EMPLOYMENT TRIBUNALS

Claimant: Ms L Page

Respondent: Adara Healthcare Limited

Heard at: Cambridge Employment Tribunal **On:** 6 November 2023

Before: Employment Judge Dobbie (sitting alone)

Appearances
For the Claimant: In Person
For the Respondent: chose not to attend

JUDGMENT having been sent to the parties on 21 December 2023 and written reasons having been requested on 3 January 2024 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. Following Acas Early Conciliation from 30 November 2018 to 13 January 2019, the Claimant presented a claim on 7 February 2019 claiming solely for unfair dismissal. The Claimant had been employed as a Night Care Assistant between 22 February 2013 until 31 August 2018 when she was dismissed for gross misconduct. She was paid one week's pay in lieu of notice.

2. References in square brackets below (such as [xx]) are to pages in the joint bundle provided to me.

Procedural History

3. There has been considerable delay in this matter coming to a final hearing. It was originally listed for 28 October 2019, but that listing was cancelled on the Claimant's application due to her health. It was then relisted for 28 May 2020.

4. The hearing listed for 28 May 2020 was converted to a telephone preliminary hearing for case management due to the Covid pandemic. It was then re-listed for 12-13 August 2021. That hearing was postponed on the Respondent's application due to its representative needing to attend his son's wedding on that date. Accordingly, the matter was further postponed to March 2022.

5. On 3 March 2022, EJ Brown issued an unless order that the Claimant provide an explanation for not pursuing her case, with any medical evidence in support by 24 March 2023. The Claimant replied on 25 March 2023. EJ Postle allowed the claim to continue and it was listed for 23-24 August 2023. I am not sure from the file why that listing was cancelled, but it was. Further case management orders were made and the matter was listed for 6 and 7 November 2023.

6. The Respondent's HR provider (and representative for the purposes of the proceedings) wrote to the tribunal on 3 November 2023, attaching an email to the Claimant of 2 November 2023, and stating it had made:

   "a considered decision NOT to attend the Tribunal Hearing next week. Instead, the Respondent will rely on the bundle of documents provided, and written representations (attached). There are no witness statements to submit in this case, as the staff who were at the Home at the time are no longer employed by the Respondent and are no longer contactable.".

7. The email contained a three-page document titled "Respondent's Written Representations".

8. Given that the Respondent had indicated it had made a positive decision not to attend or advance any witness evidence, I decided it was appropriate and just to proceed with the hearing in the Respondent's absence under rule 47 of the Employment Tribunal Rules of Procedure 2013 (the Rules).

9. The Claimant had not produced any witness statement on her own behalf and did not advance any witness evidence from anyone else. Despite being in breach of the case management order to provide a statement, I decided it was just and proper to treat her pleadings and an email she had provided on 24 August 2021 as her witness evidence and she swore them as true.

10. I was provided with a series of documents from the Respondent. Some of the documents had been scanned as single-sided but must have been double-sided because alternate pages were missing. I therefore asked tribunal administration to send me a full scan of the tribunal bundle to ensure I had complete copies of the relevant orders, correspondence and pleadings.

11. I was also provided with a Claimant bundle, which I also took into account.

Issues

12. The issues in the case were clarified and recorded in Employment Judge Ord's Order following the case management hearing of 28 May 2020, sent to the parties on 21 July 2020, and which was subsequently adopted by Regional Employment Judge Foxwell in his case management order of 24 August 2023 (sent to the parties on 30 August 2023). They are recorded as being:

(i) What was the reason, or if more than one reason, the principal reason, for dismissal?

(ii) Is that a potentially fair reason for dismissal (the respondent relies on the claimant's conduct)?

(iii) Following the leading case of British Home Stores Ltd v Burchell, the questions the tribunal will ask in those circumstances are:

1. Did the respondent have a genuine belief that the claimant was guilty of misconduct?
2. Did it have reasonable grounds on which to sustain that belief?
3. At the time it formed the belief, did it do so on the basis of a sufficient investigation?
4. Was the claimant dismissed for the conduct found as a result of that investigation?
5. Did the respondent act reasonably in treating that conduct as sufficient to justify the summary termination of the claimant's employment?

(iv) The further questions for the tribunal will be:

1. Is the dismissal was procedurally unfair what was the prospect of a fair dismissal taking place if a proper procedure had been followed?
2. If the claimant was unfairly dismissed was she guilty of blameworthy conduct which contributed to her dismissal?

Findings of Fact

13. The Claimant commenced working for the Respondent on 21 February 2013 as a Night Carer, 30 hours a week [35]. The night shift was from 20:30 to 08:30 with a 20-minute break per shift. [38-39]. There were four carers on the night shift for approximately 25 residents.

14. On 21 February 2013, the Claimant signed a health declaration stating she was physically and mentally fit to do the role and promised to inform the Respondent immediately if that changed [40].

15. On 7 February 2017, poor performance issues were raised with the Claimant.

16. In March 2017, further performance issues were raised with the Claimant and she was performance managed intermittently from that point onwards.

17. On 28 March 2017, the Respondent issued a formal improvement notice to the Claimant.

18. On 23 August 2017, colleagues reported to management that the Claimant was asleep on duty twice in one shift. The notes are signed by colleagues Tuffnall, Millman and Bishop (the other three staff on the night shift). In her evidence to the tribunal, the Claimant denied she was sleeping on this occasion.

19. On 24 August 2017, the Claimant's colleague (Tuffnall) reported to Janet Smith and recorded in a handwritten note that the Claimant was asleep on duty. Janet Smith asked the Claimant what was wrong and the Claimant is said to have replied "It's my leg, nothing is wrong". In evidence to the Tribunal, the Claimant

denied that she was sleeping on that occasion, merely that her leg was poor / swollen from an allergic reaction.

20. In May 2018, it was reported in internal documents that the Claimant had made vast improvements in her performance. When asked about any other issues, she said she only had personal issues. She did not mention any medical issues. This review was conducted by Janet Smith.

21. On 15 August 2018, the Claimant was under performance supervision again for *"attitude and performance"* [41]. When asked whether there were "any other issues", the form records that she replied "none".

22. On 29 August 2018, the Respondent contends that the Claimant was seen asleep in a resident's room whilst on duty. The Claimant's colleague "Jenny" reported this to manager Janet Smith, who made a handwritten note at page [43]. The manager told the colleague to take a photo of the Claimant asleep. The manager attended the home at 6am and the Claimant was awake at that time. The Claimant's manager called her into a discussion as soon as shift ended around 08:30am.

23. There are two photos of the Claimant sleeping in two different chairs [45 and 46]. One looks like a chair in a resident's room and other looks like it was taken in the lounge. The Claimant confirmed the rooms in her evidence.

24. In her evidence to me, the Claimant said of the two photos:

> "When I was doing like that I was putting my eyedrops on my eyes and I had sore eyes and during that time I was due bilateral cataract operation and very poorly and had to rest eyes whilst using successive medication and I was not aware of any CCTV at workplace I did not sign for that."… "I told them I was very poorly and they believed that I was asleep. If I was sleeping I would not be sleeping in a chair like that. I would be in bed putting a blanket on. I am not accepting I was asleep during that time…"

25. Maureen Danjuma, one of the Claimant's colleagues produced a statement on 30 August 2018 which is handwritten and signed [Page 44]. In that statement, she reports that she and her colleague Jennifer saw the Claimant asleep in a resident's room whilst she was meant to be on duty. Jennifer attempted to take a photo but Maureen did instead. This was said to be around 03:45 am. Maureen reported that the Claimant then woke up, went to lounge and continued to sleep from 04:10 until 05:45. This is consistent with the two photos being in different locations.

26. The Claimant's reply to this in the hearing to me was that:

> "I was not sleeping at all I was administering myself with eye ointment… I was then told by Jess that I have to wait for her while she went to have a smoke and said do not touch anything or the patient, just sit down. You are allowed to sit down and do not do anything without her because we work in twos. I took opportunity to put eyedrops which I had to do every two hours. She did not come back on that night and I was waiting for her and then went to sit down in lounge a few minutes later."

27. J.Patteson also produced a handwritten statement stating that J.Tuffnail and Maureen Danjuma had reported to her that the Claimant was asleep and that she witnessed the Claimant asleep herself later in the shift.

28. J.Tuffnail produced a statement stating she had seen the Claimant asleep on duty on 29 August 2018 both in the resident's room and later in the lounge.

29. In respect of J.Patteson's statement, the Claimant's explanation to me was that:

> "It's not true, she was spying on everyone. She did not like me because the way I work I am not lifting myself up but I have experience and always having to tell them they have not done the job right and commenting on them and they were also trying to ruin my reputation about my job because I cannot work. I am not saying I am God but I can work. They did not like that I was available to do overtime and work flexible hours."

30. In respect of the statements of Tuffnail and Patteson, the Claimant stated:

> "They are both conniving and covering for each other. They are always saying these things it is because I am too helpful to them so they try to criticise by saying I am sleeping that is why I am very upset but they were the ones who were sleeping but I did not have camera to prove it. I know this one will come out because they tried to ruin…"

31. On 30 August 2018, around 08:30, the shift changeover time, Janet Smith spoke to the Claimant. The Claimant records that Janet Smith shouted at her. She stated:

> "I remember she gave me dismissal letter and shouting at me and not to come back and she gritted her teeth because I insisted I will tell the whole story and she just shooed me out of the door with her mates, the big lady and pushed me outside of the door and said do not bother coming back. Then gave me the notice of misconduct letter."

32. The Claimant stated she had been shown the photograph by Janet Smith:
"Yes, she showed me the photograph and I asked where did you get this Janet and she said she took it herself and I said "you did it on the computer Janet" and keep coming to workplace out of hours. I did not realise she was spying on me. I was very innocent about what she was doing, but she was trying to catch me and some others out. She did not tell me if the others were sleeping."

33. On 31 August 2018, the Respondent wrote to the Claimant stating that she was dismissed for sleeping on duty on more than one occasion [51]. The letter read:

> "Your employment at the Shrubbery has been severely compromised by conclusive evidence of you sleeping whilst on duty and on more than one occasion. The evidence includes statements and photographs taken by other members of staff. Our duty to the welfare and safety of residents must always be our primary concern and for that reason it has been decided that your employment at the Shrubbery cannot be allowed to continue. We reserve the right to vary our disciplinary procedures in cases such as this, and therefore your employment is terminated with immediate effect."

34. In a card to a colleague in August 2018, the Claimant wrote that Janet Smith had taken the photo and edited it on the computer and it was a fake photo.

35. On 10 September 2018, the Claimant wrote to Janet Smith stating she sought an appeal and that "I am a diabetic person, I could fall asleep in a coma without knowing. If my sugar level is low or high there is a tendency I could falling asleep." In evidence to the tribunal, the Claimant stated that if she had been sleeping, which she denied, she could have ended up dead being left to sleep for four hours.

36. There was no further contact after the Claimant's appeal and no appeal process was offered or held.

37. On 25 September 2018, the Respondent made a referral in respect of the Claimant to Northampton County Council as a safeguarding / abuse concern [53-55].

38. On 2 October 2018, the Council rejected the referral and closed the matter [56].

Relevant Legal Principles

Unfair Dismissal

39. Section 98 Employment Rights Act 1996 (ERA), states:

98.— General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

40. In cases of ordinary unfair dismissal, where the employee has at least two years' service, the Respondent carries burden of proof in showing the sole or principal reason for dismissal. Then there is a neutral burden of proof as to whether the dismissal for that reason was fair or unfair in all the circumstances (Boys and Girls Welfare Society v McDonald [1996] IRLR 129).

41. I reminded myself that, following Sainsbury's Supermarket Ltd v Hitt [2003] IRLR 23 and Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, the tribunal is not asked to consider what it might regard as fair, but what a reasonable employer might consider in same circumstances. This is known as the "range of reasonable responses" test.

42. In British Leyland (UK) Ltd v Swift 1981 IRLR 91, CA, the Court of Appeal stated:

> 'The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view.'

Reason for dismissal

43. The Respondent carries the burden of proving the reason for dismissal. In this case, the Respondent says it is conduct. If that is correct, the test set out in BHS v Burchell [1980] ICR 303 applies, as was identified by EJ Ord in his CMO of 28 May 2020 (as set out above).

44. The reason for dismissal is the "set of facts known to the employer, … or of beliefs held by him, which [caused] him to dismiss the employee": per Cairns LJ in Abernethy v Mott Hay and Anderson [1974] IRLR 213, approved in W Devis & Sons Ltd v Atkins [1977] IRLR 314.

45. In the present case, Janet Smith, the decision maker was not present to give an explanation of the reasons in her mind at the material time. I have of course read the Respondent's ET3 and the contemporaneous documents carefully, especially the dismissal letter. I find on balance of probabilities that the reason is misconduct. However, I do not accept the Respondent's case that the reasons in Janet Smith's mind were all of those set out in the ET3 namely: (1) the Claimant secretly leaving her things in bags around the care home because she was homeless and had not informed the Respondent; (2) using washing machine facilities to wash her own clothes; (3) obtaining considerable sums of money from colleagues under false pretences.

46. Rather, I find that the sole or principal reason was that the Respondent believed the Claimant was sleeping on duty on the night shift of 29/30 August 2018. I make this finding because:

    46.1 The dismissal letter [at page 51] refers only to sleeping on duty.

    46.2 The statements taken by colleagues Jennifer Tuffnail, Jessica Patteson, Maureen Danjuma and Janet Smith all refer to sleeping on duty and not to any of the other matters listed by the Respondent in its ET3

47. Therefore, despite rejecting the various other reasons advanced by R, I do find that sleeping on duty was the main reason and that this is a conduct reason within s.98(2) ERA, hence a potentially fair reason.

Reasonableness of the dismissal

48. Ordinarily, a reasonable process is a requirement of a fair dismissal for conduct, as indicated by the Burchell test and principles of natural justice. However, where there is a complete breakdown in working relations, an employer may be entitled to dismiss the employee without following a procedure, on the basis that a process would be futile. This will only apply in "exceptional" cases.

49. In Polkey, Lord Bridge strongly emphasised the importance of procedural safeguards in the following passage:

"Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognised as valid by [now ERA 1996 s 98(2)]…But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action… in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation… If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment] tribunal is not permitted to ask in applying the test of reasonableness posed by [s 98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of [s 98(4)] this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under [s 98(4)] may be satisfied'.'

50. With regard to the exception / qualification in Lord Bridge's last sentence of the above passage, in Spink v Express Foods Group Ltd [1990] IRLR 320, the EAT considered that the only circumstances where Lord Bridge was envisaging that consultation would not be necessary would be in circumstances of dismissal by reason of redundancy where, for example, there might be a sudden and immediate financial crisis.

51. However, a different and broader application of this exception was made by the EAT by Choudhury P in Gallacher v Abellio Scotrail Ltd UKEATS/0027/19. In this case, the claimant was a senior manager whose relationship with her manager had deteriorated at a time of economic difficulty for the employer. Attempts to rectify this were to little avail and eventually the decision was taken to dismiss her. On the advice of HR this was done by due notice but without invoking the employer's normal disciplinary procedure. She brought a claim for unfair dismissal and the tribunal held it was an SOSR case in which there had been a breakdown of trust and confidence in the employee which, on the facts, was fair. The EAT upheld the decision. Choudhury P stated (at paragraphs 43-46):

"The fact that no procedure is followed prior to dismissal would in many cases give rise to the conclusion that the dismissal was outside the band of reasonable responses and unfair. Such procedures, including giving the employee an opportunity to make representations before dismissal and to appeal against any dismissal, are fundamental to notions of natural justice and fairness and it would be an unusual and rare case where an employee would be acting within the band of reasonable responses in dispensing with such procedures altogether… It is well-established but there may be cases, albeit rare, where the procedures may be dispensed with because they are reasonably considered by the employer to be futile in the circumstances. Such a situation is contemplated in *Polkey v Dayton* , where Lord Bridge stated as follows:

"It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under s.98(4) may be satisfied"

45. In the present case, the Tribunal expressly stated that it did not consider that any procedure would serve any useful purpose: see [254].

46. In fact, the Tribunal went further than merely concluding that the procedure would not serve any useful purpose and went on to state that "if anything it would have worsened the situation ". This Tribunal heard the evidence over a number of days and was well-placed to form views as to the position between the two protagonists at the time of the Claimant's dismissal. Its conclusion that a procedure would have "worsened" the situation was open to it in the rather unusual circumstances of this case."

52. The test is an objective one in that the Tribunal must ask whether an employer, acting reasonably, could have made the decision that it would have been futile to follow proper procedures. However, there is no requirement that the employer did in fact consider and make a deliberate choice to dispense with a procedure (Duffy v Yeomans and Partners Ltd 1995 ICR 1, CA).

Findings on reasonableness

53. I find that the Respondent's belief that the Claimant was asleep for a considerable period during her shift on 29 August 2018 was reasonable because:
    (a) Two photos clearly indicate this;
    (b) The fact that the Claimant fell asleep was reported to the manager at the time by a colleague by telephone;
    (c) Three staff members reported that the Claimant had fallen asleep and been asleep for a considerable period in written statements;
    (d) The staff accounts and photos are consistent with the Claimant being asleep in two different locations at different times on the shift; and
    (e) The Claimant had been reported for falling asleep in the past.

54. I find that it was reasonable for the Respondent to accept the various colleagues' accounts at face value and the photos - which are clear.

55. As to the reasonableness of the process, Janet Smith did speak to the Claimant about the matter on 30 August 2018 and showed her the photos. She did not have the written statements from colleagues at the time, but she clearly sought the Claimant's explanation based on what she had been told and the photos. This was not a formal meeting and even if it could be described loosely as an investigation interview, it was not sufficient to amount to a disciplinary hearing, with all the procedural safeguards that such a hearing would normally entail. It descended to an argument and Janet Smith telling the Claimant to leave and not return. Therefore, there was no fair process. The Claimant was not invited to review all of the evidence, so as to answer the charges.

56. Falling asleep on duty is very serious in the context of the Claimant's employment. Night staff are there to ensure the health and safety of residents

who are elderly and some vulnerable. There are only four Night Carers on shift to care for 25 residents. The ratios will have been assessed to ensure adequate coverage but most likely was not a generous or excessive allocation. By this I mean that it was deemed that four Night Carers were needed. The role is a safety critical role. Residents may have complex needs and are at the behest of the home when living there. The residents and their families entrust the home to care for them. The home entrusts its carers to do their jobs and remain alert on duty. The role entails a high degree of trust and confidence.

57. Therefore I find that it is within the range of reasonable responses for the misconduct in question (sleeping on duty) to be regarded as serious enough to merit dismissal. However, whilst there was an investigation of sorts (in that colleagues' statements were gathered and photos received), and some brief discussion with the Claimant, there was no disciplinary hearing. Therefore, there was no reasonable process.

58. I have therefore considered whether this is a case that falls within the narrow exception to the need to conduct a fair process as articulated in Polkey and Gallacher. I find that it is not possible to say that a fair process would have made no difference in the circumstances. The Respondent has advanced no evidence or arguments as to why this might be the case. Had the Respondent attended tribunal for the final hearing, it could have addressed the Claimant's evidence and made submissions on this issue.

59. Therefore, I find that the complete lack of any process renders the dismissal unfair in this case. I find that no reasonable employer would have taken the decision to dismiss the Claimant at the time that they did in the way the Respondent did.

Polkey reduction

60. I went on to consider what would have happened if a fair process had been conducted. I find that it is more likely than not that the Claimant would have given the same answers to the Respondent as she did to the tribunal. Namely, she would have asserted that the photos were "doctored" and that colleagues were victimising her by lying that she was asleep. She denied that she was asleep.

61. I find that it is highly likely that the answers given by the Claimant would not have been regarded as adequate by the Respondent and that the Respondent would have preferred the evidence of its staff and the photographs. I find that this would have been a reasonable conclusion, falling within the range of reasonable responses. Accordingly, I find that the Claimant is more likely than not have been dismissed fairly if a process had been followed. I consider that a fair process would have taken at least another two weeks, and that the Respondent could and would fairly have dismissed her summarily at that time.

62. Therefore, I find that the damages should be capped at two weeks' pay. The Claimant was paid one week's notice [51] so her losses are limited to one week's net pay.

63. On contribution, I find that the Claimant did contribute to her dismissal by falling asleep on duty and that it would be just and equitable under s.123(6) ERA to

reduce the compensatory award by 75% for that behaviour. I reduce the basic award by the same amount for the same reasons under s.122(2) ERA.

64. Accordingly, the Basic Award of £2,970.00 is reduced to £742.50.

65. The Compensatory Award is:
    65.1 One week's net pay: £334.30
    65.2 Loss of statutory rights: £400.00
    65.3 ACAS uplift 20% on compensatory award for failing to follow a fair process: £734.30 x 1.20 = £881.16

    TOTAL before contribution discount: £881.16

    Discount by 75% contribution = £220.29

66. Adding the Basic Award and Compensatory Award together makes a total award of (£220.29 + £742.50) = **£962.79.**

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Employment Judge Dobbie

_____

Date 22 March 2024

REASONS SENT TO THE PARTIES ON

25 March 2024

FOR THE TRIBUNAL OFFICE