

JERSEY / JUDGMENT

Janet May v All Care Jersey Limited

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IN THE JERSEY EMPLOYMENT AND DISCRIMINATION TRIBUNAL IN THE MATTER: BETWEEN JANET MAY CLAIMANT AND ALL CARE JERSEY LIMITED RESPONDENT TRIBUNAL JUDGMENT
Reference: [2020] TRE 070 Hearing Date: 17 September 2020 Before: Mrs H Westmacott, Deputy Chairman Appearance: For the Claimant: Advocate M Boothman For the Respondent: Did not attend DECISION The Claimant's claims for unfair dismissal and wrongful dismissal succeed. The Tribunal applied an 80% reduction to the compensation for unfair dismissal due to contributory conduct, thereby awarding the Claimant £1,430. The Tribunal reduced the damages for wrongful dismissal due to failure to seek to mitigate, thereby awarding the Claimant £1,100.

REASONS

1. A case management hearing was held on 3 August 2020 ("CMH"), at which this matter was set down for a final hearing on 17 September 2020 ("Hearing"). This judgment records my decision following that Hearing and the reasons for that decision.

Introduction

2. The Respondent is a care provider that provides care to vulnerable adults in their own homes.
3. The Claimant was employed by the Respondent as a Health Care Assistant from 1 November 2013 until 9 March 2020, when the Respondent summarily dismissed the Claimant on the grounds of alleged gross misconduct.
4. On 20 April 2020 the Claimant submitted a claim to the Tribunal stating that she had been unfairly dismissed on the grounds of gross misconduct. In summary, the Claimant asserts that the dismissal was unfair on the following grounds:
 - (1) the Claimant denies the alleged gross misconduct;
 - (2) the decision to dismiss without notice was not within the range of reasonable responses open to a reasonable employer when faced with the relevant facts; and
 - (3) the dismissal was procedurally unfair in that the Respondent failed to carry out a fair investigation or disciplinary process.
5. In addition, the Claimant is also claiming that the dismissal was wrongful, in that she was not given any notice nor was she paid in lieu of her notice period.

6. The Claimant seeks compensation and damages in respect of the unfair dismissal and wrongful dismissal claims respectively.
7. The Respondent defends the claims on the grounds that:
 - (1) the decision to dismiss without notice was fair in light of the Claimant's gross misconduct, namely the falsification of timekeeping records;
 - (2) the gross misconduct was evidenced on 3 occasions by witnesses seeing the Claimant arriving and departing from client's properties at different times to those recorded by the Claimant, both in the written log and on the "Careplanner App";
 - (3) while it is acknowledged that due process was not followed at the time of the dismissal, this was rectified by the Respondent's appeal process;
 - (4) even if a fair process had been followed at all times, the Claimant would have been dismissed in any event; and
 - (5) if the dismissal is found to be unfair any compensation should be reduced to zero due to the Claimant's contributory conduct. Evidence
8. The Tribunal received witness statements from:
 - (1) The Claimant;
 - (2) MB, a former employee of the Respondent;
 - (3) CS, manager and director of the Respondent;
 - (4) JM, director of the Respondent; and
 - (5) The individual who heard the Claimant's appeal against her dismissal.
9. The day before the Hearing the Respondent advised the Tribunal that it would not be represented at the Hearing, nor would any of its witnesses attend. The Respondent stated that JM could not attend due to a family emergency and CS could not attend due to staffing issues at the Respondent. No reasons were given as to why the Respondent's third witness could not attend or why there would be no alternative representative for the Respondent present. The Respondent clarified that it was not seeking an adjournment of the Hearing and the Claimant indicated that she wished to proceed regardless of the Respondent's absence. Accordingly, the Hearing went ahead as listed.
10. As a consequence, I only heard oral evidence from the Claimant. Advocate Boothman put some supplemental questions to the Claimant based on the information contained in the Respondent's witness statements and I also posed a number of questions to the Claimant based on the evidence provided by the Respondent and to test the Claimant's own evidence. In addition, Advocate Boothman made closing submissions at the Hearing on behalf of the Claimant.

11. The Claimant provided an agreed file of documents (the “File”) for the Hearing. References in square brackets below are, unless the context suggests otherwise, to the relevant page of the File. Those followed by § refer to a paragraph on that page.
12. When making my judgment I considered all of the written evidence provided by each of the parties as well as the oral evidence provided by the Claimant. However, as was made clear to the Respondent in advance of the Hearing, only limited weight could be given to the evidence of those witnesses that did not attend as it was not possible to cross examine them upon it.
13. My findings of fact based on the evidence provided are set out below. In this judgment only the facts that are relevant to the issues to be determined have been summarised. Where there have been factual disputes to resolve I have done so on the balance of probabilities on the basis of my assessment of the credibility of the Claimant and the consistency of the witnesses’ accounts with the rest of the evidence. The

Facts

Contract of Employment

14. The File contains copies of two contracts. One shows that the Claimant was employed by the Respondent on a zero hours contract commencing on 1 November 2013 [184] and the other shows that the Claimant was employed on a fixed hours contract commencing on 19 March 2018 [188].
 15. The Respondent alleges that there was a break in the Claimant’s employment at the start of 2018 [42] when the Claimant went to work for another employer. The Claimant admits that the Respondent did not have any work for her in December 2017 and January 2018 as the client that she usually cared for was on holiday. She therefore took a second job during this period to ensure she had some money coming in while she was not receiving any from the Respondent. The Claimant maintains that her zero hours contract was still in place during that period.
 16. The Claimant also made reference to an email that she sent to the Respondent in January 2018 in which she asked the Respondent if it had “taken her off the books”. At the Hearing the Claimant explained that, in this email, she was asking if the Respondent had decided to “let her go” as they had not asked her to work for some time. However, the Claimant recalled that she received a telephone call in response to this email saying that the Respondent planned to give her more work but they did not know exactly when. In the event, the Claimant next undertook work for the Respondent in February 2018.
 17. The parties agree that at the time of termination of the Claimant’s employment her hourly rate was £11 per hour and she was contracted to work 25 hours per week. Accordingly, her wage when the contract came to an end was £275 per week [41 and 42].
- Scheduling and Time Recording

18. The Claimant's role for the Respondent consisted of her going into the houses of the Respondent's clients and providing care services to them, such as helping clients to wash and dress, doing some cleaning, preparing food and helping them take medication.
19. The rota of clients that the Claimant was to visit each week was sent to the Claimant by email some time the week before. One such rota for the period 1 to 8 March 2020 is included in the File [210]. This rota illustrates that the Claimant was scheduled to visit between 3 to 6 clients per day and that the duration of each visit varied, with the majority scheduled to last for 1 hour. The shortest visit was scheduled to last only 30 minutes and the longest was scheduled to last for 4 hours. I also note from the schedule that some time was allowed between most of the visits. The time allowed between visits ranged from 15 minutes to over an hour. However, there were 2 occasions where the visits were scheduled back-to-back, allowing no time between them.
20. The parties agree that time actually spent at a client's house should have been recorded in the following two ways:
 - (1) in writing on the hardcopy record kept at the client's house, where the carer should note down both their arrival and departure times; and
 - (2) by using a fob kept at the client's house to generate a code which is to be inputted into the Careplanner App on the carer's phone and which automatically records the time at which this is done. This is to be done both on arrival at and departure from the client's house. If the carer left early for any reason the Careplanner App gave them the opportunity to specify why. The Dismissal
21. It is undisputed that on 9 March 2020 the Claimant met with CS and JM and at that meeting the Respondent dismissed the Claimant without notice on the grounds of gross misconduct (the "Dismissal Meeting"). Both CS and JM state in their witness statements that they took the decision to dismiss without notice on the basis that they "could not put our clients at anymore risk" [71§30 and 77§30].
22. The Claimant asserts that she was asked only the day before to attend this meeting via the Careplanner App in order to see how she was getting on with some new clients she had recently been allocated. However, when she arrived at the meeting she was told it was a disciplinary meeting and she was being dismissed with immediate effect for leaving client's homes earlier than the scheduled finish time on three occasions and for fabricating company records. The Claimant asserts that she was not given any opportunity to prepare for the meeting and at no stage during the meeting was she asked to explain or provide any response to the allegations against her [45§9].

23. The Respondent concedes that it did not follow the disciplinary process in relation to the Dismissal Meeting, namely it failed to invite the Claimant to a disciplinary meeting or observe her right to have someone accompany her to that meeting [71§31 and 77§31]. The minutes from the Dismissal Meeting, which I understand were produced by the Respondent, indicate that the Claimant was asked very briefly about the occasions where she left early and recorded only a very limited response [234].
24. The Claimant asserts she had never been through a disciplinary process before nor had she received any verbal or written warnings in the past. There had never been any previous complaints or issues raised regarding her work or performance, either during her annual appraisals or at any other time [45§10]. The Respondent does not dispute this.
25. In a letter from the Respondent to the Claimant dated 9 March 2020 (the “Dismissal Letter”), the Respondent confirms the Claimant’s dismissal and reiterates that the reason for it was her alleged deliberate falsification of records, namely that on three occasions she was witnessed arriving and departing from client’s properties at different times to those that she recorded, both in the written log and on the Careplanner App [236]. The minutes of the Dismissal Meeting indicate that no other reasons for dismissal were raised at this time [234].
26. The Claimant appealed the dismissal and an appeal hearing was held on 30 April 2020. Following the appeal hearing a report was produced on 13 May 2020 [242] in accordance with which the decision to dismiss the Claimant without notice was upheld.
27. The Claimant asserted that the individual who conducted the appeal hearing had a potential conflict of interest, in that both she and CS were founding shareholders of another care company. This was contrary to the statement in the appeal report, which stated that the person overseeing the process knew “of no reasons why there should be any perception of bias” [245]. The Claimant asserts that she only became aware of this potential conflict of interest the day before the final tribunal Hearing. Advocate Boothman said he had hoped to raise this with CS at the Hearing, but as she did not attend he was unable to do this. However, CS subsequently confirmed by email that both she and the person overseeing the appeal were shareholders of another care company at the time of the appeal. Spot Checks
28. JM asserted in her witness statement that on 2 March 2020 she was made aware by another staff member that the Claimant’s daughter had waited in the car for her mother while the Claimant undertook a visit to Client X’s house and that the Claimant’s daughter had indicated to the other staff member that the visit had only lasted a few minutes. JM said in her witness statement that she established that this visit took place on 21 February 2020 and when she looked at the Careplanner App arrival and departure times for the visit recorded the Claimant as being there for 51 minutes [76§16].
29. As this did not accord with the information regarding the duration of the visit that was passed on to JM following the other staff member’s conversation with the Claimant’s daughter, JM and CS decided to carry out three spot checks on the Claimant as follows:

- (1) on 5 March 2020 both JM and CS witnessed the Claimant arriving and departing Client X's house from across the road;
 - (2) on 6 March 2020 JM witnessed the Claimant arriving and departing Client X's house from across the road; and
 - (3) on 8 March 2020 JM arrived at Client Y's house prior to the end of the Claimant's scheduled visit to find the Claimant had already left. Arrival and Departure Times
30. JM and CS's witness statements set out the times at which they observed the Claimant at or, on the final occasion, absent from the client's houses [70 and 76]. The File also contains the following documents:
- (1) a copy of the rota which was sent to the Claimant by email in advance and which sets out the scheduled times of the visits [210];
 - (2) copies of the relevant hard copy logs which are kept at the client's houses and which the Claimant confirmed at the Hearing showed the arrival and departure times that she wrote down [220, 228 and 233]; and
 - (3) a print out from the Careplanner App which shows the times that the Claimant logged in and out from the App [214 and 215].
31. The relevant arrival and departure times taken from the above mentioned documents are set out in the table below and I have also calculated the duration of each visit from these times:
- | Date | Arrival Time | Departure Time | Visit Duration |
|--------------|-----------------------|----------------|------------------------------|
| 5 March 2020 | Scheduled 17:15 | 18:15 | 1 hour |
| | Witnessed 16:45 | 16:55 | 10 minutes |
| | Written Log 16:40 | 17:25 | 45 minutes |
| | Recorded on App 16:45 | 17:23 | 38 minutes |
| 6 March 2020 | Scheduled 17:15 | 18:15 | 1 hour |
| | Witnessed 16:34 | 16:45 | 11 Minutes |
| | Written Log 16:30 | 17:15 | 45 minutes |
| | Recorded on App 16:32 | 17:39 | 1 hour 7 minutes |
| 8 March 2020 | Scheduled 10:30 | 14:30 | 4 hours |
| | Witnessed N/A | 13:48 (absent) | 3 hours 48 minutes (or less) |
| | Written Log 10:00 | 14:10 | 4 hours 10 minutes |
| | Recorded on App 10:08 | 14:10 | 4 hours 2 minutes |
32. At the Hearing, the Claimant explained that on the days in question she had written in both her arrival time and "expected" departure time when she arrived at the clients' houses. When asked why she recorded her expected departure time as 45 minutes after arrival, yet her visit was scheduled for 1 hour, she could not explain this.
33. The Claimant admitted that she left all 3 of the visits that had been subject to spot checks prior to her expected departure time. However, when doing so, she forgot to amend the written log. She also said that when she left she forgot to log out of the Careplanner App and so did this when she remembered, which was some time after she left.

34. The Respondent asserted that the Claimant had logged out of the Careplanner App using a code that had been generated by the fob at the client's houses. The witness statements of both JM and CS stated that they thought the Claimant must have generated a code prior to leaving the client's houses then either written down or taken a photograph of the code and used this to log out at a later stage [71§22 and 77§22].
35. However, at the Hearing the Claimant denied writing down or photographing any codes, explaining that she had simply made up a code to enter into the Careplanner App to log out. She directed me to the print out from the App which, against the relevant departure time entries, states "OTP code "287255*" could not be decoded." [*this number varies for each entry] and which she asserts supports her position that she inputted a made up code. It was also noted that the same message was displayed in respect of the arrival time on 6 March 2020. The Claimant thought this could have been because she inputted the code incorrectly as she had forgotten her glasses that day. Leaving Early
36. At the hearing I questioned the Claimant regarding how long she had stayed at Client X's house, observing that it was the Respondent's case that she had only stayed there for 10 and 11 minutes respectively. While she acknowledged she had not stayed there until the departure times that she had recorded she could not recall how long she actually stayed for as she had been under a lot of stress at the time. I asked whether she could indicate an approximate time but she could not. She did say however that she felt she stayed an adequate length of time and did everything she was required to do. Specifically she said that she gave Client X her medication, confirmed that Client X was alright and had a quick chat with her.
37. Contrastingly, the Respondent has indicated as part of these proceedings that the Claimant did not do all of the tasks expected of her during the visits to Client X's house that were subject to spot checks. The Respondent asserts that, while the Claimant had given Client X her medication on both occasions and emptied the bin on one of the visits, she did not take down dry washing, clear away a dirty coffee cup or clean the kitchen.
38. It was the Claimant's case that the reason she left Client X's house early was because Client X had asked her to. She said that she had worked for Client X for a long time. The Claimant knew that Client X liked to smoke but was not allowed a cigarette while she had a visitor. The Claimant asserted that on both occasions Client X, as she often did, asked the Claimant to leave so that she could smoke. Accordingly the Claimant did so. In support of this the Claimant directed me to the print out from the Careplanner App where it noted the reason for leaving early in respect of her departure time on 5 March 2020 as "CLIENT REQUESTED CARER TO LEAVE EARLY". The Claimant could not recall why she had not also noted this when she left early on 6 March 2020, nor given a reason for why she left Client Y's house early, but she thought she must have just forgotten.

39. The Respondent asserts that both Client X and Y are deemed not to have capacity and drew a distinction between them and the other clients that the Claimant cared for, who the Respondent asserts the Claimant followed the correct procedure for [71§25] in terms of length of visit. However, when questioned on whether the Claimant knew that Clients X and Y did not have capacity, or that the Respondent regarded them as not having capacity, she said that she did not. She felt that they did have capacity as she could communicate with them both sufficiently and she drew no distinction between them and the other clients she cared for.
40. The Respondent provided evidence to show that the Claimant received mental health awareness training and training on the Mental Capacity Act [206 and 207]. However, I have not been shown any evidence on what this training entailed nor what information the Claimant was given by the Respondent in relation to Clients X and Y's mental capacity, if any. There is a document in the File providing background information on Clients X and Y, which states that they do not have capacity [212] but it is not clear who prepared this or when the Claimant first had sight of it.
41. The Claimant asserted that carers often left clients houses before the scheduled time and the Respondent did not have any issues with this so long as all of the necessary tasks had been completed. The Claimant alleged that leaving early was an accepted practice. In support of this the Claimant said that the Respondent often scheduled visits back-to-back, so there would not have been time to get from one client's house to another without either leaving one early or arriving late to another. In addition, the Claimant referred me to the printout from the Careplanner App, which shows that of the 15 visits recorded between 2 and 8 March 2020 only 2 of them lasted for the scheduled duration. The remainder (including the 3 subject to spot checks) lasted between 20 and 85% of the scheduled time. The Claimant specifically referred me to one on 6 March 2020 which was scheduled for 30 minutes but which only lasted for 7 minutes. The Claimant said that the Respondent raised no issue with this. In addition, the Claimant asserted that, on occasions, the Respondent asked carers to leave clients' houses early if they were needed elsewhere due to sickness or scheduling issues. Alternative Employment
42. The Claimant asserted that she had been offered an alternative job as a carer after she was dismissed by the Respondent, but that she could not start her new role until the new employer had received a reference from the Respondent. The Claimant asserted that a reference was requested from the Respondent but that CS telephoned her potential new employer to say that she would not provide a reference until after the outcome of the Tribunal claim.
43. The Respondent's position is that in response to any reference request for a job outside of the care industry it would be happy to provide dates of employment but that any reference for another care provider would need to mention the reason for the Claimant's dismissal [72].

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44. At the Hearing the Claimant confirmed that she did not approach any care agencies for work other than the one that had offered her a job and was awaiting a reference, nor did she look for work in any other industries as she wished to remain in the care industry.
45. The Claimant said that she made an application for income support in May 2020. The Law Unfair Dismissal
46. The law in relation to unfair dismissal is well established. Article 61 of the Employment (Jersey) Law 2003 (the “Law”) states that an employee shall have the right not to be unfairly dismissed.
47. Article 64 of the Law states that the employer is required to show a fair reason for the dismissal and specifies a number of potentially fair reasons for dismissal, one of which is the employee’s conduct.
48. In order to show the reason for dismissal when it relates to conduct an employer only needs to demonstrate to the Tribunal that it had a genuine belief in the employee’s misconduct. That belief does not have to be correct.
49. Most recently the Tribunal summarised its powers in respect of determining whether or not a dismissal was unfair in the case of *Tania Castanhiera v Empire Catering Limited* [2020] TRE 049 at paragraph 6 of that judgment: “when hearing a case of unfair dismissal, a Tribunal’s powers are limited, specifically that I am not permitted to substitute my judgment for that of the employer. Rather, it is for me to say whether both the decision to dismiss (*Iceland Frozen Foods v Jones* [1983] ICR 17 EAT) and the way in which the investigation was conducted (*J Sainsbury Pic v Hitt* [2003] ICR 111 CA) fell within the range of responses of the reasonable employer, in the circumstances in which the Respondent found itself. If the dismissal or the conduct of the investigation falls within the range, it is fair, if outside, then it is unfair.”
50. Where the employee’s conduct is the reason for dismissal, the Tribunal is guided by the legal test established in the English case of *British Home Stores Limited v Burchell* [1980] 1CR 303. The employer has to show that:
- (1) he believed the employee was guilty of the conduct;
 - (2) he had in his mind reasonable grounds upon which to sustain that belief, and
 - (3) at the stage at which he formed the belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.
51. If unfair dismissal is established the Tribunal must award compensation in accordance with Article 77F of the Law and the Schedule to the Employment (Awards) (Jersey) Order 2009, which sets out the level of compensation to be awarded based on the employee’s length of service.

52. Article 77F of the Law also allows the Tribunal to exercise its discretion and reduce such an award as follows: “77F Compensation awards
- (3) An award under Article 77(2) or Article 77E(3)(a) may be reduced by such amount as the Tribunal considers just and equitable having regard to any of the circumstances described in paragraphs (4), (5), (7), (8), (9) and (10). ...
- (5) The Tribunal considers that any conduct of the complainant before dismissal (or, where the dismissal was with notice, before the notice was given) that contributed directly to the dismissal was such that reduction of the award is just and equitable. ...
- (10) Any circumstances that the Tribunal considers would be just and equitable to take into account.”
53. The principle set out in *Polkey v AE Dayton Services* [1988] AC 344 is relevant when considering a reduction to a compensation award. *Polkey* established that if the Respondent can show it could have fairly dismissed the Claimant, the Tribunal can reduce the Claimant's compensation to reflect the possibility that the employer would have done so. *Wrongful Dismissal*
54. In accordance with Article 56 of the Law an employer is required to give an employee with between 6 and 7 years continuous employment 6 weeks' notice. If the employer fails to do so the employee can bring a claim for damages for breach of contract.
55. However, the employee must seek to mitigate the losses it suffers as result of the breach. In the case of *Lonczak v Kumpin Dental Limited* [2019] TRE 192 the Tribunal rejected the Claimant's claim for damages for the latter part of her notice period on the basis that she failed to seek to mitigate her losses.

Conclusion

Unfair Dismissal

56. The Claimant was an employee who was dismissed and had over 52 weeks continuous employment at the time of the dismissal. The Claimant therefore qualifies to bring a claim for unfair dismissal.
57. The Respondent's position is that it dismissed the Claimant for a reason related to conduct, which is a potentially fair reason for dismissal under the Law. As the dismissal was based on conduct the test in the *Burchell* case is applicable. The first question to consider as part of this test is: did the Respondent believe the Claimant was guilty of the misconduct? Specifically in this case, did CS and JM genuinely believe that the Claimant was falsifying her time records?
58. Advocate Boothman has submitted that it is not possible to test whether the Respondent had a genuine belief in the Claimant's misconduct as CS and JM were not available for cross examination. Whilst it is true that it was not possible to test CS and JM's evidence on this

point, based on the consistency of their witness statements with the documentary evidence that has been provided and the fact that no alternative reason for dismissal has been put forward by the Claimant, I accept that the Respondent did have a genuine belief in the Claimant's misconduct.

59. The second question in the Burchell test is whether the Respondent had in its mind reasonable grounds to support its belief. I must look at the evidence that CS and JM had when they made their determination that the Claimant was guilty of falsifying her time records. CS and JM had seen for themselves the Claimant leaving (or on one occasion being absent from) the clients' houses. They had also seen the Claimant's handwritten time entries and the times that she submitted on the Careplanner App and were aware these did not match the times they saw her leaving or absent. Accordingly, they had good evidence that the Claimant had recorded the wrong departure times for her visits. Absent the Claimant's explanation as to why the departure times were wrong, CS and JM came to the conclusion that this had been a deliberate error.
60. This is where the final question in the Burchell test becomes relevant and I must ask myself whether, at the time at which CS and JM formed this belief, had they carried out as much investigation into the matter as was reasonable in the circumstances? Advocate Boothman argues that this belief was formed in advance of the Dismissal Meeting and that the outcome of that meeting was predetermined. This appears to be supported by the Respondent's own evidence, in that both SC and JM state that they met with the Claimant on 9 March 2020 "to advise her of her dismissal" [71 and 77]. Accordingly, and this is supported by the brief minutes of the Dismissal Meeting, it appears that the Claimant was given little or no opportunity to respond to the allegations of deceit against her prior to her dismissal.
61. While there may be some very limited situations where it is acceptable not to ask an employee who is accused of deceit for their side of the story, this is not one of those situations. Indeed under most circumstances, including those of this case, it would be more appropriate to give the employee the opportunity to consider and respond to all of the evidence against them before taking any decision on how to proceed. In this case, not only did the Respondent not do this but, as it has admitted, it did not follow its own procedures by advising the Claimant that she was being asked to attend a disciplinary meeting or allowing her the opportunity to bring someone with her. Accordingly I find that, in respect of the dismissal process, the third limb of the Burchell test is not satisfied.
62. However, I have also had regard to the Respondent's assertion that the appeals process rectifies the errors made in the dismissal process. The errors made in the dismissal process in this case are substantial and, in my view, it is unlikely that an appeal process would be capable of rectifying such errors. However, I have looked specifically at the appeal process in this case and I note the following:
 - (1) there was a delay of over 2 months between the dismissal and the outcome of the appeal;

- (2) while I make no determination in relation to the independence of the person overseeing the appeal, it is relevant that a potential conflict of interest was not disclosed to the Claimant in advance of the appeal hearing; and
- (3) the appeal report relies on the fact that there is no evidence that carers left clients early and managers were aware of this [249 and 250]. This appears to be contradicted by the Careplanner App log, which does not form part of the appeal report.
63. Accordingly, I conclude that the appeal process does not rectify the errors made by the Respondent in the dismissal process. The conduct of the investigation was not within the range of reasonable responses that an employer in the same circumstances as the Respondent could have made and, therefore, the Claimant was unfairly dismissed. Wrongful Dismissal
64. The parties agree that the Claimant was not given any notice of her dismissal or any payment in lieu of that notice. Accordingly, unless the Respondent can show that the Claimant committed gross misconduct, the Respondent will be in breach of contract and the dismissal will be wrongful. I have therefore considered whether there is sufficient evidence for me to make a finding of gross misconduct.
65. It is my view that if the Claimant were to have been deliberately deceitful in the pre-meditated way asserted by the Respondent this could constitute gross misconduct. I have therefore spent some time considering the feasibility of the Claimant's explanation that she forgot to log out on the Careplanner App and amend her written departure time when leaving the clients' houses.
66. I note that based on the Careplanner App log it appears that the Claimant only forgot to log out when leaving the houses of Clients X and Y and not those of any other clients. In addition, the Respondent has asserted that it differentiates between the capacity of Clients X and Y and the other client's the Claimant visited and this is why the Claimant only failed to logout correctly with Clients X and Y. However, I have only seen the Careplanner App log for one week so it may be that the Claimant forgot to log out at other houses in a different week or there may be a reason why she was more likely to forget with Client's X and Y. In addition, when giving her evidence the Claimant was very clear that it was an honest mistake, she simply forgot to log out, and that she did not draw any distinction between the capacity of Client's X and Y and other clients. I also note that the Respondent was not available at the Hearing to test its evidence in relation to the client's capacity or the likelihood of a carer forgetting to log out.
67. In addition, I considered the Respondent's assertion that the Claimant was premeditated in her deceit as she wrote down codes from the fob in the clients' houses to use later. The Claimant's response to this is that she logged out of the App using codes she made up once she realised her mistake and that this is evidenced by the error messages shown on the Careplanner App. The error messages may indeed show this, or perhaps they instead show that the Claimant was not next to the fob when entering the correct code; as the Respondent

did not attend the Hearing I did not hear its position on this. Accordingly, other than the Claimant's witness testimony, I have no conclusive evidence on this point either way. However, what this does illustrate to me is that that some further investigation should have been undertaken.

68. It is for the Respondent to show that the Claimant was deceitful and, based on the evidence before me, I am not satisfied that this has been done.
69. I have also considered whether there could be gross misconduct based on the fact that the Claimant did not remain at the clients' houses for the scheduled length of time. In my view, leaving a little bit early is very unlikely to constitute gross misconduct, but it is possible that in some situations only staying for a very short period of time, particularly when coupled with not completing tasks set or leaving clients at risk, could constitute gross misconduct.
70. Based on the evidence before me it appears that leaving a client visit prior to the end of the time scheduled is accepted practice within the Respondent. The back-to-back scheduling referred to by the Claimant and shown in the rota for 1 to 8 March 2020 supports the assertion that on occasions the Respondent expected carers to leave one shift early to get to the next one on time. In addition, the Careplanner App log for the same week shows that it was rare for the Claimant to stay for the full visit and the Respondent makes no complaint regarding the Claimant leaving early on most of those occasions. Further, the App allows for the carers to provide a reason for leaving early, indicating that this practice was, at least to some extent, permitted.
71. Accordingly, leaving a visit early on its own cannot be considered to be gross misconduct. However, I have taken account of the fact that the Respondent asserts that not only did the Claimant leave early but that, on at least two occasions, she only stayed for 10 out of the scheduled 60 minutes. The Respondent's evidence in relation to the times at which the Claimant left the clients' houses was very consistent and included time stamped photographs, which although not conclusive evidence without supporting oral testimony to explain them are nevertheless persuasive. In addition, the Claimant's evidence on how long she stayed for was limited. She could not recall the length of time she stayed, only the few tasks that she had done, which it seems could have been completed within 10 minutes. Accordingly, I conclude that it is likely the Claimant's visits on 5 and 6 March 2020 only lasted for 10 and 11 minutes respectively.
72. Common sense tells me that if a visit is scheduled for 1 hour, 10 minutes is unlikely to be sufficient time to do all that could be done, nor does it seem fair on the client to only stay for such a short length of time. However, when considering whether leaving after this period of time constitutes gross misconduct I must take account of the fact that the Respondent appeared to accept that carers would not always stay for the full duration of their scheduled visit and the Claimant's assertion that the client asked the Claimant to leave early. Based on the evidence before me, I do not find that leaving after 10 minutes on these 2 occasions would constitute gross misconduct.

73. The Respondent also makes reference to the fact that elements of the Claimant's work were not completed before she left the clients' houses. However, the Respondent has not provided any evidence of this other than witness evidence, which it was not possible to test. Further, the Claimant has been consistent throughout her written and oral evidence that she had completed all necessary tasks prior to leaving the clients' houses. In addition, incomplete work was never raised by as an issue by the Respondent at the time of dismissal. I therefore placed no weight on this assertion.
74. I also note that the Respondent's assertion that the Claimant put clients at risk is made without any supporting evidence or indication of the way the clients were at risk. Accordingly, I have also not been able to place any weight on this argument.
75. As I have mentioned, I consider it relevant that the Careplanner App allowed the carers to provide a reason for leaving early. As well as indicating that leaving early was permitted, to some extent at least, this also indicates that it is important for the carer to specify why if they do leave early. Based on the log from the Careplanner App it appears the Claimant gave a reason for leaving one of the visits that were subject to spot checks early, but not the other two. In addition to failing to give reasons for leaving early the Claimant has admitted that she made mistakes in her time recording.
76. I therefore conclude that the Claimant could and should have acted differently. She should have placed more importance on her accurate time recording. She should also have made sure she gave reasons for leaving a client's house early on each occasion. In addition, it may have been preferable for her to ask her managers in advance whether she should leave early, if not on each occasion, certainly after being asked by the Client to leave so early more than once.
77. However, while it may be arguable that the conduct of the Claimant was poor enough to warrant a severe written warning or possibly even dismissal, following an appropriate investigation and dismissal process, I have not been shown sufficient evidence to make a finding of gross misconduct which would permit the Respondent to dismiss the Claimant without giving her any notice. Accordingly the Claimant should have been given notice of her dismissal and I conclude that the Claimant's claim for wrongful dismissal succeeds.
- Remedy
78. Based on the evidence supplied by the parties in relation to the Claimant's periods of employment, I conclude that the Respondent employed the Claimant from 1 November 2013 until 9 March 2020 without any break in employment and, accordingly, the Claimant had 6 years continuous service.
79. The maximum amount of compensation the Claimant is entitled to is therefore as follows: (1) for unfair dismissal, 26 weeks salary at a weekly wage of £275, which equates to £7,150 (2) for wrongful dismissal, 6 weeks salary at a weekly wage of £275, which equates to £1,650

80. I note that the Claimant's quantification of claim [41] specifies the Claimant's statutory notice period is 7 weeks. However, 7 weeks is the statutory notice period for an employee with 7 years continuous employment. I believe a 7-year period of continuous employment was calculated based on a mistake made in the pleadings, where the parties agreed that the Claimant was employed from November 2012. This mistake was rectified in the Claimant's witness statement, which states that she was employed from November 2013. This accords with the start date set out in the written contract included in the File. Consequently, the correct period of continuous employment is 6 years, for which the statutory notice period is 6 weeks.
81. I must now consider whether any reductions should be applied to either of these maximum amounts. Unfair Dismissal
82. Article 77F of the Law grants the Tribunal the discretion to reduce an award for unfair dismissal by any amount it considers just and equitable if it considers that there was conduct by the Claimant that directly contributed toward her dismissal or if there are any other circumstances that it considers would be just and equitable to take into account.
83. The Respondent asserts that the award for unfair dismissal should be reduced to zero due to the Claimant's conduct prior to her dismissal. It is my view that the Claimant should have done things differently and it is highly likely that if the Claimant had not left the client's house so early on 5 and 6 March 2020 or made mistakes on her time recording, she would not have been dismissed.
84. In addition, the Respondent has argued that, even if it had followed the proper procedure and undertaken further investigations it would have dismissed the Claimant in any event. Accordingly, following the principle set out in the Polkey case there should be a reduction in any award on this basis. However, Advocate Boothman has submitted that, had the Respondent made reasonable enquiries with the Claimant prior to dismissing her, it would not have had reasonable grounds for believing that she had dishonestly falsified records and so would not have dismissed her. While I cannot say that there would have been no grounds for this belief had further investigations been conducted, it is possible that an element of doubt in the certainty regarding the Claimant's dishonesty may have formed, which may have led to the Respondent at least considering a formal written warning rather than dismissing the Claimant.
85. Therefore, while I agree with the Respondent that there was some contributory fault from the Claimant it is not a forgone conclusion that had further investigations been made or the proper process been followed the Claimant would have been dismissed in any event. It would not, therefore, be appropriate to reduce the award to zero, but some reduction should be made to take account of these facts. Taking into consideration the levels of reductions applied by the Tribunal in the past and the facts of this case I consider that a reduction of 80% would be appropriate.

86. Consequently the Claimant is awarded £1,430 in respect of her claim for unfair dismissal. Wrongful Dismissal
87. There is a duty on the Claimant to seek to mitigate her losses, in that she should seek a reasonable alternative source of income. The Claimant explained that she had found an alternative care role but that the new employer was not prepared to take her on until it had received a reference from the Respondent. The Respondent was not prepared to give a reference to another employer without mentioning its reason for dismissing the Claimant. It asserted that it would however provide a reference for a non-care role.
88. The Claimant gave oral evidence to say that she did not look for any other roles, either in the care industry or otherwise. She said that she had worked in another industry in the past but she did not wish to do so again. This Claimant did seek and was awarded income support, but not within the first 6 weeks after her employment was terminated.
89. Accordingly, I find that the damages for wrongful dismissal should be reduced to take account of the fact that the Claimant did not make any further efforts to mitigate her losses. I consider that a reduction of 2 out of the 6 weeks' wages is appropriate.
90. Consequently, the Claimant is awarded £1,100 in respect of her claim for wrongful dismissal. Summary of Award Compensation for unfair dismissal £1,430 Damages for wrongful dismissal £1,100 Total Award £2,530 Mrs H Westmacott, Deputy Chairman Sent to the parties on: 12 October 2020

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Prepared on 26 October 2026 · Esheria