



EMPLOYMENT TRIBUNALS

Claimant: Ms Lesley Collins
Respondent: Shaw Healthcare Limited
Heard at: London South Employment Tribunal (Croydon)
On: 12 and 13 March 2026
Case number: 2300863 / 2025
Before: Employment Judge M Da Costa (sitting alone)

ATTENDANCE AND REPRESENTATION:

Claimant: In person, represented by Mr Keers
Respondent: In person, represented by Mr Tudor of counsel

RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

Complaint of unfair dismissal pursuant to section 111(1) Employment Rights Act 1996 contrary to section 94 of that Act

1. The claimant's claim for unfair dismissal is not well founded and is dismissed.
2. The respondent had a potentially fair reason to dismiss the claimant within section 98(2)(b) of the Act.

3. The respondent acted fairly in dismissing the claimant for that reason because the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the claimant within the meaning of section 98(4) of that Act.

REASONS

4. The claimant worked for Shaw Healthcare Ltd, a care home provider, between 12 August 2019 and 22 October when she was dismissed for gross misconduct on 23 October 2024. She worked at the respondent's Hillside Lodge home. She became a Team Leader in February 2023.
5. The claimant brings a claim for unfair dismissal.

The Hearing

6. I heard the case on 12 and 13 March 2026.
7. Mr Tudor of counsel appeared for the respondent. For the respondent, Mr Rees, Ms Markland and Mr Vanhinsbergh gave sworn evidence.
8. Mr Keers appeared for the claimant. The claimant gave sworn evidence as did her witness Ms Sutherland.
9. At the end of the second day of evidence and after having heard submissions from both Mr Tudor and Mr Keers, I reserved judgment.

Background

10. The allegation which the disciplinary outcome letter that operated to dismiss the claimant stated to have been substantiated was that *"it is alleged that you have been sleeping on duty"*. Following the allegation, there was an investigation, followed by a disciplinary meeting, then a disciplinary outcome against which she appealed. Her appeal was not upheld. At all the meetings she was accompanied by a colleague Sally Sunderland.
11. The reason underlying the gross misconduct alleged against her is found at Appendix 1 to (which is section 6 of) the respondent's night policy which states relevantly as follows:

"Staff must not sleep whilst on duty, including breaks if taken, and must remain alert at all times to their assistance being required by Service Users or other staff. This includes staff ensuring that they do not 'rest their eyes' as it will be assumed that a member of staff found with his or her eyes closed is in fact asleep. Staff should be aware that sleeping on duty is gross misconduct for which they may be summarily dismissed, (see Disciplinary Procedure).

During quieter periods, the Team Leader should ensure that all night staff are appropriately located in a well lit and adequately ventilated area. Staff must remain vigilant and ready to respond promptly to the needs of the Service Users. Staff should remain

professional at all times and the use of blankets and cushions by staff is prohibited as this could suggest an intention to sleep.

Staff are not allowed to watch TV during their breaks as this not only can induce sleep but also can be perceived as disrespectful to Service Users.

If a member of staff feels unwell in the course of the night shift, the Team Leader should be informed immediately particularly if the member of staff intends to take medication that may affect their level of alertness.

The Disciplinary Procedure, in Appendix 2 – “Standards of Conduct and Performance” states clearly that Sleeping on Duty is an offence regarded as a Gross Misconduct which may result in Dismissal without Notice.

This is a fundamentally important issue. Staff on duty are employed to undertake their care responsibilities to our service users. Shaw healthcare managers may visit any service at any time to ensure that staff are carrying out their duties properly and are awake. Staff found to be sleeping on duty will immediately be subject to the Disciplinary Procedure, regardless of the circumstances. This type of misconduct is likely to result in dismissal.

It is the responsibility of each individual employee to ensure that they are fit and able to carry out their jobs when they report for duty. Employees must not put themselves in situations where there is an increased risk of them falling asleep.”

12. The reference to sleeping on duty is actually set out in Appendix 1 (not Appendix 2), or section 7, of the respondent’s Disciplinary Policy. It describes gross misconduct as *“misconduct of such a serious and fundamental nature that the company is justified in no longer tolerating the continued presence at the place of work”*. It then lists various specific examples of conduct which are examples of gross misconduct as defined. Amongst those, one example specifically set out is:

“Sleeping on duty except when expressly permitted, or acting contrary to the Night Policy, including behaviour which appears that an employee is asleep or has made preparation to sleep”.

13. It is this example which Ms Markland of the respondent in her witness statement (see paragraph 20 thereof) states to be the matter which in the case of the claimant amounted to gross misconduct. It is also this example which is set out in the respondent’s outcome letter dated 23 October 2024 which operated to dismiss the claimant.

14. The event which operated to begin the allegation and ensuing investigation against claimant was an email sent by an anonymous person on 27 September 2024 from an email address with “anonymous” in its address which said:

“Attached are photos of team leaders and Carers sleeping on duty and it is well known by management that they do sleep on duty at night...”.

15. Attached to that email were two attachments containing a series of photographs showing staff. By saying *“Attached are photos of team leaders and Carers sleeping on duty...”*, the email intrinsically implied that these people were asleep whilst on duty. But the email did not state which hours or days or shift times the photographs corresponded to. No date or

time stamps appear on the photographs. The first of the photographs shows a person sitting in an armchair with legs crossed and arms folded. It is taken from the right-hand side view of the person and shows only the right-hand side of their face. It can be seen in the photograph that their right eye is closed. The left eye is not in view. There is no dispute between the parties that the person in this photograph is the claimant.

16. Following the anonymous email, an investigation was launched that involved 4 staff members including the claimant. All of these were suspended on full pay on 30 September 2024. The eventual outcome was that two of these resigned and the other two, which included the complainant, were dismissed.

Anonymisation in passages below

17. Due to the principle of open justice and because the Tribunal hearing was a public hearing, I have not anonymised below the names of those persons who provided witness statements and who gave sworn evidence at the Tribunal hearing. But in passages below there are references to people who did not provide witness statements and who did not give evidence at the Tribunal hearing. I have anonymised the names of those latter people in passages below by replacing their names with initials.

Findings of fact in relation to the investigatory, disciplinary and appeal procedure

18. I set out below the train of events in the investigation, disciplinary procedure and appeal relating to the claimant. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed Final Hearing Bundle.
19. On 27 September 2024 an email was sent by an anonymous person to the respondent's commercial and human resources department, copied to the CQC, alleging discrimination in the application of the respondent's night duty policy at Hillside Lodge, to the detriment of people of African origin. The allegation was that team leaders and carers at Hillside Lodge slept on duty at night but only those of African origin were dismissed. Attached were photographs of members of staff alleged by the email to be "*sleeping on duty*" which, it was said in the email, was "*well known by management*".
20. Following that email, on 30 September 2024 the claimant was suspended on full normal pay and remuneration. It is not in dispute that one of the people displayed in the photographs attached to the email was the claimant. It is also not in dispute that three other members of staff also displayed in the photographs were investigated, with two of those (employees A and C) resigning (employee A after invitation to a disciplinary hearing) and the other (employee B) being dismissed after an investigation, disciplinary procedure and unsuccessful appeal.
21. At employee B's investigation and disciplinary hearings three photographs were shown to her. Employee B explained that one of those was not her but was another member of staff who I will call AH. This is documented on page 202. In cross-examination Mr Rees accepted that AH had been identified by employee B. On it being suggested to him that AH was the person shown in the photograph at page 105, he said that this was not established as a matter of fact and not determined definitively.

22. In cross-examination Ms Markland admitted that AH was not investigated or put through a disciplinary process. She said that management investigating the matter had not been able to corroborate the identity of AH via the photograph even after AH had been named by employee B. I find these as facts.
23. In the documentary evidence and in cross-examination of all the witnesses, the topic of who else had or had not been investigated for similar alleged sleeping on duty offences at some time prior to the proceedings commenced by the anonymous email, arose. In the claimant's disciplinary interview, she said that her guess was that a person that I will name as "CH" had taken the photograph of her at page 102 because, maliciously, CH had been wanting to *"trap"* people after CH and another person had previously been photographed asleep. In her disciplinary interview the claimant repeated this, saying that CH and that other person had been photographed sitting with their eyes closed and that this was dealt with *"in-house"*, they may have been given a warning, but they were still employed at Hillside Lodge. She said that this was *"a long time ago"*, probably over a year before the date of her disciplinary interview. She said that CH *"may have shown her"* the photograph in question. She repeated this again in her internal appeal hearing, developing it further by saying that the photograph (with the two members of staff side by side in chairs) went to the office at Hillside Lodge and was dealt with locally by way of an unofficial warning, and that the person photographed had *"made it her mission"* to photograph the person who had taken the photograph of her, and to photograph other people in similar situations, as grounds to prove that *"I'm not the only one, other people do it too"*. All this is in addition to an incident where a support worker had been dismissed for having been discovered on a night inspection sleeping on shift which according to the oral evidence of Mr Rees occurred about 6 to 8 weeks before the anonymous email investigation. In cross-examination Miss Markland did not deny that person had been dismissed but declined to give any more information about it. This is also alluded to in the claimant's supervision record at page 195 which states in relation to the issue of people sleeping *"A lot of staff close their eyes at some point – unfair is just M not the likes of CH"*.
24. The investigation was conducted by Mr Rees. He was tasked with investigating all of the people shown in the photographs accompanying the anonymous email. He interviewed them all on the same day, 03 October 2024. Based on the cross-examination of Mr Rees, I find the following as facts:
- (a) The suspension of the claimant and the process leading to her invitation to the disciplinary meeting pre-dated the involvement of Mr Rees. His involvement only began on the date on which the claimant was sent the invitation to the investigation meeting.
 - (b) There were no previous allegations against the claimant for sleeping on duty and no previous complaints about her service.
 - (c) The claimant was not provided with the anonymous email at any time during the investigatory stage.
 - (d) No special procedure in relation to anonymous allegations was drawn to Mr Rees's attention.

- (e) Mr Rees had no knowledge of the truth or otherwise of allegations of discriminatory application of the night policy in the past. He had simply been supplied by managers of the service at Hillside Lodge with the anonymous email and photographs, told by them who they thought were pictured in the photographs, and asked to conduct the investigation meetings that had been arranged. He had asked the Hillside management team and the HR department whether reports about dismissal of Africans had been provided and had been told they had not.
- (f) Mr Rees was aware that an email had been sent to the anonymous emailer asking for further details, but that no clear response was obtained other than that the time of the photos was in 2024. This was not in the investigation pack sent to the claimant.
- (g) Mr Rees made no attempt to speak to any staff who may have worked the same shifts as the claimant. This is because he took the view that it would not assist, since speaking to people who throughout 2024 may or may not have been in a position to see the claimant asleep on any given shift would not be likely to have borne fruit, since such events would have been unlikely to have been remembered.
- (h) The claimant had in her investigation meeting named two employees who may have been responsible for taking the photograph of her at page 102. Mr Rees did not approach them. But he did feel it necessary to understand whether either of those named persons were the same people who had previously taken the photograph of CH and another person asleep. The claimant refused to say in her investigation meeting who she suspected had taken the photograph of CH and another allegedly sleeping.
- (i) Mr Rees was informed that the metadata behind the anonymous email and the accompanying photographs had been checked and had revealed no date or time stamp.
- (j) After being told in the investigation interview that the furniture shown in the anonymous email of the claimant was old and had been changed since the photograph was taken, Mr Rees made no attempt to corroborate the time or date of the photograph by inquiring as to when the furniture had been changed.
- (k) In the investigation interview, Mr Rees had been told by the claimant that as far as she knew, a photograph of CH and another member of staff asleep had been taken. He had no prior knowledge of that situation and did not know whether those staff were still employed at Hillside Lodge. But, as a result of his investigation he did not recommend that CH or the person photographed with her should be further investigated for sleeping on duty or interviewed as witnesses in relation to the allegation against the claimant. This is because he felt that did not need to be explored as part of the case against the claimant. He felt that the photograph supplied, along with the night policy, were key and that these could be put to the claimant in the investigation interview.
- (l) Mr Rees said that although the date on his investigation report is 04 October 2024 and his witness statement also stated that the report was submitted to his superiors on 04 October 2024, those dates were recorded in error. I accept Mr Rees' oral evidence that he did not submit his investigation report before having seen the amendments to the investigation interview that the claimant had provided.

(m) The result was that the sum total of the evidence relied on by Mr Rees in coming to the conclusion in his investigation report in relation to the claimant, was an anonymous email with a single photograph of the claimant, without date or time stamp, allegedly taken at some point in 2024, along with the respondent's night policy and the account given by the claimant in her investigation interview.

25. The investigation report compiled by Mr Rees was short. Its conclusion was a recommendation for the matter to be heard by a disciplinary panel. Due to its brevity, it is convenient to set it out in full here, as follows:

"Megan [my note: the claimant said she preferred to be named as Megan] denied that she was asleep in the photo and said "That may have been one of those rare moments where I sat down and closed my eyes for a few seconds because I was exhausted. That photos [sic] is probably seconds". Megan initially said "yes" when asked if she was aware of the night policy but then said that she had never actually seen it and claimed that she was not aware of the section of the night policy which states:

"Staff must not sleep whilst on duty, including breaks if taken, and must remain alert at all times to their assistance being required by Service Users or other night staff. This includes staff ensuring that they do not 'rest their eyes' as it will be assumed that a member of staff found with his or her eyes closed is in fact asleep. Staff should be aware that sleeping on duty is gross misconduct for which they may be summarily dismissed, (see Disciplinary Procedure)."

When this section of the policy was put to Megan she said that she does not sleep and that the photo was likely taken by another staff member, CH, "trapping people". During the meeting I asked Megan if she was aware of any other staff sleeping on duty and she said "the entire staff team. Senior nurses" and when asked for further information Megan said that she was aware of a photo in which two staff members appeared to be asleep. She named these staff members at CH (support worker) and D (team leader) but would not say who took this photo and could not say for sure if this photo was shown to a manager."

26. I will make findings of fact below about whether on the balance of probabilities it is objectively reasonable to conclude that the claimant was asleep and/or resting her eyes when shown in the photograph from the anonymous emailer. However, I do find now as a fact that the record of the investigation meeting does not show the last sentence of the quotation immediately above to be correct. The initial record of the investigation meeting says that *"photos went to management of CH and D the Team Leader"*. But the amended record of the investigation interview as corrected by the claimant and which I am not in a position to dispute, says that CH *"may have shown photos to the management"* (namely the anonymous photos) but does not mention whether photos of CH and D allegedly sleeping were shown to the management. No evidence has been produced by the respondent or given at the Tribunal hearing by the respondent's witnesses, to the effect that CH or D were ever formally disciplined at the time that the photograph of them was taken. On the basis of what the claimant said in all of the various interviews in the whole process, and which on this particular point is unchallenged, my finding of fact is therefore that CH and D were not formally disciplined after being photographed with eyes closed.

27. Ms Markland (operations manager) chaired the disciplinary meeting with the claimant, along with Ms Clare Gibson (senior operations manager). That occurred on 18 October 2024. Based on the cross-examination of Ms Markland, I find the following as facts:
- (a) Ms Markland also chaired the disciplinary meetings with the other employees that were investigated following the anonymous email, and those were all conducted on the same day.
 - (b) Although Ms Markland did not personally take steps to corroborate any context around the photograph of the claimant at page 102, she had been aware that there was correspondence from the HR team to the anonymous emailer which had resulted in no response back. She personally did not enter into any such correspondence with that anonymous emailer.
 - (c) Ms Markland was pressed in cross-examination about whether the claimant's information as to who may have taken the photograph of her was pursued as a line of enquiry, with a view to providing more context for the photograph of the claimant. Her oral evidence was somewhat uncertain, starting with an assertion that she was "*pretty certain*" though could "*not say 100%*", that meetings were held with both people named, then saying she "*cannot recall directly*", then finally resting at "*I cannot recall a meeting being held, but as far as I am reading, it was a suspicion rather than a fact*". My finding of fact is therefore that, based on the combined oral evidence of Mr Rees and Ms Markland, the respondent did not pursue the line of enquiry provided by the claimant in terms of the names of people, as suggested by the claimant, that potentially took the photograph of her.
 - (d) Ms Markland made no attempt to clarify, via any follow-up enquiries, the timing of the photograph of the claimant. This was because she felt that the day and time of the photograph were not relevant, in view of the clear content and meaning of the night policy.
 - (e) Ms Markland was prepared to concede that the photograph of the claimant showed only one eye to be visible, so that it could not be determined with certainty that both eyes were closed. But she believed, in her view reasonably from the photograph at page 102, that both eyes would have been closed.
 - (f) In assessing the totality of the evidence after the conclusion of the disciplinary interview, Ms Markland did not place weight on the character references that the claimant had obtained. This is because she felt that the claimant's demeanour in the photograph, even if it was no more than a resting of the eyes which the policy would "*deem*" to be asleep as opposed to absolute proof of sleeping, amounted to a contravention of the night policy which demonstrated an inability in that particular moment to provide the required level of care to residents.

28. The outcome of the disciplinary hearing was that the claimant was dismissed for gross misconduct. That outcome was communicated via letter dated 23 October 2024 and attached to an email to the claimant of the same date. The “sleeping on duty” paragraph from Appendix 1 or section 7 of the respondent’s Disciplinary Policy was quoted in the letter, and the relevant company policies and contractual terms for the claimant’s role were listed. In terms of the reasoning behind the allegation of sleeping in duty being substantiated, the material aspects were explained in the letter as follows in summary:
- (a) The claimant was aware that if she was on shift at the time, it would have been a “*waking night*”, which was shared verbally with the claimant even if she had not seen the night policy.
 - (b) The claimant had not checked the company’s policies.
 - (c) The photograph of the claimant on which the allegation was based only showed one eye visible and that eye was closed.
 - (d) The claimant had explained to the Panel that for the duration of the photograph she could have blinked, which could have lasted a few seconds or been a “*long blink*”. But the disciplinary panel’s opinion was that if the shutting of the eyes was a blink, even a long blink of a few seconds, the photographer would have had to have been ready to catch the shot on either side of the blink whilst the claimant’s eyes were open, and that if the claimant had been alert either side of the blink, she would likely have seen who was taking the photograph.
 - (e) The disciplinary panel’s opinion was that the claimant appeared “*slumped and comfortable*” in the photograph.
 - (f) The disciplinary panel did not agree with the claimant’s explanation as to why her eyes may be closed in the photograph taken of her. Instead, it agreed with the allegation that she had either slept or “*rested [her] eyes*” which is in breach of the company’s night policy.
 - (g) As regards a culture of sleeping at Hillside Lodge, the claimant had explained that, naturally, people may have on occasions “*nodded off*”. “*Nodding off*” in the opinion of the disciplinary panel equated to “*resting eyes*” as prohibited by the night policy.
 - (h) As to the date on which the photograph was taken, the claimant had stated that she thought it must have been between April 2024 and the date on which she was suspended.
 - (i) The claimant had been signed off on long term sick for three months due to cancer, returning in April 2024. A welfare meeting took place on 11 March 2024 prior to return to work in which it was confirmed by the claimant that no adjustments were required apart from support with the trolley, that the claimant had said she was fit to return to work on normal duties and that Occupational Health input was not required. A return-to-work interview took place on 03 April 2024 and a risk assessment on 26 March 2024 confirming fitness to return on normal duties.

29. On 23 October 2023 the claimant appealed against her dismissal. The reasons stated for her appeal were:
- (a) The evidence provided at the disciplinary hearing did not prove the allegation against her.
 - (b) Questions asked by the claimant were not answered satisfactorily.
 - (c) The claimant was prevented from providing a suitable defence because she was denied the opportunity to present any witnesses or witness statements on her own behalf.
 - (d) The outcome was too harsh.
30. The claimant prepared a written statement ahead of the internal appeal hearing. The record of the appeal hearing shows that, substantially, she read this out at the start of the appeal hearing. The points made therein were in summary as follows:
- (a) The questions that she said had not been answered were, firstly when the photograph of her was taken, in terms of the day and time (this was to establish whether she was on shift or not at the material time, stated by her to be important because she said she got to work before her shift on most days, or the photograph could have been taken after her shift had finished). Secondly, how could the respondent establish whether she had both eyes closed? Thirdly, could the respondent tell her how long they said her eye or eyes were closed for? Fourthly, what is meant by “resting their eyes” in terms of how long the eyes need to be closed for the relevant part of the night policy to operate?
 - (b) If the claimant had been using her Dry Eyes Eyelid Spray at the time the photograph was taken, it would necessitate her to close her eyes after application and keep her eyes closed for several seconds. During those seconds she would not be asleep.
 - (c) On occasion, because of her cancer treatment, she would close her eyes to reflect on what had happened or could happen. She had on days of her medical appointments taken a few minutes after shift to sit and think about what was coming up.
 - (d) The claimant asked prior to the investigation and the disciplinary hearing if she could get witness statements and this was refused on both occasions due to privacy and confidentiality. This prevented her from mounting a suitable defence.
 - (e) Due to the nature of the evidence presented against the claimant (a single photograph with one eye closed where the duration was not proven), and also due to the fact that other people of previous occasions had been photographed with eyes closed and given informal warnings only (and still working at Hillside Lodge), the sanction of dismissal against her was overly harsh. In contrast, the other person recently discovered on a check by a member of management actually to be asleep with having to be woken, was dismissed.
 - (f) The outcome of the investigation (and therefore of the subsequent stages) was pre-determined the moment that the anonymous email was copied to the CQC.

31. Mr Vanhinsbergh was the person that chaired the internal appeal proceedings and hearing. Based on the cross-examination of Mr Vanhinsbergh, I find the following as facts:
- (a) Although no guidance of definition was provided to employees about precisely what “*resting your eyes*” means, the place where it is referenced is in the night policy. The night policy does not give a specific time scale nor any stipulated period for length of eye closure but explains the context that employees on a night shift must be alert at all times, must not make preparations to sleep or put themselves in a position where they might fall asleep.
 - (b) The respondent’s judgment that the photograph of the claimant was taken at night was based on it appearing to be dark outside, that the room looked quiet and there was nobody else in attendance.
 - (c) The respondent did not know the exact time that the photograph was taken. But if the claimant’s shift was a 12 hour shift it would have started at 8:00pm, and if the photograph had been taken between October 2023 and March 2024, it may have been dark from 5:00pm onwards. There was no evidence to establish, either way, definitively whether the claimant was on shift or not, therefore that was discounted as a mitigating factor.
 - (d) The respondent did not take steps to verify with any other person whether the claimant was on shift at the time the photograph was taken. But their judgment was that it was unlikely that she was not on shift given that she was photographed in the lounge with no other persons present, when there are adequate facilities to rest elsewhere before coming on shift.
 - (e) The possibility of a person having been able to manipulate the photograph (for example by isolating it from a continuous time lapse video recording) was not considered.
 - (f) It was the opinion of the respondent that if a person had been taking a covert picture of the claimant, she would have been, generally speaking alert and therefore would have been in a position to notice that.
 - (g) The confidentiality that the respondent was seeking to protect was the confidentiality of everybody involved in the process.
 - (h) The respondent had a zero tolerance of staff sleeping on duty, which was enforced by dismissal for gross misconduct.
 - (i) Mr Vanhinsbergh did not review the cases of CH and D before considering whether dismissal was the appropriate outcome for the claimant. But he was aware that there had been concerns that managers (this included the manager that was dismissed before events associated with the anonymous email) may not have been following the correct process for persons breaching the company night policy which could have led to a significant number of staff feeling comfortable with sleeping whilst on duty.
 - (j) The claimant’s point about potential contemplation over her medical treatment was considered as mitigation as part of the appeal but rejected.

- (k) The claimant's point about potential use of eye drops was considered as part of the appeal but also rejected. The rationale for this was that there was no eye drop dispenser in view in the photograph.
 - (l) The claimant's long standing good service, evidenced in her character references, was considered as mitigation in the appeal process.
 - (m) Mr Vanhisbergh's belief from the photograph and the transcripts of the previous internal proceedings was that the claimant was asleep, in a position that was more a resting position than a waking sitting position. His further view was that as a team leader the claimant should not have put herself in the position where she could have fallen asleep, and that the likelihood of just one of her eyes being closed was slim.
 - (n) In terms of any possibility of bias or pre-judgment, Mr Vanhinsbergh excluded this via considering the claimant's points of appeal and listening to her explanations in the appeal hearing.
32. The outcome of the appeal hearing was communicated by letter dated 06 November 2024. It listed all the heads of points of appeal that the claimant had raised. The conclusions for each were:
- (a) As to sufficiency of evidence:

The opinion of the appeal panel was that *"as a team leader the claimant should lead by example and not put [herself] in a position which could induce sleep"*. The panel believed based on the documentary evidence from the previous stages and the explanations given during the appeal hearing that the *"photograph was taken at night or evening as a window is visible which shows it to be dark outside. The Panel believe that this photograph shows you resting your eye(s) and or asleep, also shows you not alert to provide assistance, should this be required by Service Users or other staff"*.
 - (b) As to questions that the claimant had asked:

There was no evidence either way as to exact date and time of the photograph. As to other matters, clarity was given during the process as to what the company policies were and meant, and although the claimant did not agree with them, she had confirmed her understanding of the processes and procedures and the importance of following those.
 - (c) As to the allegation of a denial of obtaining witness statements:

This would have breached the confidential nature of investigations and of the disciplinary processes as outlined in the company's policy. The claimant was made aware of the option of Character references, she exercised it, and the panel did take into consideration the three character references that were obtained.
 - (d) As to harshness of sanction:

The night policy states that sleeping when on duty, including staff resting their eyes is gross misconduct for which they may be dismissed. This policy also referred staff to the company's disciplinary procedure, which lists those aspects as a disciplinary offence. The panel considered the claimant's record with the company and any possible alternatives to dismissal, such as a final warning along with the company's

night policy but believed the outcome for this allegation of gross misconduct to be reasonable.

Findings of fact about the role of the claimant's companion Ms Sutherland

33. An important issue raised was regarding the role of the companion, Sally Sutherland who accompanied the claimant in her internal investigation, disciplinary and appeal hearings. Sally Sutherland was and is an employee of the respondent and had no trade union capacity. In relation to this I find facts as follows from the documentary evidence:

(a) On 01 October 2024 the claimant was told via email by a people partner of the respondent in relation to her upcoming investigation meeting *that "although there is no legal right to a companion, we will allow you to be accompanied by a work colleague or trade union. However their attendance will be in a silent capacity only"*.

(b) At the investigation meeting of 03 October 2024, Sally Sutherland was introduced by Mr Rees as *"a companion who is here as support and in a silent capacity"*.

(c) In the letter dated 10 October 2024 that invited the claimant to her disciplinary interview, it was stated *"You have the right to be accompanied at the hearing by a fellow colleague or a trade union official if you so wish"*.

(d) At the disciplinary interview, Ms Sutherland was not introduced by the interviewing panel, but introduced herself by saying *"I'm Sally Sunderland, I'm just here as Megan's colleague to support"*. But then Ms Markland stated as follows:

"As mentioned in your letter you've got the right to be accompanied; so Sally you're accompanying. During this meeting you are, obviously, not allowed to be involved, but as I say if you want to adjourn then just let us know".

(e) In the letter dated 25 October 2024 inviting the claimant to her appeal meeting, it was stated that *"You have the right to be accompanied at the hearing by a colleague or a trade union official. Please confirm back to me via email whether you wish to be accompanied and if so, who you wish to be accompanied by so that we may make arrangements in this regard"*.

(f) At the internal appeal hearing, the following exchange occurred:

"MV: Okay, and we've also got Emma who's for the purpose of this meeting is literally taking the minutes. And from your side I notice you've got Sally with you, is that correct?"

SS: Yeah, I'm here.

MV: Hi, Sally. Are you aware of what your role is in this. That you're to observe and to listen. You're not to ask questions or be involved in the direct appeal process. Do you understand what your role in this is?"

SS: Yeah, we were going to ask what exactly my role is.

MV: That is your role. You're here to offer support to your colleague, but you're not here to answer questions. So, you can't do that on her behalf. She has to answer them herself.

SS: Can I ask you why that is?

MV: Because that's the policy and that's what we've had all the way through. We tend to...what happens is we need to understand your thoughts and where you are on it, Megan, and not Sally's ideas and suggestions. So, it has to come from you and through you, not through the third party. That would also be the same if you had a union rep, for example. They wouldn't be able to ask questions or partake on your behalf. We would assume that you'd had them conversations before the Appeal Hearing, but what you can do is you can ask at any time during the course of this meeting, you can ask to take a break and suspend, and communicating anything you want to and then come back, if you feel that works. You've, obviously, got the right to do that if you want to. Okay.

SS: Okay."

(g) The respondent's disciplinary policy and procedure states materially as follows:

In relation to investigations:

"Employees have no legal right to be accompanied at an investigatory meeting, but Shaw healthcare will normally allow employees to be accompanied by a work colleague or trade union representative, provided that person is in attendance in a silent capacity and that there is no consequent delay."

In relation to disciplinary hearings and internal appeal hearings:

"The employee's chosen companion may address the meeting but may not answer questions on the employee's behalf unless the employee is not present."

And

"Appendix 2 – procedure at a disciplinary hearing

[...]

2. Employee (or their representative)

Presents own case / response to allegations".

34. In relation to the matter of the role of Ms Sutherland, I find facts as follows from the cross-examination of the witnesses:

(a) Ms Markland's understanding at the time of the disciplinary hearing was that Ms Sutherland should be present in a supportive role. But by the time of the date of the Tribunal hearing, she had come to realise that Ms Sutherland could have played a more active role.

- (b) Ms Markland accepted at the Tribunal hearing that the restriction from playing a more active role was not in accordance with the Acas Code on Disciplinary and Grievance Procedures, and that at the time of the disciplinary hearing that had been an oversight on her part.
 - (c) Ms Markland accepted at the Tribunal hearing that the restriction of Ms Sutherland from playing a more active part was not in accordance with the respondent's company policy.
 - (d) Mr Vanhinsbergh felt that although he did not quote the relevant part of the Acas Code verbatim, his wider explanations as quoted above, as well as the conduct of the interview itself as a matter of fact, complied with it in spirit because Ms Sutherland was not actively persuaded not to participate actively, the critical aspect that a companion is not permitted to ask questions for the employee so as to prevent them from explaining their case on their own behalf was in his opinion in compliance with the Code, the respondent's policy that the companion is not there to answer questions on behalf of the employee was complied with, there was a clearly expressed allowance to break and suspend for the purposes of conferring, and Ms Sutherland had the opportunity to sum up on the claimant's behalf if she had chosen to.
 - (e) Ms Sutherland had no communications with the claimant before any of the investigation, disciplinary and internal appeal hearings about whether she could do anything to assist the claimant present her case during those meetings. This was because she was told at all times that she was there in a silent capacity only. She assumed that if it would be otherwise, she would be guided through what she was permitted to do.
35. My findings of fact in relation to the point about the role of the claimant's companion Ms Sutherland are:
- (a) Ms Markland at the disciplinary interview failed to make clear to the claimant and to Ms Sutherland that Ms Sutherland was permitted to put and sum up the claimant's case and respond on the claimant's behalf to any views expressed in the interview. However, she did make it clear that by adjourning, Ms Sutherland would be able to confer with the claimant during the interview. I make the same finding in relation to Mr Vanhinsbergh in the internal appeal hearing.
 - (b) The reason why Ms Sutherland and the claimant did not make arrangements before the various internal hearings to discuss how Ms Sutherland might present and sum up the claimant's case was firstly that the claimant was not permitted to speak to other staff in advance of the various hearings, and secondly that what she and the claimant were expressly told (namely that the role was a silent one) had the effect of dissuading, subjectively in their minds, from any active participation.
 - (c) However, nothing that the respondent did or said at any time had the effect of preventing the claimant and Ms Sutherland from being fully aware that they could break during any of the hearings, for the purposes of conferring.

Findings of fact about the claimant's ability to call witnesses

36. Another important issue raised was whether the claimant was permitted to arrange for and present witnesses on her behalf at any or all stages of the proceedings. On this point I make the following findings of fact:
- (a) Prior to the investigation meeting, nothing was said or done by the respondent that prevented the claimant from calling witnesses on her own behalf. Although she was expressly forbidden in writing by the respondent's people partner from "*attend[ing] any of Shaw's premises or contact[ing] any employee of Shaw during [the] suspension period, without the prior permission of [the named people partner] or [the claimant's] service manager*", this would not have prevented the claimant from asking for permission to name specific people as witnesses. The claimant failed to do that.
 - (b) The reason for the prohibition quoted immediately above was to preserve the confidentiality and evidential integrity of the proceedings as a whole.
 - (c) Although it may in practice have been difficult for the claimant to name specific people as witnesses without having been provided in advance with the date and time of the alleged offence of sleeping on duty, this would not have prevented the claimant from naming which people she worked with regularly on shifts and asking for them to be contacted to verify whether they had ever witnessed her sleeping or resting with eyes closed whilst on duty. The claimant failed to do that.
 - (d) Prior to the disciplinary hearing, the claimant wrote by email to the respondent saying "*I will need to contacts [sic] some of my work colleagues to get witness statements from them, to say that I do not sleep, do I have permission to do this please?*"
 - (e) In response, the respondent wrote back by email saying "*we do not authorise you to reach out to staff at this time for witness statements. Investigation and Disciplinary's [sic] are a confidential process therefore, you cannot discuss this matter with your colleagues. If you did this would be a breach of confidentiality, which may result in a separate disciplinary procedures [sic]*". The email also said: "*To avoid a possible breach of confidentiality you can give the Panel members the names of staff that you feel would be able to provide witness statements and the Panel can discuss this further with you, during your hearing*".
 - (f) It is therefore clear to me that the claimant was not prevented from seeking witness statements ahead of the disciplinary hearing. It is clear to me that she was provided in writing with the mechanism by which she could do that, and that mechanism would have enabled her to obtain statements from her colleagues as to her wakefulness on duty. The claimant failed to take advantage of that opportunity. Instead, she took the opportunity to obtain character statements.

Findings of fact about whether the claimant was aware of the night policy

37. Another significant matter raised is what was or was not the claimant's awareness of the respondent company policies, specifically the night policy.

38. In the minutes of the investigation meeting as amended by the claimant, her account of her awareness of the respondent's night policy was as follows:

"DR: Are you aware of the night policy?"

MC: Yes. The actual policy I have never seen. The first time I saw it was when the incident blew up with the support worker after there was a night inspection. And then all of a sudden there is a printed copy of the night policy everywhere.

DR: So in your employment you have never seen it?

MC: I have never seen it, and never been given a copy."

39. When asked during her disciplinary meeting whether she had ever read the night policy, the exchange went like this:

"MC: The only time, the first time I saw the night policy was after M was caught asleep on duty by H. That's the first time, there was a copy of the night policy circulated around Hillside. Other than that I have never seen it.",

and

"HM: Okay, so, as a night worker you were never aware that there was a night policy or you had never read it.

MC: I had never seen it. I mean, I was aware it was a waking night, but I've never seen the policy or anything written down to give me any information. You know, there's nothing...I've never seen the policy.

HM: Okay. Do you feel that it would be your responsibility to check the policies?

MC: Well, there's probably a policy for pretty much everything, isn't there, but I can't say that I have ever looked at them, no."

And at another point in answer to how she knew it was a "waking night" if she had not read the night policy,

"Yeah, because people had said it's a waking night. It's a verbal thing. People have always said it's a waking night. That doesn't mean to say I've seen the policy".

40. In the disciplinary hearing, the claimant referenced a specific part of the night policy that said that slots should be identified and recorded for each member of staff when they would be able to take their rest break, to be taken on a designated unit or floor or in an agreed rest area. In answer to the suggestion in that same hearing that as a team leader she should be aware of the policies, she answered by saying that never in 3 years before she became a team leader had she been allocated a break. Under cross-examination at the Tribunal hearing, the claimant admitted that she was not a junior member of staff. She said that, on a practical level, there was insufficient time to sit and read all the company policies word for word and learn them word for word. Her view was that her role was to look after the residents. She was clear in her evidence that her job was very busy. She said that, by word of mouth, she understood that she was not allowed to sleep but that

she had *“never seen the night policy until after another resident was caught on a night inspection”*. She said that a few weeks after that event was when the night policy was distributed, which was around September 2024. My note in answer to a question I asked her as to whether the policy was distributed before or after she was investigated for this alleged sleeping on duty was this:

“At the time I read..., that was after it was distributed yes – that was previous to me being suspended – I have no idea when the photo was taken so I do not know when I was accused of it – I do believe it was a long time before because that furniture in the room was very different from what it was at time policy was distributed.”

41. At page 191 there appears a supervision log for the claimant, which is dated 30 September 2024, the same day on which the claimant was suspended. It is signed by the claimant and by her supervisor. This document does not mention the suspension. It talks about the claimant’s wellbeing generally, her biggest achievement since her last supervision (which was getting back to work after her illness), about how she displays the values of the organisation, about staffing challenges and about outstanding e-learning that needed to be done because there was no time at night to sit down and do it. It specifically talks about the night policy needing to be followed, as an action for the claimant to do. It appears to me that this document must have been completed before the claimant had become aware of her suspension.
42. My finding of fact in relation to whether the claimant had read the night policy is this. There is an inherent contradictory tension, running in like measure through both the claimant’s documentary evidence in the appeal bundle and her evidence in cross-examination, between an assertion that she had *“seen”* the night policy and that she had never read it. Further, on the occasion when she explained the anecdotal nature of knowledge about the *“waking night”* she said she did not *“see”* the policy. This is inconsistent with the rest of her evidence. The night policy as disclosed in the final hearing bundle is a mere 5 pages long and is set out in clear and accessible terms. In my view, in the quote set out in paragraph 40 above from her oral evidence there is a slip of her tongue when she mentions *“I read”* which could indicate the true position, and the next part of the evidence does not fit with the first part of it, making it appear as though it could be a distraction. In the context of the evidence as a whole, and taking into account the circumstances in which the night policy was distributed and the fine line, if any between the claimant having *“seen”* and *“read”* it, I find it more likely than not that the claimant was fully aware of the contents of the night policy, and of its full significance, at the time that she was suspended, meaning that it is more likely than not in my judgment that she had previously read it, even if just fleetingly. I find that the significance of the policy in terms of *“resting eyes”* would have been obvious even from a fleeting reading.

Findings of fact about whether there was a culture of sleeping at night

43. A further matter which is significant and which was raised is whether there was at Hillside Lodge, where the claimant worked, a culture of staff feeling it acceptable to sleep or rest whilst on night duty. My findings of fact on this point are as follows:
 - (a) In her investigation meeting, the claimant said that *“everyone has closed their eyes at some point. But no one sleeps on my shift”*. She also said *“people do sleep and some doze off. Some are worse than others”*. Following a line of questioning about the allegation that the claimant was asleep in the anonymous photograph and in answer

to the question *"is there anyone else that sleeps on duty"*, she said *"The entire staff, the senior nurses"*.

- (b) In her disciplinary interview, the claimant was asked whether there was a culture of sleeping at night. She answered that *"it depends what you call sleeping"*. She then explained that in her view there is a difference between sleeping and sitting in a chair because one has been so busy. She said: *"have people ever nodded, of course they've nodded"*.
 - (c) In the supervision log at page 195, evidence about problems of a culture of sleeping is clear. In the *"additional comments"* section, it is written *"a lot of people close their eyes at some point – unfair its [sic] just M not the likes of CH"* and *"No sleeping at night, [then an asterisk] * well you will sack half our night staff"* followed by a record of what should be done if a person is found sleeping. This document was not put to the claimant in cross-examination. But in my opinion, it is more likely than not that, taken together with the evidence in totality, the comment about *"you will sack half our night staff"* is a record of an impromptu comment by the claimant.
 - (d) Mr Vanhinsburgh was clear in his oral evidence at the Tribunal that a culture of sleeping had developed at Hillside Lodge.
44. Taking all the above together, my finding is that in the place where the claimant had worked, there had arisen a significant problem about staff being comfortable about sleeping, or at the very least resting with eyes closed and/or napping or dozing, and that this represented a complacency around adherence to the company's night policy.

Findings of fact as to whether, on an objective basis, it is rational and reasonably arguable to conclude that the claimant breached the respondent's night policy

45. Detailed findings have been made above as to whether the claimant was aware of the contents of the respondent's night policy, and as to whether there was a culture of sleeping or resting/dozing, therefore are not repeated here. However, in terms of what the anonymous photograph of the claimant actually shows, the claimant's evidence can be summarised as follows:
- (a) In the investigation interview that the claimant was not asleep but that her *"eyes"* (plural) were shut for a few seconds because she was exhausted, but she was *"not out for the count"* and that *"all I can say, is my eyes caught up with me"*.
 - (b) In the disciplinary interview, that she is sat in an armchair for the *"second when that photograph was being taken my eyes are closed"* but that the photograph actually only shows one eye so cannot prove that the other eye is not open; that she could have blinked when the photograph was taken, or that she *"could have literally sat in the chair and gone, oh"* (the suggestion being that this was a resting pause of a few seconds. She said here that she was not *"slumped"* in the chair. She also conceded in this interview that if on a night shift she had finished all her work in the office, she would sometimes sit in an armchair for 5 minutes.
 - (c) Also in the disciplinary interview, that it is possible that people on a night shift could have *"been sitting in a chair because you've been so busy and all of a sudden you've"*

gone, oh God, and it catches up with you", and that people on night shifts had nodded off.

- (d) Also in the disciplinary interview, that her eyes being closed could have been accounted for by her having just put in eye drops.
 - (e) In the internal disciplinary appeal hearing, repeating the fact that only one eye is visible and the potential about eye drops. Adding here also that another explanation could be that she was momentarily contemplating her illness, or that she may not have been on shift at all at the time (the photograph possibly being before or after her shift started). Repeating here that she does not appear to be *"slumped"* in the photograph.
46. In cross-examination the claimant repeated her assertion that the photograph could show her simply sitting in a chair *"for a few minutes"* and *"taking a deep breath, gosh that was a busy half hour"*. When it was put to her that comments, such as *"my eyes caught up with me"* were illustrative of her having fallen asleep and trying to justify it, she denied this. She attempted to retract the points in the documents where she had said there was a culture of sleeping. She also said that the photograph possibly showed *"a rare moment maybe where I had caught up with work so went to sit in the lounge to maybe have my break"*. It was put to her that her account in the investigation interview was of a fundamentally different character than her account later in the disciplinary and internal appeal hearings, and that her account of not being on shift at all, of the eye drops and the contemplation were added only after she had had enough time to invent new explanations that, if they had been true, she could have advanced at the start. She denied all of this. It was also put to her, as it was put to her in the internal disciplinary interview, that the photograph was taken from beside her at horizontal level and short range instead of from a covert viewpoint and angle, and that it would not have been feasible for her **not** to have noticed the shot being taken if she were in an awake and alert state. She denied this, repeating that if a person had been scrolling on their phone, seemingly innocently but with an underlying malicious intent, they could have transferred to camera mode unnoticed and taken a shot quickly, unnoticed at a moment when her eyes were closed for a few seconds.
47. My overarching finding of fact is that it is more likely than not, that the claimant was either sleeping or resting with her eyes closed for much more than a period of a few seconds. In finding this, I take into account that the claimant's consistent evidence both documentary and oral was that her night shift was extremely busy, and that the supervision report complains of staff shortages. I consider it inherently unlikely that a person could reasonably have taken the photograph when the claimant had been alert, and not in a state of rest. I do not consider that the photograph shows the claimant *"slumped"*, but I do consider that the photograph shows a semi-reclining position and to that extent is consistent with the claimant having a rest with both eyes closed, and that it is not therefore unreasonable for a conclusion to be drawn that when doing so the claimant was asleep or *"napping"*. I consider that the claimant's alternative explanations put forward in the internal disciplinary proceedings are inconsistent with her oral admission in cross-examination that she could have been resting in a break, and that this oral admission is also internally inconsistent with her assertion in oral evidence that the photograph could represent a momentary *"deep breath"* state. I agree with the cross-examination suggestion that she could and should have raised any alternative explanations at the first opportunity at the investigation meeting. I find it inherently unlikely, given the posture shown and the lack of sight of any dispensing vessel, that the photograph represents recovering from the sting

of eye drops. I also find it inherently unlikely that one eye would be closed and another open. Finally, I find it entirely consistent with the claimant's clear admissions in the documentary evidence that there was a culture of, at the very least resting with eyes closed or dozing/napping, that she was resting for a period of at least some extended minutes with eyes closed and that she could have in that state easily fallen asleep.

48. My findings immediately above support a proposition that a conclusion that the claimant breached the respondent's night policy is not unreasonable but is rationally arguable. The policy is crystal clear that "sleeping on duty" includes not being alert at all times to assistance being required by service users or other staff, and that the policy prohibits not only actually being asleep but resting with eyes closed. The policy is also crystal clear that the intention behind the policy is for staff not to put themselves in a position where there is an increased risk of falling asleep. Again, in my view it is not an irrational and unreasonable conclusion from the totality of the evidence, including the oral evidence at the tribunal hearing, that the claimant put herself in exactly that position. It may fairly be said that, in the context of a 12-hour shift which involved gruelling work along with understaffing issues, a policy that prohibits "resting one's eyes" could be described as unrealistic, or even draconian. But be that as it may, it is not for the Tribunal to arbitrate on the propriety or desirability of employers' policies. The Tribunal must respect employers' ability to enforce their policies and must avoid any subjective opinion about whether those policies are good or not. The Tribunal does not dispute that the claimant was a dedicated and valuable employee. But that is no part of the factual matrix of whether it is rational to conclude that her actions were in breach of a company policy on one particular occasion.

The relevant law – unfair dismissal

49. Section 94 of the Employment Rights Act 1996 gives employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to an employment tribunal under section 111. A claimant must show that they were dismissed by the respondent under section 95.
50. Section 98 of the 1996 Act deals with the fairness of dismissals. 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.
51. 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.
52. In misconduct dismissals, there is well-established guidance 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, 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).

The relevant law – ACAS Code

53. ACAS has produced a statutory code of practice on disciplinary and grievance procedures. In the foreword that Code states as follows:

“The Acas statutory Code of Practice [...] provides basic practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace.

[...]

A failure to follow the Code does not, in itself, make a person or organisation liable to proceedings. However, employment tribunals will take the Code into account when considering relevant cases.”

54. In the section of the Acas Code dealing with allowing the employee to be accompanied by a companion in a disciplinary meeting, where that could result in a formal warning being issued, the taking of some other disciplinary action or the confirmation of a warning or some other disciplinary action (appeal hearings), it is stated that workers have a statutory right to be accompanied by a fellow worker, a trade union representative, or an official employed by a trade union. In that section it is stated relevantly as follows:

“The companion should be allowed to address the hearing to put and sum up the worker’s case, respond on behalf of the worker to any views expressed at the meeting and confer with the worker during the hearing. The companion does not, however, have the right to answer questions on the worker’s behalf, address the hearing if the worker does not wish it or prevent the worker from explaining their case.”

Application of the law to the facts, discussion and conclusions

55. I deal first with the Acas Code aspect because that has a bearing on the analysis about unfair dismissal.
56. I made findings of fact above in relation to the role of Ms Sutherland in the claimant’s disciplinary and appeal hearings. On the basis of those findings, there was in my judgment a clear breach of the Acas Code. The breach did not constitute the entirety of the passage from the Code quoted above. It was confined to a failure to allow Ms Sutherland to address the hearings so as to put and sum up the claimant’s case, and to respond on behalf of the claimant to any views expressed at the meetings.
57. I will address below the weight that I attach to that breach, in the context of the respondent’s conduct as a whole as it relates to the unfair dismissal analysis.

58. I now make the unfair dismissal analysis.
59. In this case the respondent admits that it dismissed the claimant on 23 October 2024. Therefore section 95 is satisfied.
60. There is no dispute that the respondent has shown the reason for the dismissal – namely an alleged breach of the respondent's night policy. There is also no dispute that the respondent has shown that this was a potentially fair reason for the dismissal within section 98(2), since it related to the conduct of the claimant. The respondent contended that the claimant's breach constituted gross misconduct as defined in its disciplinary and grievance policy. Therefore sections 98(1) and (2) are satisfied.
61. The question in this case is whether the section 98(4) test for unfairness is made out, in light of the Burchell criteria.

Genuine belief

62. Mr Tudor for the respondent submitted that Ms Markland of the respondent explained her findings and her belief in paragraphs 18 and 19 of her witness statement and maintained the same in cross-examination. The submissions of Mr Keers for the claimant did not in fact challenge the aspect of whether the respondent's belief was **genuine in the mind of the respondent**. Instead, they focused on the reliability of the evidence relied on by the respondent and the alleged unfairness of the proceedings as a whole.
63. I accept the submission of Mr Tudor in relation to genuine belief. The respondent's belief in summary was that the claimant had either slept or rested her eyes whilst on duty which was in breach of the night policy. I add that the reasoning set out at paragraph 28 above displays in my judgment that Ms Markland came to that belief by reaching cogent and rational conclusions based on the evidence before her at the date of her decision. In light of the cogent and rational nature of the findings that Ms Markland made, coupled with my findings above as to whether the claimant was aware of the night policy, whether there was a culture of sleeping at night, and whether on an objective basis it is reasonable to conclude that the claimant breached the respondent's night policy, I find that the belief that Ms Markland held as to the claimant's misconduct was genuine and was within the band of reasonable responses open to an employer in the respondent's circumstances. In relation to the lack of a date and time stamp for the photograph, I note in making my finding that the claimant had not by the time of the disciplinary interview (indeed not until the appeal hearing) suggested that she had **not** been on shift at the time that the photograph might have been taken, and had herself suggested that the photograph must have been taken after her return to work from illness in April 2024.
64. In submissions for the respondent, Mr Tudor made a number of points arguing for the reasonableness of the basis for the respondent's decision that the night policy had been breached. In summary, this was based on the claimant's admissions at an early stage of the process that the photograph may have represented one of the rare moments when her eyes may have been closed because she was exhausted, that her account in the later stages following the investigation stage was fundamentally different, and that her later explanations were not consistent with the reality of the situation.

I agree. My findings in paragraphs 45 to 48 above are similar.

65. Mr Keers' submission for the claimant was that a single photograph lacking context and devoid of temporal and situational markers, capturing only a fleeting moment and incapable of providing insight into the events preceding or following it, is inherently doubtful as to whether it portrayed the claimant in breach of the night policy.

I disagree. In my judgment, it was within the band of reasonable responses for the respondent to rely on the appearance of what the photograph showed, taken together with the context of the known culture of sleeping, the statement in the anonymous email that all the 4 members of staff photographed were sleeping, and the apparent failure of the claimant to provide satisfactory explanations to the contrary.

The reasonableness of the investigation and the procedures followed during the investigation and the disciplinary and the appeal proceedings

66. Mr Tudor's submissions regarding the fairness of the wider procedure were brief and targeted. In essence, his key points were the following:

(a) The claimant had at all times the opportunity to put forward her case.

I agree.

(b) The fact that the anonymous email was never provided to the claimant had no material effect on her ability to rebut the respondent's case against her because the email contained just 2 key allegations, that of sleeping on duty which was levelled at her and others, and that of taking photographs of other people which she was never accused of, and she was at all times given the full opportunity to provide an explanation as to the first.

I agree.

(c) In terms of the lack of availability of witness statements, again this made no material difference because it would likely not have assisted her case in any way because it was, just in practical terms, unlikely that a person would have been found to say she had not been sleeping in the instant pictures in the photograph.

On this point, my finding above was that, in fact, ahead of the disciplinary interview the claimant was **told in terms** that she could provide names of witnesses that the respondent would follow up. Therefore, in my view there was no material prevention by the respondent.

(d) The fact that the email was anonymous is not a failing, nor an unfairness. The complaint was a whistleblowing complaint and therefore the informant had a right to remain anonymous because they justifiably feared repercussions.

On this point, I agree that the informer had a right to remain anonymous with a view to preventing the danger of reprisal. This is particularly so because it is clear from the evidence in totality that there was significant tit-for-tat activity around the night policy in terms of people accused taking reprisal photographs of other people, which was becoming toxic. It was therefore in my judgment within the band of reasonable responses for the respondent to protect the confidentiality of all parties. That said, the

respondent could have approached CH and D in person to seek further context and ask them if they knew about the photograph of the claimant whilst assuring them that their anonymity would be protected if it were they that had taken the photograph.

- (e) As to the complaint that Ms Sutherland was denied the right to summarise the claimant's case, Ms Sutherland's oral evidence was that she had no plans to do so anyway. Therefore, there was no prejudice to the claimant. Moreover, even if an ideal employer may have allowed Ms Sutherland to participate more extensively, the Acas Code (where it does not relate to the participation of union representative where the legal requirement is strict) is guidance and so a breach does not necessarily vitiate the validity of the whole process.

Whilst I agree with Mr Tudor's point about an Acas Code breach not necessarily being fatal, I do not agree with his application of this to Ms Sutherland. In my judgment, it is not possible to assess what Ms Sutherland may or may not have done in the absence of her knowledge at the time of what her full rights were.

- (f) The other 3 members of staff reported by the anonymous email were all treated in the same way apart from one person who could not be identified, although efforts were made to do so.

I agree.

- 67. The submissions of Mr Keers for the claimant as to the alleged unfairness of the investigation, disciplinary proceedings and appeal procedure can be summarised as follows:

- (a) The overarching defects, in thematic terms, were inadequacy of the evidential foundation for the allegations, a lack of procedural fairness afforded to the claimant, and a lack of consistency and integrity with which the respondent applied its policies.

I will explain below that, whilst there were some deficiencies, in totality the fairness of the investigation and disciplinary process was in my judgment not fatally compromised.

- (b) The anonymous photograph was unsupported by supplementary documentation, context or eyewitness testimony, which the Acas Code of Practice says is inherently problematic and should be approached with caution because it cannot be effectively challenged, and for the respondent and the Tribunal to accept it undermines integrity and transparency.

I disagree. Whilst as I will explain below the respondent could have made further enquiries, it was in my judgment within the band of reasonable responses for the respondent to rely on the photograph, the assertion in the anonymous email and the claimant's various assertions in interviews as a reliable basis for making the decision that it made.

- (c) The anonymous email is not trustworthy because it alleges uniform disadvantageous treatment of employees of African origin under the night policy but the evidence at the

Tribunal revealed that one such person was never disciplined for the same offence and remains employed.

I disagree. There is no clear evidence in front of the Tribunal as to what happened in the cases of CH and D and, even if it is true that they were not disciplined, it is clear that at a later date there was an escalation of a problem of contravention of the night policy. It was in my judgment within the band of reasonable responses for the respondent to take steps to correct the culture that was escalating. If that were not so because the respondent would be bound by previous unsuitable disposals of similar allegations, the respondent would effectively be barred from enforcing its night policy, which would be an unreasonable position for it to be placed in.

- (d) There is a stark contrast to the respondent's case being built on the word of an unidentified accuser whose allegations were not substantiated and the claimant whose references showed proven and impeccable character.

I disagree. I think this submission is misconceived because the comparison is not, in principle, like for like. In the context of a finding of gross misconduct, there is no requirement for the respondent to dilute the finding, whereas an unidentified accuser can still provide reliable evidence.

- (e) None of the respondent's three witnesses at the Tribunal hearing were able to confirm when the photograph was taken and no date was provided in the anonymous email. In this context, the absence of any effort to interview relevant individuals identified by the claimant, was a serious deficiency that undermined the credibility of the respondent's entire process because it was a missed opportunity to gather evidence, whether inculpatory or exculpatory.

I agree partially in that individuals identified by the claimant could have been interviewed. However, as I will explain below, whilst there were some deficiencies, in totality the fairness of the investigation and disciplinary process was in my judgment not fatally compromised.

- (f) The respondent declared in the appeal meeting that it could have been that she was not in fact on shift at the time that the photograph was taken (she may have been resting either before or after her shift) but the respondent declined to regard that as justification or mitigation in her favour. This was a vital detail that should have been given weight.

I do not agree. The evidence is in my view clear that the claimant did not raise this until the appeal hearing, and that when she did raise it, Mr Vanhinsbergh evaluated it fully. For reasons that were in my view cogent and rational and therefore within the band of reasonable responses, he did not accept it as credible.

- (g) Mr Keers said that, for the reason in (f) and for the reasons in (b) to (e) above the respondent's case was uncorroborated, not credible, speculative and on the balance of probabilities insufficient for the respondent to rely on to dismiss the claimant.

I do not agree. In my judgment, the reasoning that Ms Markland and Mr Vanhinsbergh arrived at was cogent and rational and therefore within the band of reasonable

responses. As I will explain below, whilst there were some deficiencies, in totality the fairness of the investigation and disciplinary process was in my judgment not fatally compromised.

- (h) The claimant was not provided with a comprehensive account of the circumstances of the allegation because she was never presented with the anonymous email, nor permitted to call witnesses or submit written statements in her defence. This amounts to a breach of the principles of transparency, accountability and natural justice, and undermines the fairness of the process.

I do not agree. In my judgment, to supply the anonymous email to the claimant would not have added anything because the only relevant allegation in it was put to her anyway. As to witnesses that she may have called, as I said above my finding is that, in fact, ahead of the disciplinary interview the claimant was told in terms that she could provide names of witnesses that the respondent would follow up, and therefore in my view there was no material prevention by the respondent. As to written statements, I see no evidence that the claimant was prevented from submitting these, indeed she did so as preparation for her internal appeal hearing and Mr Vanhinsbergh obtained a copy of that from her before making his decision.

- (i) The respondent imposed unreasonable constraints on Ms Sutherland, the claimant's companion, in breach of the Acas Code and the respondent's own policies.

I agree. As above, I find that there was a clear breach here. However, as I will explain below, whilst there were some deficiencies, in totality the fairness of the investigation and disciplinary process was in my judgment not fatally compromised.

- (j) The claimant's explanations about eye drops and/or a natural reflex of closing eyes, which are commonplace, were plausible and credible but were summarily dismissed by the respondent.

I do not agree. In my judgment, these were taken into account by the respondent but for reasons that were cogent and rational, were not found to be credible. In my judgment it was within the band of reasonable responses for the respondent, in the context of the conflicting accounts given by the claimant over the various internal hearings and the overarching picture that the evidence provided them with, to discount these explanations.

- (k) The respondent failed to interview available witnesses that had been named by the claimant.

I agree. However, given that the persons named by the claimant were named by her as persons that would likely substantiate the allegation **against** her, this omission was in my judgment not material. Therefore, whilst this is at face value a potential deficiency, in my judgment it did not fatally compromise the investigation and disciplinary procedure. Mr Keers says that there is a duty to obtain evidence even if it is **inculpatory**. I find that the respondent **did take steps** to contact the anonymous complainant but those were not answered. It is true that based on the names provided by the claimant, the respondent could have physically approached people who they suspected might have been the anonymous complainant. However, I find that since

there was no duty to do so (especially since there were signs that the complainant positively did **not want** to be approached) and the allegation was in and of itself clear, the failure to approach those people did not remove the respondent's actions from the band of reasonable responses.

- (l) The respondent failed to verify other explanations raised by the claimant such as the change of furniture, as a time marker for context for the photograph.

I agree. However, I do not consider that this omission was material. It would not have altered what was pictured in the photograph as regards the posture of the claimant, her eye being closed, the part of the premises that she was in and the darkness outside. Her own evidence in the disciplinary interview was that the timing of the photograph was likely after she had returned to work in March 2024 from her illness. For those reasons it was in my judgment within the band of reasonable responses for the respondent to rely on the evidence that they had in isolation of this line of enquiry.

- (m) The matters in (g) to (l) above, as well as the submission of the investigation notes by Mr Rees before the investigation interview transcript had been finalised, demonstrated a lack of systematic approach, and a carelessness and lack of diligence that was inconsistent with openness and impartiality.

I do not agree. I found as a fact above that Mr Rees did not submit his investigation report before he had considered the claimant's amendments to the transcript of the investigation hearing. The way in which the anonymous email was followed up was systematically the same in relation to all those suspected of a policy breach. And, generally as I will explain below whilst there were some deficiencies, in totality the fairness of the investigation and disciplinary process was in my judgment not fatally compromised.

- (n) The respondent did not apply its night policy consistently. Although Mr Vanhinsbergh stated that the automatic tariff for either sleeping or resting one's eyes was gross misconduct and dismissal, the claimant had identified a previous occasion where a person photographed with eyes closed had resulted in informal action only. The same was true of failure to investigate the employee named by employee B. In contrast is the dismissal of the claimant from an anonymous complaint. This amounts to selective treatment which is fundamentally at odds with organisational integrity, fairness and transparency.

I do not agree. What I said in (c) above applies equally here. I agree with the submission of Mr Tudor that all employees that were identified as part of the anonymous whistleblowing complaint were treated in the same terms, along with the previous person M who was discovered asleep and woken in a night inspection. The evidence is clear that there was a significant and escalating problem with disregard of the night policy and that the respondent took a "whole organisation" approach to tackling that problem. It was in my judgment within the band of reasonable responses for it to do so.

- (o) There was evidence of bias. This was in the form of remarks in the disciplinary interview such as *"we can all agree that's not what's happening here"* and *"the photo says a lot more than what you're saying"*. This demonstrates an unwillingness to

genuinely consider the claimant's explanations and a tendency to interpret the evidence to her detriment, thereby undermining fairness and her right to a fair hearing.

I do not agree. Taken in the context of the evidence and information that the respondent had available to it as a whole, these quotations were no more than opinions as to what the respondent thought the evidence showed, and they were entitled to express that opinion. It would have been preferable for them to express it in more neutral terms. But this did not in my judgment vitiate the fairness of the proceedings as a whole. In my judgment, there is no credible evidence of bias, either actual or apparent.

(p) For all of the above reasons, the entire process was fundamentally flawed.

I do not agree. As I will explain below, whilst there were some deficiencies, in totality the fairness of the investigation and disciplinary process was in my judgment not fatally compromised.

Presence of some faults but taken as a whole the fairness of the process was not fatally compromised

68. My findings of fact above in relation to the investigation by the respondent do reveal that there were some deficiencies in the way that the respondent went about their investigation and disciplinary proceedings. These were as follows:

- (a) The claimant was not provided with the anonymous email at any time during the investigatory stage.
- (b) Neither Mr Rees nor Ms Markland made any attempt to speak to any staff who may have worked the same shifts as the claimant.
- (c) Neither Mr Rees nor Ms Markland approached the two employees (CH and D) that the claimant had named in her investigation who may have been responsible for taking the photograph of her at page 102. Whilst it was appropriate for the respondent to seek to maintain confidentiality, it could have approached them and asked whether they knew anything about the photograph whilst assuring them that their confidentiality would continue to be protected from other employees going forwards and that they would suffer no detriment as whistleblowers. This might have assisted in establishing a time and date for the allegation and in discovering information as to how long the claimant's eyes were closed for.
- (d) Neither Mr Rees nor Ms Markland made any attempt to corroborate the time or date of the photograph by inquiring as to when the furniture had been changed.
- (e) Mr Vanhinsbergh did not take steps to verify with any other person whether the claimant was in fact on shift at the time the photograph was taken. Although he did not know the date and time of the photograph, he did know that in the disciplinary interview the claimant had said it may have been after she returned from her illness in March 2024. He could have made inquiries as to who the claimant had worked with since that time and asked them in confidence whether they recalled the photograph of the claimant, whilst maintaining the confidentiality of the proceedings.

- (f) Ms Markland and Mr Vanhinsbergh breached the Acas code of practice on disciplinary and grievance procedures by failing to make it clear to Ms Sutherland that she was allowed to address the disciplinary hearings so as to put and sum up the claimant's case, and to respond on behalf of the claimant to any views expressed at the meetings.
69. In relation to the matters (a) to (e) in paragraph 68 immediately above, it is clear to me that those omissions were not committed by the respondent in bad faith or by way of a pattern of carelessness. It is evident that the other three employees that either resigned or were dismissed as a result of the same anonymous email were all assessed in accordance with the same evidential source and the same lines of enquiry, and that confidentiality was sought to be protected in relation to the whole operation. It is also clear to me that the lines of enquiry that were not followed above would not have changed the calculus of what the anonymous evidence had found. The reason why the respondent did not follow those lines of enquiry was that they assessed that it would not provide further evidential value. In my judgement, the lines of enquiry missed would have been less likely, not more likely, to have assisted the claimant in her defence. Nevertheless, the respondent did not consider whether making the omissions would have disadvantaged the claimant, and to that extent the omissions were deficiencies. However, balancing the lack of materiality of the deficiencies against my findings that the respondent arrived at cogent and rational conclusions on the basis of evidence that was on its face reliable, my judgment is that any unfairness to the claimant was not at a level that operated to vitiate the overall fairness of the respondent's proceedings, and that therefore the deficiencies do not remove the actions of the respondent from the band of reasonable responses of an employer in the circumstances. To that extent, to follow up the lines of enquiry missed would have been ideal but were not strictly necessary in terms of the legal test regarding the "band of reasonable responses".
70. In relation to the Acas Code breach, there is in my judgment a clear breach. However, I accept Mr Tudor's submission that a breach does not necessarily vitiate the fairness of the entire process. Taking into account that the breach was not a full breach (namely, the right to adjourn for discussions was expressly explained), that the oral evidence of Ms Sutherland was that there were no preparations to intervene in an active way in any event, and balancing the breach against the reality that at all times the claimant was permitted to and did present a full (indeed an evolving) defence and against the compelling nature of the evidence against the complainant, my judgment is that the breach is not sufficiently material to remove the actions of the respondent taken in totality from the band of reasonable responses of an employer in the circumstances.

Reasonableness of the penalty imposed

71. The thrust of the submissions of Mr Keers for the claimant, was that entire investigatory and disciplinary process was so flawed that any sanction imposed on the claimant that went as far as dismissal is unsafe and invalid.

I do not agree. I have made findings above about what the respondent's night policy meant and whether a conclusion that the claimant breached it is a potentially rationally arguable one from an objective point of view. The night policy is explicit in its express terms that the contravention alleged and found amounted to gross misconduct for which dismissal is an available option. In view of my findings above, the clearly stated rationale for the night policy in terms of customer safety, and taking into account the way in which all four

employees sanctioned as part of the same anonymous complaint were equally treated, in my judgment the sanction of dismissal was within the band of reasonable responses open to an employer in the circumstances.

Final conclusion

72. For all the reasons given above, the claimant's claim for unfair dismissal is not well founded and is dismissed.

Approved by:

Employment Judge M Da Costa
30 March 2026

Judgment sent to the parties on:
2 April 2026

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For the Tribunal:

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