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EMPLOYMENT TRIBUNALS

Claimant: **Mrs Avanelle Allen-Lynch**

Respondent: **Care UK Limited**

Heard at: **East London Hearing Centre**

On: **1 and 2 November 2018**

Before: **Employment Judge Russell**

Representation
Claimant: **In person**
Respondent: **Ms Anna Beale (Counsel)**

JUDGMENT

The Judgment of the Tribunal is that:

(1) The Claimant made a protected disclosure on 19 October 2017 to Ms Saadat.

(2) The Claimant did not make a protected disclosure to Ms Sandford on 19 September 2017.

(3) The reason for dismissal was conduct.

(4) The dismissal was fair in all the circumstances of the case. The claim fails and is dismissed.

(5) In respect of holiday the Claimant is entitled to be paid for 17.1 days outstanding holiday calculated at a blended rate of 7.4 hours per day. The correct sum of £772.35 is paid on 11 October 2018. That claim also fails.

REASONS

1 By a claim form presented to the Tribunal on 15 February 2018, the Claimant brings complaints of unfair dismissal (ordinary and because of a protected disclosure) and for holiday pay. The Respondent resists all claims. The issues were identified by EJ Burgher at a Preliminary Hearing on 21 May 2018. I heard evidence from the Claimant on her own behalf. On behalf of the Respondent, I heard evidence from Ms Gillian Sandford,

Mr Anthony Browne and Ms Eileen Coyle-Jones. I was provided with an agreed bundle of documents and read those pages to which I was taken in evidence.

Law

2 The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996. The Respondent relies upon conduct within section 98(2)(b). The legal issues in a conduct unfair dismissal case are well established in the case of **BHS –v- Burchell** [1978] IRLR 379, namely:

> (1) did the employer genuinely believe that the employee had committed the act of misconduct?
> (2) was such a belief held on reasonable grounds? And
> (3) at the stage at which it formed the belief on those grounds, had the employer carried as much investigation as was reasonable in all the circumstances of the case?

3 Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial merits of the case. This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

4 In an unfair dismissal case it is not for the tribunal to decide whether or not the claimant is guilty or innocent of the alleged misconduct. Even if another employer, or indeed the tribunal, may well have concluded that there had been no misconduct or that it would have imposed a different sanction, the dismissal will be fair as long as the **Burchell** test is satisfied, a fair procedure is followed and dismissal falls within the range of reasonable responses (although these should not be regarded as 'hurdles' to be passed or failed).

5 The range of reasonable responses test or, to put it another way, the need to apply the objective standards of a reasonable employer, applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision to dismiss, see **Sainsbury's Supermarkets Limited v Hitt** [2002] IRLR 23, CA.

6 The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v- Madden** [2000] IRLR 827, CA. There is often a range of disciplinary sanctions available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563. However, the range of reasonable responses test is not a test of irrationality; nor is it infinitely wide. It is important not to overlook s.98(4)(b) the provisions of which indicate that Parliament did not intend the Tribunal's consideration of a conduct case to be a matter of procedural box ticking and it is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer, **Newbound –v- Thames Water Utilities Ltd** [2015] IRLR 734, CA.

7 In deciding whether the dismissal was fair or unfair, the tribunal must consider the

whole of the disciplinary process. If it finds that an early stage of the process was defective, the tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA per Smith LJ at paragraph 47.

8 The Tribunal must have regard to the ACAS Code of Practice which sets out basic principles of fairness to be adopted in disciplinary situations, promoting fairness and transparency for example in use of clear rules and procedures. This includes the requirement that employers carry out necessary investigations to establish the facts of the case.

9 A qualifying disclosure requires a 'disclosure of information' which in the reasonable belief of the worker tends to show, amongst other things, that the health or safety of any individual has been, is being, or is likely to be endangered, s.43B(1)(d) Employment Rights Act 1996 or a legal obligation breached, s.43B(1)(b).

10 The Tribunal must look at the words used by the Claimant to decide whether they convey information (and an allegation may contain information); words which are too general and devoid of factual content tending to show breach of a legal obligation will not amount to information. Words which otherwise fall short may be boosted by context or surrounding communication. The assessment is an objective evaluation in all of the circumstances of the case, **Kilraine v LB of Wandsworth** [2018] EWCA Civ 1436.

11 In a claim under s.103A Employment Rights Act 1996, the Tribunal must decide whether the protected disclosure was the sole or principal reason for dismissal.

Findings of Fact

12 This case concerns the dismissal of the Claimant who was employed as a care assistant at Queens Court Care Home from 30 January 2002 until her summary dismissal on 14 December 2017. Queens Court is a Care Home for elderly residents with age related problems including dementia and Alzheimer's disease. It has capacity to care for 62 full time residents, over three floors of accommodation. The Claimant worked on the 2nd floor.

13 Until September 2017, Queens Court was owned and operated by Central & Cecil Housing Trust. On 1 December 2017 ownership was acquired by the Respondent and at that point the Claimant and other staff TUPE transferred to the Respondent's employment.

14 The residents of Queens Court are vulnerable and safeguarding is paramount. The Claimant and other staff attended training on dementia and safeguarding issues. The Respondent, and in particular Mr Browne and Ms Coyle-Jones, are particularly alive to safeguarding issues. In a care setting it is inappropriate to video residents as they cannot give consent. This is regarded as abuse and a very serious matter of misconduct even on the Claimant's own case.

15 The Claimant had returned from maternity leave early in April 2017. She was working night shifts to fit in with her caring responsibilities for her family. On 1 September 2017 she worked with a senior carer, K, who was in charge of the unit and another care assistant E. During the course of the shift the Claimant observed bruising to a resident's arm. The resident suggested that a member of staff had pinched her. The Claimant

notified E and K of the allegation. It appears that K took no further action.

16 On 2 September 2017 the Claimant was working again with K in charge and another carer, G. The carer on the day shift was P. Other staff working that evening on different floors included M and E. One resident with dementia would on occasion become angry and aggressive, such an incident occurred on 2 September 2017. The resident became particularly aggressive towards the Claimant as she could not find her purse and accused. It is important to make clear that the Claimant had done no such thing. I accept the Claimant's evidence that this was a distressing situation for her and that the resident had been agitated, angry and had thrown items at one point.

17 The residents care plan made clear that when agitated the resident should be taken to a quiet area and her daughter telephoned if required. This did not happen on 2 September 2017. Instead, K used her mobile telephone to video record a small part of the incident in footage lasting just over one minute. In the video, K can be heard laughing at the resident who was then in the sitting room. Two other female residents were present and one complains that staff are laughing at them. The resident approaches K in a clearly agitated and distressed state, unhappy that she has been laughed at. K does not calm the resident but continues to laugh and speak to her in a disrespectful manner. The resident becomes more agitated and threatens to slap K. K then says that they need to "drug her up".

18 During this time, the Claimant is present in the corridor approximately 5 metres away from K. The resident is shown turning in the direction of the Claimant, who comes into shot approaching the resident and then backing away. The Claimant's pace is measured. The resident reaches towards K, who says "don't slap me" in a tone which does not suggest fear but appears mocking. The video turns towards the Claimant who appears to be looking in the direction of the mobile telephone which is recording the interaction. The resident moves towards the day room and then back towards the corridor in the direction of the Claimant, walking slowly and holding the wall to steady herself. The Claimant enters a room off the corridor and shuts the door behind her. She does not make her way to the stairwell immediately behind her, she is not running and appears calm. The resident tries to open the door, K moves closer, still filming and says "watch this" whilst the Claimant holds the door closed. Laughter can be heard. The video then ends. No other care worker can be seen in the video.

19 It is not in dispute that: (1) G was not present during the incident as she arrived late for her shift; (2) later in the evening, the resident was calmed and went to bed in her own room; (3) the Claimant worked the remainder of her shift; and (4) later in the shift K sent the video to the Claimant via WhatsApp. The remainder of the shift passed without incident and it no report was made to management that night.

20 On 4 September 2017, following an enquiry about the bruises on the other resident, the Claimant wrote to the manager of Queens Court and alleged that she had told K on the evening of 1 September 2017 about the bruising and that K had failed to document or act upon the report of potential abuse which the Claimant said had nothing to do with her.

21 The Claimant and K exchanged a series of WhatsApp messages between 4 and 9 September 2017 in connection with the bruises on the resident. The Claimant was unhappy that the night staff may be unfairly blamed. In a WhatsApp message on 9

September 2017, the Claimant accused K of failing to record the bruising and referred to previous errors in medication of residents. K raised a complaint about the content of the messages from the Claimant which she regarded as threatening.

22 The Claimant was suspended on 9 September 2017 by the care home manager and Ms Fiona Saadat was appointed to investigate. Consistent with the later letter confirming suspension, I accept Ms Sandford's evidence that she was advised at the time of the suspension.

23 Following her suspension and before the investigation meeting, the Claimant contacted Ms Sandford by telephone on a number of occasions. The Claimant's case is that she recorded the conversations. In evidence, the Claimant played the recording of a call to Ms Sandford on 20 September 2017 in which she referred to medication errors, favouritism, a lack of action when problems were raised, the deputy manager having favourites and not maintaining confidentiality and also the bruising incident. The Claimant did not mention the video recording taken on 2 September 2017. A further recording on 19 September 2017 was later played in the appeal hearing but was not played at Tribunal, this did not refer to the existence of the video footage taken by K. Other than these two recordings, no other recorded conversations have been disclosed by the Claimant.

24 The Claimant's case, as set out by EJ Burgher in the agreed issues, was that in a conversation on 19 September 2017 she told Ms Sandford about the existence of the video recorded by K, at the same time as she made disclosures about the bruises and medication overdoses. Ms Sandford accepts that the bruises and medication were mentioned but denies that the Claimant referred to the video, stating that the allegation was so serious that she would have acted immediately if she had been told. On balance, I prefer the evidence of Ms Sandford whom I found to be a credible and reliable witness. The Claimant's failure to refer to the video in a telephone conversation the very next day and the conversation on 19 September 2017 as set out in the appeal hearing notes is not consistent with her evidence to this Tribunal of an oral disclosure to Ms Sandford. The Claimant's case during the investigation and disciplinary process was inconsistent (for reasons set out below) and I did not find her a reliable witness. On balance, I find that the Claimant did not tell Ms Sandford about the existence of the video either on 19 September 2017 or any of their other telephone conversations in September 2017.

25 The Claimant attended an investigation meeting with Ms Saadat on 19 October 2017 during which she played the video footage taken by K. The Claimant's case was that she did not know that K had been video-taping the resident and had received the video after the resident had settled down. The Claimant did not say that she had already told Ms Sandford about the video. Ms Saadat was very concerned about the existence of the video.

26 On 27 October 2017, the Claimant attended an investigation with Ms Capper to consider an allegation that she had failed to disclose information about abuse. The Claimant's explanations to Ms Capper were inconsistent. At times, the Claimant maintained that she did not know that K was recording the interaction, had only seen the video about a month ago due to a problem with her phone and had told Ms Sandford about it during a telephone conversation. At other times, the Claimant said that she had told K that she should not be videotaping at work when K had sent the WhatsApp message to her and that she had not expressly referred to a video in her conversations with Ms Sandford but more generally to "some information whereby seniors are abusing

residents". On balance, I find that the Claimant's answers to Ms Capper indicated that she had known by the end of the shift on 2 September 2017 that K had taken the video footage of the resident and, contrary to her evidence to this Tribunal, she had not expressly told Ms Sandford that such a video existed. The Claimant admitted to Ms Capper in the meeting that she had heard K say that they needed to 'drug her up' and that she had not reported that comment or the existence of the video.

27 Ms Capper also interviewed G, who confirmed that she knew that K had sent a video to the Claimant via WhatsApp but that she did not know what was on it. In her interview with Ms Capper, K said that she told the Claimant that she had taken the video and was going to delete it but the Claimant had asked her to send her a copy on WhatsApp. K also said that she had shown the video to G. Another carer, M, was also interviewed by Ms Capper. He gave evidence about the resident being upset and K trying to calm her down. This was not the part of the incident video-taped by K who was clearly not at this time trying to calm the resident. The matter was referred to the police.

28 In a second interview on 7 November 2017, the Claimant named two other carers (P and E) who had been working that day and who had seen that she had been attacked by the resident. The Claimant denied asking K to send her the video or that either she or G had been shown in that night. P was interviewed; she denied helping the Claimant to calm down the resident and said that she was not involved. E was not interviewed.

29 The Claimant was invited to attend a disciplinary hearing on 6 December 2017. As the Claimant had now TUPE transferred, the disciplinary hearing was chaired by Mr Browne, the new manager of Queen's Court. Mr Browne had no prior knowledge of the investigation as he was new in post and relied upon the investigation report produced by Ms Saadat. The report referred to the evidence taken, including that from M but not G. Although it listed the interview notes for G and M as appendices, copies were not in fact attached to report sent to the Claimant, Mr Browne or (later) Ms Coyle-Jones.

30 At the disciplinary hearing, Mr Browne made clear that he did not want to hear about the messages which had led to the initial disciplinary investigation but was focused on the video as that was the issue of crucial concern to him. The Claimant's case at disciplinary was that she had reported the existence of the video when she was first able to access it on WhatsApp with her new telephone and had reported it immediately to Ms Sandford, on the evening in question she was not aware of the video as she had been so concerned about the resident's behaviour towards her. Mr Browne explored the Claimant's account of what was seen on the video and in particular how she could not be aware that K was filming given her close proximity. Mr Browne was an honest witness and I accepted as genuine his evidence that the concern was not that the Claimant had disclosed the video but the fact that she had <u>not</u> disclosed it in a timely manner but had waited six weeks to do so. Having considered the Claimant's explanations, Mr Browne did not accept that the Claimant had only seen the video on 19 September 2017 or that problems with her mobile telephone prevented her from seeing it sooner. In this Tribunal, the Claimant has relied upon evidence confirming that the Claimant got a new mobile telephone on 18 September 2017 having experienced problems with the speakers and sticking keys on her original telephone in August 2017. Even if that evidence had been available to Mr Browne, I accept that it would not have affected his view on the Claimant's ability to receive and view WhatsApp messages and his belief that the Claimant had actually witnessed the video recording (and hence abuse) on the night of 2 September 2017 and, on her own admission, had been told by K on 7 September 2017 that the video

had been sent to her. Mr Browne's genuine belief was that the Claimant should have disclosed the video then even if, as she said, she had not watched it.

31 By the conclusion of the disciplinary hearing, Mr Browne formed the view that the Claimant showed no insight or remorse. He believed that the Claimant had come across as quite arrogant, believing that she had done nothing wrong and showing no compassion for the resident. Mr Browne decided that she should be summarily dismissed for gross misconduct. The reason for dismissal was the Claimant's failure to disclose information relating to the abuse of residents at Queens Court. Mr Browne believed that the Claimant was aware of what was happening and K's conduct, and the distress caused to the vulnerable resident, but chose not to intervene and should have raised the abuse sooner than the first meeting on 19 October 2017.

32 The first letter confirming the reasons for dismissal was not received by the Claimant and she received the version dated 21 December 2017. The reasons for dismissal are the same in each, albeit with some formatting changes.

33 Mr Browne gave oral evidence in this Tribunal hearing about his reasons for dismissal. I accepted his explanations, consistent with his written reasons at the time, that the misconduct was not that the Claimant had disclosed the video and therefore an act of abuse but the fact that she had done it six weeks too late and had not intervened despite being aware of the distress caused to the resident.

34 G had been suspended on 23 October 2017 due to concern that she too had seen the video and not reported it. G attended an investigation meeting and also a disciplinary hearing, also chaired by Mr Browne. G denied any sight of the video or knowledge of what was on it. Mr Browne accepted her evidence as truthful, unlike that of the Claimant, and found that she was unaware that the video sent by K was of the distressed resident. As there was no misconduct, G was not dismissed. I accepted that this was the genuine belief held by Mr Browne based upon his assessment of G's credibility in her disciplinary hearing.

35 The Claimant appealed against her dismissal on grounds that procedures had not been followed and the penalty was unduly severe. The Claimant complained that she had been victimised, bullied and discriminated in the period after her suspension, had made Ms Sandford aware of her concerns about abuse of residents and had been prevented by Mr Browne from relying upon evidence relevant to the earlier concerns including an unduly close relationship between K and the Deputy Manager.

36 On 3 January 2018, the Respondent wrote to K confirming that following a disciplinary hearing on 14 December 2017 it was satisfied that she had taken video footage of a resident who was clearly in distress, had laughed and shouted at the resident which had made the situation worse and had offered no valid reason for forwarding the video footage to a colleague the same night. As the letter recorded, had K not resigned on 30 October 2017 she would have been summarily dismissed. In any event, K was referred to DBS in relation to her conduct.

37 Ms Coyle-Jones was appointed to hear the appeal which took place on 22 January 2018. The recording of a conversation between the Claimant and Ms Sandford on 19 September 2017 was played (as referred to above); as the Claimant accepted in evidence, that recording did not refer to the video. No further recordings were provided to

Ms Coyle-Jones. The hearing lasted an hour and 20 minutes and the Claimant explained in detail why she considered her dismissal unfair.

38 In the appeal hearing, as here, the Claimant relied on K's interview notes asserting that G had seen the video on 2 September 2017. K's assertion was the only evidence suggesting wrongdoing by G; both G and the Claimant's position was that K had not shown either of them the video that night. After the appeal hearing, Ms Coyle-Jones interviewed G and accepted as truthful her evidence that she had not seen the video as alleged by K.

39 By a letter dated 15 February 2018, Ms Coyle-Jones informed the Claimant of the decision to uphold the dismissal setting out her reasons in full. Ms Coyle-Jones relied upon the importance when working with vulnerable adults of trust and confidence in employees to report any incidents of abuse. She found that the Claimant had chosen to disclose the video of abuse to the investigating officer Ms Saadat on 19 October 2017. She also rejected the assertion that there had been problems at the home, finding that the Claimant had not raised any concerns with Ms Sandford prior to suspension. Ms Coyle-Jones gave evidence at Tribunal about her reasons for rejecting the appeal. I found her to be a reliable and credible witness and I accept that her reason for upholding dismissal was the Claimant's delay in reporting the existence of the video and failure to report the incident on 2 September 2017.

Conclusions

40 As set out in EJ Burgher's Preliminary Hearing summary the only two protected disclosures upon which the Claimant was allowed to rely were (a) 19 September 2017 to Ms Sandford regarding the video and (b) 19 October 2017 to Ms Saadat regarding the video. It was not in dispute that the second disclosure was made and for the reasons set out above, I have found that the disclosure to Ms Sandford was not. In submission, Ms Beale did not take any point on whether the Claimant held a reasonable belief that her disclosure to Ms Saadat tended to show a relevant breach and were in the public interest. The issue was therefore whether that disclosure was the sole or principal reason for dismissal. I conclude that it was not.

41 For the reasons set out above, I have found that both Mr Browne and Ms Coyle-Jones held a genuine belief that the Claimant had committed an act of misconduct in that she failed to disclose the existence of the video in a timely manner. Mr Browne genuinely believed that the Claimant had been aware that the resident had been video-recorded and that the Claimant had been complicit in the incident. As both made clear, the concern was not that the Claimant had disclosed the video of abuse but that she had <u>not disclosed</u> it for at least six weeks. It was this failure to disclose which was the conduct for which she was dismissed.

42 Was such belief reasonable, based upon a reasonable investigation? The Claimant's principal complaint about investigation is that she did not have the interview notes of M or G. Neither, as I have found, did Mr Browne or Ms Coyle-Jones. They did not rely upon such information when reaching their decision save to the extent that it was set out in the report in any event. Moreover, the Claimant's issue is not so much what Grace said in her witness statement so much as the fact that she was not dismissed as well. This is more relevant to sanction than to investigation. The other carer named by the Claimant was not interviewed. However, it was not in dispute that E was not present

during the incident. There was no dispute that the resident had been aggressive towards the Claimant at an earlier point in the shift and that E had not seen or known of the video. In such circumstances, it is difficult to see what E could reasonably add.

43 The Claimant also complains that her health issues were not explored and that Mr Browne did not hear evidence about her previous problems at the home which were the background to the disciplinary allegations. Dealing with health first, the Claimant was signed off from the 22 September 2017. This was 20 days after the incident and after the Claimant had become aware of the video. The Claimant had worked her full shift on 2 September 2017 and the following nights. Even if this evidence had been before Mr Browne and Ms Coyle-Jones, it would not have supported the Claimant's case that she was so traumatised on 2 September 2017 that she had no memory of what had happened. In any event, this was not the explanation put forward in the internal process.

44 The investigation in a conduct dismissal need not be perfect. The incident with the resident was not in dispute and the issue was whether the Claimant was aware of the video and whether she disclosed it as soon as she should. The video spoke for itself and the relevant witnesses who were said to know about the video were interviewed. The context was not in dispute. Even if there had been problems in the working relationships previously, it was reasonable for the employer considering this particular allegation of misconduct to decide that they were not relevant. I am satisfied that this is an investigation that falls within the range of reasonable responses.

45 As for the reasonableness of the belief, both Mr Browne and Ms Coyle-Jones rejected the Claimant's case as to the events on 2 September 2017 and particularly her denial of knowledge that K was taking the video or of its contents that night when sent to her. I am satisfied that their negative view of the Claimant's credibility was reasonable in all of the circumstances. In the internal process, and indeed in this Tribunal, the Claimant has not presented as a reliable witness. I have seen the video footage upon which Mr Browne and Ms Coyle-Jones attached such weight. Having done so, I am satisfied that it was reasonable for both to reject the Claimant's explanations about what she knew about the incident as it was recorded. The Claimant's assertion in evidence that she was so focused on getting out of the proximity of the resident that she did not notice K's actions is not consistent with her movement towards K and the resident. The Claimant's demeanour and measured pace seen in the video is not consistent with her case that she was so traumatised or fearful of her safety that she did not see K video recording nor hear her laughing and goading the resident when she was within 5 metres and could hear the 'drug her up' comment.

46 As for the finding that the Claimant did not disclose the video until her meeting with Ms Saadat, I have also found the Claimant's evidence about an earlier to Ms Sandford unreliable. It was not supported by the tape recorded conversations which have been disclosed and I have preferred Ms Sandford's evidence. On the evidence before them, both Mr Browne and Ms Coyle-Jones reasonably formed the belief that the Claimant had seen the WhatsApp video before she said she had. The evidence available to them, and to this Tribunal, was of other WhatsApp messages sent and received between the Claimant and K during the period 4 to 9 September 2017.

47 For all of these reasons I am satisfied not only that Mr Browne and then Ms Coyle-Jones held a genuine belief that the Claimant had committed an act of misconduct namely that she knew of the abuse on 2 September she knew of the content of the video and she

had received it and had the opportunity to see it on 2 September but that they rejected in the entirety her assertions to contrary. I am satisfied that that belief was reasonable based upon a reasonable investigation.

48 As for procedural fairness, I have found that Ms Sandford did know about the suspension at the time. The Claimant's principal challenge to fairness is alleged inconsistency of treatment: she was dismissed, G and K were not. Mr Browne reached his decision to dismiss based upon the Claimant's explanations and his belief that they were not credible. Just as with the Claimant, G was suspended, interviewed on investigation and required to attend a disciplinary hearing. Unlike the Claimant, however, Mr Brown believed G's explanation that she did not know what was on the video. That belief was reasonable. The only evidence against G was provided by K; it was contradicted by G and the Claimant. The Claimant essentially seeks to argue that K was an unreliable witness when she implicated her but reliable when she implicated G. I do not agree. The circumstances relating to G and to the C were materially different. As for K herself, it is correct that she was not dismissed. That, however, is because she had resigned first. It is an indication of how seriously the Respondent regarded her conduct that K nevertheless attended a disciplinary hearing, was told that she would have been summarily dismissed if she had not resigned and was referred to DBS anyway. There was no inconsistency of treatment and dismissal fell well within the range of reasonable responses open to an employer in the circumstances of the case.

49 I turn finally to the issue of holiday pay. The parties agree that at the effective date of termination, the Claimant was entitled to 17.1 days of holiday. The dispute is as to the rate at which these should be paid. The Claimant's contract of employment provided that she would work 37 hours per week. In practice, this was by working each week an average of three shifts of 12 hours each. The contract also provided that outstanding holiday would be calculated on a payment per day based upon 1/261th of annual holiday. The dispute is clarified at the outset of this case is whether or not the Claimant should be paid for 12 hours work on each day of holiday (as she contends) or 7.4 hours work on each day of holiday (as the Respondent contends). The Claimant's holiday entitlement is based upon full time for 37 hours per week and I am satisfied that the holiday entitlement must be averaged over a full working week as the Respondent contends. The Claimant was not working five days a week at 12 hours per day, to calculate holiday pay on her basis would be to overpay her considerably. As such, the Claimant was entitled to 17.1 days holiday, based upon a 7.4 hour working day, giving a net sum of £772.35. The full amount was paid to the Claimant on 11 October 2018 and there is no further sum due.

Employment Judge Russell

2 January 2019