employment Rights Act 1996? Conduct is a potentially fair reason.

Fairness

7. Applying the test of fairness in section 98(4) did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss?
8. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The tribunal will usually decide, in particular, whether:
 - (a) the respondent genuinely believed the claimant had committed misconduct;
 - (b) were there reasonable grounds for that belief;
 - (c) At the time that belief was formed had the respondent carried out a reasonable investigation;
 - (d) the respondent followed a reasonably fair procedure;
 - (e) dismissal was within the band of reasonable responses.

Breach of contract/Wrongful dismissal

9. What was the claimant's notice period?
10. Was the claimant paid for that notice period?
11. If not can the respondent prove that the claimant was guilty of gross misconduct that entitled them to dismiss without notice?
12. I must also consider the principles of Polkey and contributory fault. The respondent saying 100% reduction for both.

Findings

13. The claimant commenced employment with the respondent on 23/11/17 and her employment was terminated summarily on 30/9/20. The claimant had an earlier period of employment with the respondent in 2016 but that is not relevant for these proceedings.
14. The claimant was a care assistant.
15. The respondent runs one residential care home called Ashley House. It is a company that employs around 20 staff. The home is an 18 bed home when it is full. This is therefore not a large employer. They do outsource their HR to a company called Supportis who have assisted the respondent throughout this process from suspending the claimant to representation in these proceedings.
16. The staff operate on day shifts and night shifts. The day shift consists of 1 senior member of staff and 2 care assistants. On the night shift there are only 2 care assistants and no senior member of staff.
17. The claimant was issued with a statement of terms and conditions [54] this provides that she was entitled to 2 weeks' notice after 2 years' service and 1 additional week for each year thereafter.
18. The claimant had a clean disciplinary record, she was considered to be a good member of staff who came up with suggestions on how operations could be

improved and she was a dedicated member of staff. There was no reason to believe that she would not have taken new instructions or training on board.

19. The contract refers to the handbook in respect of its disciplinary procedures. This can be found at [63] in the bundle. It is clear from the handbook that it was not produced particularly for this employer as it includes reference to at home services which the respondent does not provide. Nonetheless the principles contained in it would equally apply to this respondent. The claimant was not provided with a copy of this handbook until her disciplinary hearing.
20. The disciplinary rules are at [87] they do not provide a clear procedure for taking disciplinary action as they don't set out who should deal with each stage of the process. It sets out what amounts to misconduct and gross misconduct and what level of sanction might be given according to the severity of the conduct. Mrs Rizvi said she considered 1h and e to be relevant and under E 'negligence' were relevant to the conduct of the claimant.
21. The incident that led to the claimant's dismissal occurred on the shift from 10/8/20 to 11/8/20. The claimant was on shift with her colleague EM who was a new and young member of staff and still in her probationary period. Although the claimant did raise some issues with her training I find that she was considered to be competent by the registered manager; there had been no complaints about her work and the residents liked her.
22. Although the claimant was more experienced than EM the claimant did not have a line management role and she was not expected to 'supervise' EM. The staff worked as a team – this is clear from the evidence of the claimant, Linda Connolly and Christine Thorpe.
23. The way in which they worked on a shift was 'team work' and there was no key worker role i.e. neither member of staff was allocated to any one particular resident. Nor were there allocated duties so there was no clear delineation of roles between the two. They were expected to work together to cover the duties throughout the night. There was a heavy work load for both of them.
24. Although the claimant questions the numbers of staff on at night there is no evidence before me that would suggest the level of staffing is below what either Manchester City Council or the CQC would accept. I do however find that the night shift would have been busy given the amount of work that had to be done between the two of them.
25. The incident on this night involved one resident – JC – he was a resident that the registered manager thought should not have been in this home. Ashley House is an unlocked unit – that means the residents can open the external doors they are only locked by mortise locks, no keypads or other levels of security. This could not be changed because of the nature of the registration at Ashley House.
26. Mrs Thorpe had voiced to the council and social workers that she thought JC ought to be moved and she had raised this prior to 10/8/20. She explained that it took almost 2 years to have him moved out of the home due to the difficulties with policies and procedures of moving residents.

27. JC had a care plan and risk assessment. There is no clear evidence as to which care plan was available on the 10/8/20 nor is it clear that it was available to the claimant on this date. What these documents highlight is that there was a risk that JC would wander away from the home. The night care plan states that JC does not *"like his light on during the night but he likes his door closed for his own privacy and I am at risk of wandering away from the home and opening the front door"* staff are required to *"be aware that James has been known to wander at night so they should be aware of his whereabouts at all times and check on him in the night"*. The risk assessment did not include directions or requirements on how those checks were to be conducted.
28. There is a discrepancy between the two versions of the care plan, with different dates and an absence of signatures. Ms Thorpe accepted that these documents ought to be signed and was unable to explain why they were not. Whilst this is clearly an unsatisfactory answer from the Registered Manager whether, in fact, these care plans and risk assessments were updated in accordance with the dates at the bottom of the pages does not need to be resolved as a fact by me. This is because the claimant was aware that JC could wander and she was aware that he needed to be checked on.
29. It is clear from the night report that all the residents needed to be checked on throughout the night. The sheet requires the location at 8pm to be noted then has 5 columns for times to be checked before they are dressed and up.
30. What this care plan did not say was how often he needed to be checked on and as I have already indicated there was no allocation of tasks as to who should check on him. Nor does the care plan say that there was a way of checking on him in the night that did not disturb him given his dislike of the light being on or the door being open.
31. At roughly 2.30am the claimant saw JC in the corridor of the home and she escorted him back to his bedroom.
32. The night report sheet notes that JC was checked at 12.35 and asleep. He was noted as awake at 2.20 which fits with him being seen by the claimant around that time. Then the next check is 4.50am notes as asleep and again at 7.05 asleep.
33. The writing on this form is the claimant's. She has not signed this document she has written in the times and whether the residents are asleep or awake or other actions were taken in accordance with the key at the bottom.
34. The claimant could not have done all of these checks herself. She must have relied on information given to her by EM.
35. JC however was not asleep at these times. In fact he had left the care home around 2.38. he left through the laundry door and escaped through the garden by lifting a fence panel up. He was not found until 1pm the next day.
36. It goes without saying that this is a very serious safeguarding failure. His family must have been extremely distraught by this.

37. Both the claimant and EM were therefore suspended. Christine Thorpe rang the claimant twice on the 11/8/20 once to ask the claimant to prepare a written statement and the second time to suspend her. She was provided with a suspension letter on 14/8/20 [124].
38. There was then an investigation. Although it was originally due to be conducted by Christine Thorpe with Linda Connolly as a note taker that did not happen. Mrs Thorpe contracted Covid and so she was absent from work for a period of time. She did interview EM but Linda Connolly interviewed the claimant.
39. The notes from EM interview record her as having said she "*checked on him at 4am opened his bedroom door he was in his bed but the room was dark. She did inform Susan of this*". When asked how that can be given it was then known he had left she said "*I must have imagined it because the room was dark*". She later said "*I checked him*". EM walked out before the interview was concluded and that was in affect her resigning.
40. The claimant was not given a copy of these interview notes until these proceedings.
41. The claimant was interviewed by Linda Connolly and it is noted that checks were "*regular after 2.30 am by SF [the claimant] did not want to disturb JC*".
42. Although this record does not note that EM told the claimant she had checked it is clear that both investigating officers understood that to be the case. I find this because of what EM told Mrs Thorpe herself and in evidence Ms Connolly confirmed it. The reference to regular checks after 2.30 would seem to include EM.
43. The claimant's written statement (prepared at the request of Mrs Thorpe as part of the investigation) does not specifically say that EM told the claimant that she had checked. But it does say "*on further checks I think I marked JC down at 4.30 and 7.05 as sleeping as I honestly thought he was*".
44. When CT returned from Covid she literally cut and pasted 2 paragraphs from this typed statement onto a sheet of paper; she did not pass the whole statement to Supportis. She did the same for the handwritten interview notes taken by LC.
45. There was no reason for her to do this. I do not accept that confidentiality was the reason given the claimant used initials and did not identify anyone. There was nothing in the document that demanded confidentiality.
46. There was no investigation report or conclusion or findings. It is therefore unclear what conclusions were drawn or indeed who they were drawn by.
47. Mrs Thorpe did fill in an incident report form which notes after the incident the respondent took steps to change the way night shifts operated including alternating staff who checked, they have changed the night report sheet, they fixed the fence panel and according to the outcome report an extra floor mat (alarm) was put on the door that JC escaped from. I also note and find that the

document at [119-120] was filled in on or around 11/8/20 and that the decision had already been taken to begin disciplinary proceedings prior to the investigation stage. Based on Mrs Rizvi's evidence

48. The decision to escalate the matter to a disciplinary hearing was a joint decision. Both Mrs Thorpe and Mrs Rizvi were involved in that decision. This was clear from their oral evidence and their written statements when they say "we" and "our".
49. The claimant was invited to a disciplinary hearing by letter dated 26/8/20 in which she was charged with three allegations:
 - You falsified the night report
 - Failure to ensure the safety of the resident
 - Failure to complete duties in checking the resident.
50. There was no clear evidence on how these allegations came into existence. Christine Thorpe in evidence said she did not frame them and they did not come from the investigation.
51. Christine Thorpe accepted that the claimant's signature was not on the night report form, she did not sign it. On the question of falsification Mrs Thorpe in evidence said "*how can she have falsified it if she has not signed it...I am not sure where the falsifying came from*".
52. Mrs Rizvi was no clearer: she said that 'falsifying' meant EM was the person who should have signed the paper but the person who signed it wasn't the person who checked. She went on to say that she understood at the time that she had signed it, 'put her name to the sheet'. When asked where she got this understanding from she said she was told it by Christine Thorpe. That is either incorrect, or was based on a flawed conclusion.
53. I asked what documents were available to Mrs Rizvi to decide whether the matter should become disciplinary or how to frame the allegations but she was unclear. She kept on saying 'I was told' the only papers in the bundle that would indicate what documents were available to her were those in the disciplinary hearing and this did not include the EM interview notes. It did include what was referred to as the 'signed night report' but as we know it was not 'signed'.
54. Mrs Rizvi could not recall how the word 'falsified' came to be she said it was done over time with the assistance of Supportis and in the end she said it was Supportis who came up with it. The information to do this came from Christine Thorpe.
55. The claimant's disciplinary hearing was rescheduled twice. Initially because she didn't have enough time to get any one to accompany her and secondly because she had asked for some further information and documents to be sent.
56. It was originally going to be conducted by Dr Rizvi with an HR support, then it was to be done by Mohammed from Supportis, in the end it was done by RH from Supportis, alone, by telephone. The hearing took 28 minutes and she produced 4 pages of notes.

57. At this hearing the claimant did not admit to falsifying the night report – she said she acted in good faith and trusted EM. When filling out the sheet EM had done the bed check and it is usual procedure for one member of night staff to check.
58. I find that it was usual practice for the staff do to that. Christine Thorpe, the claimant, Linda Connell confirm that the staff were not expected to check one another's work. There was nothing in the claimant's job description that she was required to do that. The staff were expected to be able to rely on each other.
59. The notes do not suggest that the claimant also said EM told her JC was asleep at 7.05, although the claimant questions the veracity of these notes and I have not heard from the note taker.
60. I find she did say that EM told her. This is consistent with what she has said and what Christine Thorpe and Linda Connell understood.
61. The overview by RH makes no reference to EM having told the claimant that she had checked on him [169]
62. The claimant was dismissed by letter 24/9/20 for the conclusions set out [174] – it notes that she took EM's word in good faith but she did not allow EM to sign the report – this was never put to the claimant. RH also found that she ought to have double checked if she was signing the night report, but this is not what the standard practice was in the home and the evidence I heard was there was no reason to do this or not to trust Ellie.
63. It was found that the claimant recorded falsely that JC was asleep.
64. There is no reference to her length of service or good record or alternative sanctions in this letter.
65. I find that these were not taken into consideration.
66. In her evidence Mrs Rizvi revealed what her thinking was: *"it was because of the seriousness of the incident and because of the concerns of the family. We needed to take it seriously. I had taken advice and given the severity of what could have happened the residents are the number 1 priority. It was also to send a message to other staff members"*
67. Mrs Rizvi didn't actually speak to the claimant at all. At one point in her evidence she included the claimant's evasiveness as feeding into her decision to dismiss, although she backtracked from this later. When asked what the claimant could have done to keep her job there was no answer. Mrs Rizvi often responded to questions with '*I was getting advice from Supportis and taking legal advice*' she said that she took advice on the level of sanction that would be appropriate in 'this type of case.'
68. It was clear from her evidence that Mrs Rizvi was involved at every stage of this process, from deciding to escalate it to disciplinary to the decision to dismiss and then the appeal stage too. And I find given her answer above that the

inevitable outcome was dismissal irrespective of what the claimant and EM had done or said that night.

69. The claimant did appeal the decision, but she did not in the end attend an appeal hearing. It was determined on paper and the original decision was upheld. That decision on appeal was taken by both Mrs Rizvi and Dr Rizvi.
70. I have heard evidence of what the claimant said was inconsistent treatment, but for the purposes of this decision I do not need to make findings on those other incidents or treatment.

Relevant Law and Conclusions

71. **Section 94 of the Employment Rights Act 1996** confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that she was dismissed by the respondent under section 95, but in this case the respondent admits that it dismissed the claimant (within section 95(1)(a) of the 1996 Act) Section 98 of the 1996 Act deals with the fairness of dismissals.
72. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.
73. In this case it is not in dispute that the respondent dismissed the claimant because it believed she was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2).
74. The respondent has satisfied the requirements of section 98(2). Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.
75. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones 1982 IRLR 439**, **Sainsbury's Supermarkets Limited**

v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563).

76. I have heard submissions from both parties and I have considered those.

77. I find that Mrs Rizvi held a genuine belief that the claimant was guilty of misconduct.

78. However, I find that the investigation was flawed in that:

- Mrs Thorpe did not pass the whole of the interviews and statements to Mrs Rizvi for consideration. She cut and pasted the 'relevant' or damning parts only.
- Mrs Rizvi was involved in the decision to progress this to disciplinary even though there were separate investigating officers and the assistance of Supportis.
- There is no clear basis for the decision to frame the allegations in the way that they did. It was clear the investigating officer did not think the document had been falsified and she was not involved in drawing up the allegations.
- There does not seem to have been any consideration of the working practices or the fact that EM had admitted to telling the claimant that she had checked JC.
- On the basis of this investigation and EM's admission there was no reasonable basis for concluding that the claimant had 'falsified' anything, nor that she herself had failed to complete checks given she had understood they had been completed by her colleague.

79. The dismissal hearing itself was also flawed. Mrs Rizvi did not herself speak to the claimant. The hearing was conducted by an HR officer alone and the claimant disputed the content of those notes. Mrs Rizvi had to rely on these notes alone. The claimant tells me that she said both the 4.30 and the 7.05 checks were done by EM and given the author of those notes is not here I accept her evidence. Whilst it is right to say that she did not point this out later on, it must also be right that had Mrs Rizvi actually conducted the hearing she would have been there to hear it first-hand.

80. The claimant's case is that she acted in good faith when she was told by her colleague that JC had been checked. There is nothing in her job that requires her to check up on her colleague's work. Indeed the other members of staff all agreed that was standard practice and there was no reason why the claimant should not have trusted EM. Although the claimant herself felt that EM required more training which I shall come back to in due course.

81. There is nothing in the care plan or risk assessment that required the claimant to have double checked or done more frequent checks. The night report form didn't actually have room for there to be additional checks and I find that is because the 5 columns represent the respondent's expectations in terms of frequency of checks.

82. The respondent's position was that the claimant only mentioned that EM had told her she checked JC at the disciplinary hearing and not before. The problem with that of course is that EM herself had admitted it was she who 'checked' and it was she who told the claimant.

83. Further Mrs Rizvi in her statement said the claimant admitted to not checking on JC and had deliberately falsified the night report.
84. However, she failed to take into account that the reason the claimant did not check on JC was because EM had said she had already done it and there was no reason to doubt that. The claimant did not ever admit to falsifying the report. She admitted to filling it in but on information that she was given, which she had no reason to doubt. That does not amount to falsification if she genuinely thought the information was true.
85. It is also unclear how the claimant is said to have failed in her duty to keep JC safe to the extent it warranted summary dismissal. Whilst it is clear there were failures otherwise he would not have gone missing, the care plan and risk assessment in place only required the night staff to check on him regularly and EM said she did. The changes that have subsequently been made by the respondent, which include staff alternating the checks so no one person is relied upon, and there being an additional alarm put in place, show there were system failings that the claimant was not responsible for.
86. Further Mrs Rizvi in her evidence gave what I find to be the real reason for the claimant's dismissal. That the incident was serious, the family were concerned, and she needed to send a message. There was nothing that the claimant could have said or done to keep her job. I find that because this was such a serious incident the respondent decided that the claimant and EM would need to lose their jobs without any real consideration for who was responsible for what and whether or not any other sanction would be appropriate.
87. I have considered that this is small business, but it had the benefit of an outsourced HR provider, yet each stage of the process was tainted by Mrs Rizvi being involved and wanting the claimant to be disciplined.
88. Although the claimant did not attend the appeal I don't find that there would have been any other outcome given Mrs Rizvi's involvement and her decision that the seriousness of the situation was only going to lead to one outcome.
89. I therefore find that the decision to dismiss was not based on a reasonable investigation or process because it was pre-determined. The findings of the disciplinary hearing were flawed because they were tainted by Mrs Rizvi being involved at each stage and the conclusions were not based on the facts that were before the respondent – that EM had admitted in her interview to telling the claimant that she had checked JC.
90. This was a predetermined decision made because the respondent wanted to send a message to other staff and the family who understandably were very upset by the incident.
91. By failing to actually consider which aspects of her role and duties the claimant failed to comply with and failing to take into consideration her mitigation, length of service, and whether anything short of dismissal would have addressed the issues this decision was outside the band of reasonable responses.

92. I therefore find the claimant was unfairly dismissed by the respondent within section 98 of the Employment Rights Act.

Polkey

93. I agreed with the parties at the start of the hearing that if I concluded that the claimant had been unfairly dismissed, I should consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed, in accordance with the principles in **Polkey v AE Dayton Services Ltd [1987] UKHL 8, Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604.** I turn to this issue now.

94. The respondent submits that had a fair process been followed then there was a 100% chance that the claimant would have been dismissed. I must of course not consider what I would have done I am assessing what this employer would or might have done. I must assess the actions of the employer before me on the assumption that this time they would have acted fairly. This can extend to considering the claimant's mitigating factors and the closed mind of the respondent.

95. The respondent of course would say that it would have dismissed because its position was the incident itself was so severe that it warranted dismissal so that makes this a difficult analysis.

96. I have considered that this was a very serious safeguarding failure. There were two people on shift that night and as I have accepted and found they worked as a team. So whilst it is right to say that the claimant was relying on EM, she had herself seen JC out of bed at 2.30 and she had been working in the home for longer than EM. She was the more experienced of the two even though she did not line manage EM, she said that EM had not been sufficiently trained and she raised issues about her work. Therefore had there been a proper and fair investigation and consideration of all the surrounding including the claimant's actions that night and what role she played in JC absconding, including her interactions with EM and her concerns about EM's capability. Given they worked as a team it seems likely to me the respondent may have reached the decision that the claimant ought to be dismissed. I do not agree with Mr Roddy that there would be 100% chance of dismissal however, because of the factors that I have already found including the claimant's clean record, EM having admitted the significant aspect of the failure and Mrs Thorpe's evidence that the claimant was someone who was open to learning and training. I do find that there was a 30% chance that she would have been dismissed in the event the respondent had done everything right. This was as I have said a very significant failure in the home, the family would have rightly been very distressed, and ultimately neither the claimant nor EM picked up on JC's absence.

Contributory fault.

97. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the **Employment Rights Act 1996 Section 122(2)** provides as follows: "Where the Tribunal considers that any conduct of the complainant

before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.”

98. Section 123(6) then provides that: “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.”

99. There is a 3 stage approach when considering a deduction to the basic or compensatory award: first, identify the conduct which is said to give rise to possible contributory fault; second, decide whether that conduct is blameworthy; third, under section 123(6), ask myself whether the blameworthy conduct caused or contributed to the dismissal to any extent; and fourth, decide to what extent it is just and equitable for the award should be reduced

100. I find there was contributory fault – the claimant was on her case aware that EM was in her probationary period and she considered her not to have been properly trained, yet she also relied on what she was told by EM (although she was not required to check up on EM in the care plan or job description) if she was aware that EM hadn’t been doing the role for as long this would have been a sensible thing for her to do. In her statement and her investigation she did not give that clear account that she later gave at the disciplinary stage, which may have been because of the pressure on her but it nonetheless made it less straight forward for the respondent and in fact some it was not clear which of the checks EM had completed and if the claimant had/could/should have completed. I find that these were actions that were blameworthy and it did contribute towards her dismissal.

101. I do not agree that this contributed 100%. The claimant was not 100% blameworthy given the evidence that EM had lied and not the claimant. I find that her actions contributed 25% towards her dismissal and the basic and compensatory awards should be reduced accordingly.

Wrongful dismissal.

102. I have considered the claimants job description, the care plan and the risk assessment along with the respondent’s policy on disciplinary procedures and what amounts to gross misconduct.

103. I specifically asked Mrs Rizvi to take me to the part of the disciplinary policy that she relied on in concluding the claimant had committed gross misconduct. She pointed to sections relating to misconduct and then ‘negligence’ which may amount to gross misconduct.

104. Given my findings on the way the staff operated; that the claimant worked within those bounds; and there was no contractual requirement on her to line manage EM; and the evidence was that the respondent considered EM to be an appropriate member of staff to work night shift and could be trusted it is hard to see how the claimant breached her contract of employment. There may be things that she could have done differently as I have found in relation to Polkey and Contributory fault, but I don’t find those amounted to actions that

repudiated the contract entitling the respondent to dismiss. There was nothing to suggest in light of Christine Thorpe's evidence that she had lost trust and confidence in the claimant in fact she said the opposite.

105. I therefore find that the respondent would not have been entitled to summarily dismiss the claimant and she was entitled to her notice.

Remedy

106. I heard evidence from the claimant on the issue of her loss and she was cross examined. She explained that she had been unable to obtain a job for two reasons (a) because she was dismissed for gross misconduct and she had been without a reference. She said she had signed up to all the agencies and was actively seeking work, which of course she was required to do as part of the universal credit scheme.

107. The second reason related to her health. She has, as a consequence of her dismissal, experienced anxiety and depression which has exacerbated her fibromyalgia.

108. I accept that she has been unable to find alternative work and do not find that she has failed to mitigate her losses. She went on a training course as she was required to do with the job centre and she has had an interview for work but neither of these have produced a job.

109. Now that she has a finding of unfair dismissal she told me she thought it was likely her health would improve, and I would expect (and hope) the same. Further the stigma attached to having a gross misconduct dismissal should ease.

110. I therefore accept that she has been unable to find work since the EDT and today's date. That is 79 weeks loss of earnings.

111. I also find that she will have another few months before her health has sufficiently improved and she has processed what has happened including the outcome of this litigation. I am slightly more optimistic than the claimant and would assess it at 4 months loss. I take judicial notice of the volume of work available in the care assistant profession, it is not the lack of opportunity that is an issue rather the claimant's own health and this dismissal that it take into consideration.

112. Therefore I award:

- (a) loss of notice pay which is net £604 (although that in essence is set off against her other losses due to double recovery)
- (b) the basic award is £1,134 but I reduce that by 25% which is £850.
- (c) her loss to date is net $302 \times 79 = £23,858$ which is subject to 30% Polkey reduction = £26,700 and then 25% contributory fault = £12,524.85.
- (d) future loss of earnings 4 months = £5234.70 subject to the 30% deduction = £3664.29 and the 25% deduction = £2,748.22
- (e) loss of statutory rights £300

The total basic award is	£850
Total compensatory award is	£15,573.07

(NB. This is subject to recoupment).

Employment Judge Mellor
18th May 2022

REASONS SENT TO THE PARTIES ON
24 May 2022

FOR THE TRIBUNAL OFFICE

Notes

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.