Claim No. 1402069/2018

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	AND	RESPONDENT
Miss I. Duplakova		Staff Management Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: Bristol **On Wednesday, the 23rd January 2019**

Employment Judge: Mr David Harris (sitting alone)

Representation:

For the Claimant: Mr A. Small (Counsel)
For the Respondent: Ms P. Rome (Solicitor)

JUDGMENT

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

2. **The Claimant's claim of wrongful dismissal is dismissed.**

REASONS

Introduction

1. By her Claim Form presented to the Tribunal on the 11th June 2018, the Claimant claims unfair dismissal and wrongful dismissal against the Respondent.

2. At the start of the final hearing, there was discussion as to whether an interpreter was required by the Claimant. During the case management phase of the proceedings, the Claimant had indicated that she required a Slovak interpreter. No interpreter having attended on the day of the final hearing, I inquired of the Claimant's counsel, Mr Small, whether the Claimant wished to postpone the hearing so that an interpreter could attend. I indicated that there would be no difficulty whatsoever with that course of action. Mr Small, however, after taking instructions from the Claimant, indicated that the Claimant wished the final hearing to proceed in the absence of an interpreter.

The Relevant Background

3. The Claimant was employed by the Respondent as a Personal Care Assistant from the 11th April 2014 until the date of her dismissal on the 19th February 2018. The written terms and conditions of her employment were set out at pages 27 to 35 in the hearing bundle. At pages 61 to 65 of the bundle, the Tribunal was provided with a copy of the Respondent's 'disciplinary procedure', which set out, at page 64, examples of conduct that the Respondent was likely to treat as gross misconduct justifying summary dismissal.

4. On the 16th October 2017, the Claimant underwent training in the administration of oxygen to service users (documented at pages 66 to 69 in the bundle). The training included, inter alia, training in the identification of the signs of respiratory distress and

normal/acceptable oxygen saturation levels for a client by reference to the service user's Personal Care Plan ('PCP'). The training also included training on checking and setting alarm limits for oxygen saturation by reference to the service user's PCP (documented at 68 in the bundle).

5. At the time of the events that led to her dismissal, the Claimant was the Personal Care Assistant for a service user to whom I shall refer as 'A'.

6. 'A' was severely disabled and required 24-hour care. I was told that her PCP ran to 96 pages. There were extracts from that PCP in the bundle relating to oxygen saturation levels. In particular:

    6.1 At page 95 in the bundle was the following information: "*My oxygen saturations should be above 92% - please see protocol in breathing section and desaturation management. When in bed they are monitored continuously overnight.*"

    6.2 At page 96 in the bundle was a 'Breathing Individual Action Plan' for 'A'. It stated, inter alia, "*my O_2 sats monitor should remain in place while I am in bed …*" and "*… my husband has bought a new portable sats machine and wishes this to be taken with me when out of the house in case I get short of breath, although this is not normally the case when I am out of bed. When out of the house if my sats are below 92%, unreadable or even if they are reading normally but I am showing signs of shortness of breath please call 999 immediately as I don't have a portable oxygen cylinder and reassure me.*"

    6.3 At page 97 in the bundle was a 'De-saturation Management Plan' for 'A'. It stated:

        "*I experience episodes of de-saturation these occur more often when I am in bed.*

<u>My management if my O_2 sats drop below 92%</u>
If I am unresponsive, obviously in signs of great difficulty breathing or in such distress that intervention cannot be carried out then emergency services must be called immediately even in the event of normal oxygen saturation readings. This also applies if I am out of the house. If I am in the house and have oxygen to hand the above happens put the oxygen on using the cylinder and face mask, turn it up all the way to 15lts and call 999.
If I am able to respond and SATS recordings are below 92% please follow the protocol below.
Check Oxygen saturation level (Sats) with pulse oximeter.
Recognise signs of reduced Oxygen, I may have difficulty with breathing, skin may be pale in colour, have a blue tinge to lips, shallow rapid breathing or laboured noisy breathing.
There may be no physical signs of low Oxygen levels except for Sats reading, a low reading for me is below 92%.
…
If Sats do not rise to above 92% after the above intervention begin the following procedure.
…"

6.4 At page 94 in the bundle was an extract from the PCP that stated: "*My oxygen saturation levels can sometimes drop due to positioning. My sats must always be above 92% and if they drop please change my position and if my sats do not come up I will require O_2 at 5l per minute. I do not like the oxygen mask on my face and may struggle a little. Please be patient and continue to hold the mask to persuade me to have the oxygen, even if you have to hold it in front of my face it will still help.*"

7. 'A's oxygen saturation levels were monitored in her home by a saturation monitor. The monitor had been set so that it would sound an audible alarm if her oxygen saturation level reached 92%. It was understandable to the Tribunal that the monitor be set to sound the alarm at that point given 'A's PCP that stated that her oxygen saturation level must always be above 92%. Given that the oxygen

saturation level should always be above 92%, it made sense to set the monitor to sound the alarm if the level reached 92%.

8. On the 30th January 2018 the Claimant was working a night shift in 'A's home. As part of her duties, the Claimant was required to keep a daily record sheet and to complete an 'observation chart'. The observation chart reminded Personal Care Assistants that 'A's oxygen saturation levels were to be above 92% (see page 90 in the bundle).

9. During the course of the Claimant's shift, the alarm on the saturation monitor began to sound. It meant, and there was no dispute about this, that 'A's oxygen saturation level had reached 92%. The Claimant formed the view that the sound of the alarm was contributing to 'A's obvious distress and agitation and was preventing her from getting off to sleep. The Claimant then decided to lower the threshold for the alarm to 91% with a view to stopping the alarm from going off. In her witness statement, the Claimant stated that that action accorded with 'A's De-saturation Management Plan.

10. There was an alternative means for silencing the alarm on the saturation monitor, which involved pressing a button on the machine. The problem, as the Claimant saw it, with that course of action is that the alarm would sound again shortly after the button had been pressed and so, to keep the machine silent, she would have had to stay in the room with 'A' with her hand continuously pressing the button. The Claimant took the view that her continued presence in 'A's room was stimulating 'A' and was preventing her from going off to sleep.

11. Having lowered the threshold on the saturation monitor to 91%, the alarm was silenced. The Claimant then left 'A's room, leaving the door open, and then used a baby monitor in a nearby room to monitor 'A's breathing. 'A' then slept through the remainder of the night right through until the Claimant's shift ended at 8am.

12. The Claimant's adjustment of the threshold level on the saturation monitor came to light the following day. A Personal Care Assistant noticed that the saturation level was at 92% and that the alarm was not sounding. After inspecting the monitor, the threshold level was restored to 92%. The matter was reported to the Claimant's Team Leader and a disciplinary process was initiated.

13. On the 13th February 2018, the Claimant was interviewed by Elizabeth Harcourt on behalf of the Respondent. The record of the interview is at pages 71 to 73 in the bundle. In the course of the interview, the Claimant stated that she had read 'A's care plan and understood that it must be complied with. She accepted that she had reduced the threshold level on the saturation monitor from 92% to 91% and accepted that she was not medically trained to decide to alter the threshold level. She stated that the alarm on the machine was very loud and that it kept 'A' awake. She stated that she believed that, in 'A's case, oxygen saturation levels of 91% to 92% were not life threatening. She stated that she felt guilty for changing the machine but that she believed she was acting in 'A's best interests so that she could have a peaceful night's sleep.

14. The Claimant was subsequently asked to attend a disciplinary hearing on the 16th February 2018. The minutes of the meeting were to be found at pages 76 to 78 in the bundle. The meeting was conducted by Luke Martin on behalf of the Respondent. The Claimant stated that she had reduced the threshold on the saturation monitor from 92% to 91% to stop the alarm from sounding so that 'A' could go off to sleep. She accepted that she was not supposed to alter the settings of the saturation level as she is not clinically trained.

15. Following the disciplinary hearing, Mr Martin took the decision to dismiss the Claimant for gross misconduct. Confirmation of the dismissal was sent to the Claimant on the 19th February 2018.

16. The Claimant subsequently appealed against the decision to dismiss her. Detailed grounds of appeal were set out in a letter from the Claimant's solicitors dated the 22nd February 2018 (at pages 83 to 85 in the bundle). The appeal was dealt with on the papers by Eileen Lock on behalf of the Respondent. It was dealt with on the papers because the Claimant had declined two opportunities to have the appeal heard on a face-to-face basis. Ms Lock's decision was to uphold the decision to dismiss. Her reasoning was set out in an undated letter sent to the Claimant (at pages 86 to 87 in the bundle).

The Tribunal's Findings of Fact

17. I heard oral evidence from Mr Martin (a senior HR Assistant) and Ms Robinson (a Regional Clinical Manager) on behalf of the Respondent and I heard oral evidence from the Claimant. Mr Martin had conducted the disciplinary hearing and had made the decision to dismiss the Claimant. Ms Robinson had given clinical advice to Ms Eileen Lock (a Director) as part of the appeal process conducted by Ms Lock. I also read and considered the 100-page agreed hearing bundle.

18. The Claimant appeared to be an honest and straightforward witness. I accepted her evidence that she had believed she was acting in 'A's best interests when adjusting the settings on the saturation monitor to turn off the alarm. She wanted 'A' to have a good night's sleep and the bleeping monitor was preventing that from happening. As she had done in her interviews with the Respondent, she accepted fully that she had reduced the saturation level from 92% to 91%. During the investigatory stage of the disciplinary process there had been a suggestion that the Claimant may have reduced the threshold level to a level lower than 91% but I did not find that to be the case. I accepted the Claimant's evidence that she reduced the threshold level from 92% to 91% for the sole purpose of trying to silence the alarm so that 'A' could get off to sleep. I also accepted that there was no evidence that 'A' had suffered any harm from the re-setting of the monitor that had been carried out by the Claimant.

19. It was clear from the records of the Respondent's interviews with the Claimant on the 13th February 2018 and the 16th February 2018 that she had been candid in respect of her account of events during the relevant night shift. She admitted that she had altered the settings of the saturation monitor and accepted that she was not medically trained to make decisions about suitable settings for 'A's saturation monitor. She appeared contrite in her interviews and sought to reassure the Respondent that she would not adjust the saturation monitor in the future.

The Claimant's Case

20. Mr Small, on behalf of the Claimant, took a forensic approach to the evidence regarding the recommended saturation levels in 'A's case. He cross-examined the Respondent's witnesses on the basis that 'A's PCP was potentially misleading in that the 'action level', according to the De-saturation Management Plan, was a saturation level below 92% and therefore re-setting the monitor to a threshold of 91% was consistent with the 'action level'. On Mr Small's analysis, setting the monitor to a threshold level of 92% was too high in that intervention, according to the De-saturation Management Plan, was not needed when the saturation level was at 92%. It was only when the level dipped below 92% that action was needed and therefore re-setting the threshold level to 91% on the monitor was consistent with 'A's PCP.

21. Mr Martin did not see the contradiction in 'A's PCP between the action level, according to the De-saturation Management Plan, of "below 92%" and the general assertion elsewhere in the PCP that the saturation level should be "above 92%". He accepted, however, that it may appear a bit confusing to a person, such as he, who is not clinically trained. His position, however, was that it was not up to the Claimant to alter the settings on 'A's oxygen saturation monitor. Ms Robinson agreed that 'A's PCP was not as clear as it could be but her point to Mr Small, in cross-examination, was that it was not up to the Claimant to change the settings on the oxygen saturation monitor.

22. Mr Small also cross-examined on the basis that the Claimant had been trained to reset the saturation monitor because of the record of training at page 68 of the hearing bundle where there was a reference to "*sets alarm limits, per PCP*". It has to be said that that line of cross-examination was contrary to the Claimant's account to the Respondent in interview that she was not medically trained to interfere with the settings of the saturation monitor and somewhat contrary to the reassurance that the Claimant had sought to give to the Respondent that she would not alter the settings of the monitor in the future.

23. Mr Small's central submission was that 'A's PCP was unclear and ambiguous when it came to saturation levels and that the Claimant's actions in adjusting the settings of the monitor were consistent with a reasonable interpretation of the PCP and her training. He submitted that if there was fault in this case, then it lay with 'A's PCP and the Claimant's training for which she was not responsible. He submitted that her actions could not be viewed as misconduct, let alone gross misconduct.

24. Mr Small was also critical of the Respondent's investigatory and disciplinary procedure. He submitted that the nature of the allegations of misconduct had not been properly spelt out at the appropriate stages and that the investigatory and disciplinary stages had become blurred. He submitted that findings of fact had not been made at the investigatory stage, which had the effect of undermining the fairness of the disciplinary stage. He submitted that the investigatory stage was not fit for purpose and that there had been a failure to particularise the alleged misconduct during the disciplinary process. He pointed out that Mr Martin's oral evidence to the effect that he had consulted with others before making the decision to dismiss showed that this was not a fair disciplinary process.

The Respondent's Case

25. On behalf of the Respondent, Ms Rome submitted that this was a straightforward case of gross misconduct. The Claimant had admitted re-setting 'A's saturation monitor to a lower threshold level, without authority to do so, and that her actions had the potential to put 'A' at risk of harm.

The Relevant Legal Principles

26. For the purposes of the unfair dismissal claim, the starting point for the Employment Tribunal is section 98 of the ERA 1996, the relevant parts of which provides as follows:

(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.

(2) A reason falls within this subsection if it-

(a) …

(b) relates to the conduct of the employee,

(ba) …

(c) is that the employee was redundant, or

(d) …

…

(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.**

27. The Respondent puts it case on the basis that the reason for the Claimant's dismissal was gross misconduct. It is for the Respondent to discharge the burden of proving the reason for the Claimant's dismissal and that it was a reason that was capable of being fair for the purposes of section 98(1) and (2).

28. Where there is a dispute as to the reason for the dismissal, it is for the Employment Tribunal to determine the real reason for the dismissal: i.e. the set of facts known to the employer or beliefs held by it that caused it to dismiss the Claimant (*Abernethy v. Molt, Hay and Anderson* [1974] ICR 323).

29. The Claimant bears no burden of proof as to the reason for her dismissal.

30. If the employer is able to demonstrate a potentially fair reason for the dismissal, the Employment Tribunal will consider the question of fairness under section 98(4) of the Employment Rights Act 1996, at which stage the burden is neutral as between the parties.

31. In the case of a conduct dismissal, which is alleged in this case by the Respondent, the Employment Tribunal will be guided by the leading case of *British Home Stores Ltd v. Burchell* [1980] ICR 303, which will require it to consider whether the Respondent had reasonable grounds for its belief in the employee's misconduct, founded upon a reasonable investigation. The test that the Employment Tribunal is to apply at all stages of its determination of the question of fairness for the purposes of section 98(4) is whether

the Respondent's decision fell within the band of reasonable responses of the reasonable employer (see *Iceland Frozen Foods Ltd v. Jones* [1982] IRLR 439 and *Sainsbury's Supermarkets Ltd v. Hitt* [2003] IRLR 23).

32. I should add that it is not for the Tribunal to form its own view as to what it might or might not have done in the situation facing the Respondent. The task for the Tribunal is to assess the fairness and reasonableness of the Respondent's actions in light of the legal principles I have summarised above.

The Decision

33. I am satisfied, on the evidence that I have heard, that the Respondent has established that the reason for the Claimant's dismissal was misconduct.

34. Given the Claimant's admissions to the Respondent that she had reduced the threshold level on 'A's saturation monitor from 92% to 91% in order to turn off the alarm and that she was not medically qualified to make that adjustment, there was plainly, in my judgment, a reasonable basis for the Respondent's belief that misconduct had occurred.

35. I reject the Claimant's submission that 'A's PCP was ambiguous and that it was unfair to judge the Claimant's conduct by reference to that document. The PCP and the reminder in the observation chart were sufficiently clear that 'A's oxygen saturation levels must be above 92%. The information available to the Claimant indicated, in sufficiently clear terms, that 'A's saturation levels were to be kept above 92%. That is what the PCP said, in addition to setting out a detailed action plan in the event of the oxygen saturation level falling

to below 92%, and that is what the observation chart said. I therefore reject the submission that reducing the threshold level to 91% was in someway consistent with 'A's PCP and should not have been criticised by the Respondent.

36. In any event, it was clear from the Claimant's evidence that she had not adjusted the threshold on 'A's oxygen saturation monitor because of a perceived ambiguity in 'A's PCP. She had adjusted the setting on the machine in order to silence the alarm, which was sounding when the oxygen saturation level was at 92%. Furthermore, she had accepted, when interviewed by the Respondent on the 13th February 2018 and the 16th February 2018 that she was not medically trained to alter the settings on the oxygen saturation monitor and that she should not have done so. At no stage in her interviews with the Respondent had she sought to defend her actions by saying that the settings on the oxygen saturation level were wrong and inconsistent with 'A's PCP and that her resetting of the monitor was to ensure that it was consistent with the PCP.

37. I also reject the submission that the Claimant's training was in some way responsible for her actions on the night of the 30th January 2018. She may have been trained on how the monitor worked, including its controls and settings, but that is a far cry from training on what the settings ought to be in a particular service user's case. I therefore reject Mr Small's criticisms of 'A's PCP and the Claimant's training. It is clear from her interviews with the Respondent that the Claimant accepted that she was aware that she was not supposed to alter the settings on the saturation monitor.

38. In my judgment, in light of the admissions that were reasonably made by the Claimant when her actions had come to light, the Respondent had reasonable grounds for its belief that the Claimant was guilty of misconduct by resetting the threshold level on 'A's oxygen saturation monitor when she was not qualified or authorised to do so. I reject the criticism of the Respondent's procedure. In my judgment the investigatory stage and the disciplinary stage were fair. The Claimant was given an opportunity to explain the circumstances in which the

threshold level on ‘A’s oxygen saturation monitor had come to be changed and she made an admission that the Respondent was entitled to regard as reasonably and properly made. She admitted that she had reset the oxygen saturation monitor and that she was not medically qualified to do so. It was understandable that the Claimant’s actions would be of concern to the Respondent, raising, as it did, issues of trust and confidence with the Claimant.

39. In my judgment the investigatory and disciplinary process fell within the band of reasonable responses to the event that had occurred during the night shift on the 30th January 2018. I reject the submission that Mr Martin’s discussion with others following the disciplinary meeting infected the disciplinary process. Having heard Mr Martin give evidence, it was plain to me that he had formed the view, quite reasonably on the basis of the Claimant’s account to him, that she was guilty of gross misconduct by changing the settings on a service user’s oxygen saturation monitor without any authority to do so.

40. I am also satisfied that the decision to dismiss the Claimant fell within the band of reasonable responses notwithstanding her admission to the misconduct and the contrition that she expressed when interviewed by the Respondent. It was reasonable for the Respondent to treat the matter as a serious incident that put the welfare of a service user at risk.

41. Accordingly, the claim of unfair dismissal shall be dismissed.

42. The claim of wrongful dismissal is also dismissed. The admitted actions of the Claimant in altering the settings on ‘A’s saturation monitor, without authority to do so, amounted, in my judgment, to gross misconduct for which the Respondent was entitled to dismiss without notice.

…………………………………………..
Employment Judge David Harris

Dated: 12 March 2019