



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: S/4100324/16 Held at Inverness on 6 & 7 June & 28 & 29  
September & 27 October 2016**

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**Employment Judge: Mr N M Hosie (sitting alone)**

**Mrs Jeanette Wyatt**

**Claimant  
Represented by:  
Mr E Stafford -  
Solicitor**

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**Support In Mind Scotland**

**Respondent  
Represented by:  
Mr D Hay -  
Advocate**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that the claimant was unfairly dismissed by the  
30 respondent and that the respondent should pay to her by way of compensation the sum  
of Twelve Thousand, Seven Hundred and Ninety-Three Pounds (£12,793).

**ETZ4 (WR)**

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## REASONS

### Introduction

- 5 1. Jeanette Wyatt claimed that she was unfairly dismissed by the respondent, Support in Mind Scotland (“SIMS”). The respondent admitted the dismissal but claimed that the reason was conduct, gross misconduct, and that it was fair.

### The Evidence

- 10 2. On behalf of the respondent I heard evidence from:
- Bruce Armstrong, Highland Area Manager, who took the decision to dismiss.
  - 15 • Frances Simpson, Chief Executive, who heard the claimant’s appeal against her dismissal.

I then heard evidence from the claimant, Jeanette Wyatt.

- 20 3. A Joint Inventory of documentary productions was lodged by the parties (“P”).
4. I heard evidence on 6 and 7 June, 28 and 29 September 2016 and subsequently I received written submissions on behalf of the parties.

### The Facts

- 25 5. Having heard the evidence and considered the documentary productions, I was able to make the following material findings in fact. SIMS is an independent charitable organisation providing support and care to individuals with mental health issues as well as their families and carers. It operates in various locations throughout Scotland including Glasgow, Edinburgh, the Highlands, Dumfries & Galloway and Fife. Most of the referrals which it receives come from NHS Agencies, but there can also be referrals from Criminal Justice Services, other
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charities and there are also self referrals. It has approximately 90 employees throughout Scotland, including approximately 15 in the Highland area.

- 5 6. It has “resource centres” in Golspie, Alness, Inverness and Fort William and it also operates an “outreach service” where a support worker provides support on a one-to-one basis in a community setting.
- 10 7. The claimant commenced her employment with SIMS as an Outreach Worker on 24 May 1993. Her contract of employment was one of the documentary productions (P.39-41).
- 15 8. The claimant’s line manager was Viv Caird; Ms Caird’s line manager was Bruce Armstrong who joined SIMS in December 2014.
- 20 9. As an Outreach Worker, the claimant had her own caseload. She worked with service users on a regular basis giving support and helping them recover; she provided this service at their homes, in public places and at the Alness resource centre when supervising “drop-in groups”.
- 25 10. The claimant was based at “Companas College, Alness”. She was the only Outreach Worker based there. Companas produced an information leaflet for its service users (P.42/43). However, this leaflet was out of date in as much as every service user was required to have a “personal plan”; it was not a matter of choice as the leaflet stated (P.43).
- 30 11. The personal plan is an agreement between the outreach service and the service user. A hard copy is kept securely in the centre in a locked cabinet, but made available as and when required. The plan is reviewed regularly by the outreach worker and the service user to mutually assess progress and set new timelines if required. The Care Inspectorate recommends that there should be a review at least every three months and more frequently if the service user is at serious risk for example of self-harm or suicide. The plan also includes risk management.

**Continuity of note taking**

12. Every time an outreach worker meets a service user they are required to record details such as the date of the meeting, the purpose and the outcome, with specific reference to the personal plan and any progress should also be documented.

13. The outreach worker is supported by his or her line manager who meets with them on a regular basis every six weeks or so, primarily to review case work.

**Care Inspectorate**

14. As a statutory organisation SIMS and its outreach service is regulated by the Care Inspectorate which carries out regular inspection and reports.

15. The Scottish Social Services Council (“the SSSC”) issues a set of standards in the form of Codes of Conduct for organisations such as Companas, which are registered with the Care Inspectorate (P.172-205).

16. Section 6 of the provisions relating to “Social Service Workers” (P.188-204) includes the following (P.203/204): -

*“6. As a social service worker, you must be accountable for the quality of your work and take responsibility for maintaining and improving your knowledge and skill.*

*This includes:*

*6.1 Meeting relevant standards of practice and working in a lawful, safe and effective way.*

*6.2 Maintaining clear and accurate records as required by procedures established for your work.”*

**Care Inspectorate inspection in May 2015**

17. The Care Inspectorate carried out an inspection of Companas in May 2015.

5 18. In the course of this inspection the Inspector provided “verbal feedback” to Bruce Armstrong and Viv Caird. He advised that he had examined the claimant’s notes and documentation and found them to be “deficient”.

10 19. The claimant was the only outreach worker based at Companas in Alness. The Inspector advised Bruce Armstrong and Viv Caird of his: “*dismay and deep concern*”. What was of particular concern was the absence of a personal plan in nearly every one of the claimant’s 40 or so cases.

15 20. The Inspector then prepared a written report (P.134-164). The following are excerpts:

***“We gave the service these grades***

*Quality of care and support*

20 1. *Unsatisfactory*

*Quality of Staffing*

2. *Weak*

*Quality of Management and Leadership*

25 1. *Unsatisfactory.....*

***What the service could do better***

30 *The provider must ensure that all service users have a written personal plan, which sets out how their health, welfare and safety needs are to be met.” (P.136)*

***“Areas for Improvement***

35 *One of the main ways a provider can ensure that service users and carers participate in assessing and improving the quality of the care and support provided, is to put in place written, personal plans for each service user. These should stipulate how their individual health, welfare and safety needs are to be met.*

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*We noted, though, that there were significant numbers of service users who did not have a personal plan. We were told that many service users*

*had decided to opt out of the support planning process. We recognise that the recording of written information could, potentially, heighten anxiety levels for some individuals. However, with active support strategies many of these concerns could be resolved.” (P.145)*

- 5
21. The Inspector stressed in his report the need for “*immediate remedial action*” and detailed “*areas for improvement*” (see P.148-151, for example).
22. With a view to addressing the Care Inspectorate’s concerns Bruce Armstrong and  
10 Viv Caird met the claimant on three occasions in June to discuss the report.

### **Meeting on 9 June 2015**

23. This meeting was a lengthy one. It lasted some 2-3 hours. Minutes of the  
15 meeting were produced (P.48-51). I was satisfied that they were reasonably accurate. The following are excerpts: -

#### **“Clarifications of the Issues**

20 *Bruce noted that since the inspection he and Viv had reviewed 35 of Jeanette’s service user case notes. This had confirmed that no service users had Personal Plans; that none had adequate Risk Assessments of Risk Management Plans; and that none had adequate documentation of ongoing support work.....*

25 *Bruce also noted that Jeanette had received a large number of supervision and training sessions on the issue of case note documentation. These were held with a previous manager (Sharon Morris, who has now moved from Support in Mind Scotland) over a period of several months during  
30 2013 and 2014. Notes from the sessions indicate that Sharon explained in detail to Jeanette the standard and level of documentation required.....*

35 *Jeanette also observed that she considered detailed case note documentation to be unnecessary and at odds with a person-centred approach to support work. In her opinion service users preferred that support work should be undocumented, Jeanette considered that this preference should be respected. Indeed, Jeanette professed the view that the Outreach Service had always been ‘outside the system’. She stated that her understanding was that case documentation and communication  
40 with the Community Mental Health Team were to be avoided, because this is what service users prefer.”*

24. A “plan of action” was then agreed (P.50/51). The Minutes recorded the following:

5                   *“Bruce asked Jeanette if she was clear about what was required, and would carry it out. Jeanette said that she was clear about what was required. She said she was not happy about it but would do it because she had to. Bruce emphasised that these improvements in Personal Planning, Risk Assessment and other documentation would result in a better service for service users.”*

10                   25. Bruce Armstrong said in evidence that he was “very very surprised” at the claimant’s attitude to recordkeeping, especially having regard to her length of service as in his view these were “*elementary matters*”. However, the claimant presented as entirely credible and reliable when she gave evidence and she  
15                   maintained that she had carried out her work as directed by her previous line manager, Sharon Morris.

**Meeting on 12 June 2015**

20                   26. Minutes of that meeting were also produced (P.165-166). I was satisfied that they were reasonably accurate. The following are excerpts: -

25                   *“Bruce noted that, as part of training and support in relation to the issue of case documentation, Jeanette observed Viv working with two Companas Outreach service users on 11th June. Viv completed support planning, risk assessment and other work with the service users.....*

30                   *Bruce asked Jeanette if the training had been useful. Jeanette agreed it was and that Bruce had explained points in which she had been unclear.*

35                   *Jeanette remarked that her service users would not be happy to have sessions recorded and would see this as a breach of confidentiality. Bruce explained again that documentation was essential to good practice and Personal Planning was a statutory requirement. He commented that service users’ reaction to documentation in Personal Planning would be strongly influenced by the way in which Jeanette presented them. He noted that all service users in the Gatehouse Outreach Service (at Golspie) have Personal Plans and Risk Assessments. He also noted that two Companas Outreach service users who previously objected to having a Personal Plan had agreed to Personal Planning when it was offered by  
40                   Viv during the sessions which Jeanette shadowed.”*

**Meeting on 16 June 2015**

27. Minutes of that meeting were also produced (P.168/169). I was satisfied that they were reasonably accurate.

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28. Prior to the meeting Mr Armstrong had been surprised to learn that the claimant did not know how many cases she had in total and he had instructed her to find out. However, she had not done so by the time of the meeting.

10 29. There was a review of the case notes which the claimant had done in respect of two service users. It was discovered that there was no risk management plan and that more detail was required in the Personal Plan.

15 30. Although the claimant was congratulated on having made a start on the work she was advised that it still did not meet the required standard.

31. At the end of the meeting the claimant confirmed again that she was happy with the level of support and training she was receiving.

20 **Ill health absence**

32. Although it had been agreed at the meeting on 16 June that Viv Caird would shadow the claimant for two appointments and she left the meeting on good terms and apparently in a cheerful mood, the following day she did not attend work due to ill health and she was signed off work by her G.P. due to a “*stress related problem*” from 22 June until 1 September when a “phased return” was planned (P.52-58).

30 33. The respondent received a report from the claimant’s G.P. on 24 August (P.56/57). The following are excerpts: -

35 *“Mrs Wyatt was initially seen in the Practice by one of my Colleagues on June 22, 2015 when she described several major stressers in her personal life and also in addition the death of a long-term client that she’d been working with for several years. These stressers left her feeling rather low*



*in mood in general with a poorer sleep pattern and a loss of enjoyment in activities in general. It was felt at the time that some time off work would benefit her and she was indeed signed off work at that stage.*

5 *She was reviewed again as planned on July, 6 when although she had been busy and diligent with tasks at home she had felt unable to deal with contemplating her major stressers which she felt included her work. It was felt at this stage by my Colleague who reviewed her that she was not suffering from clinical depression but had had several major stressers and*  
10 *it was felt that counselling through Guided Self-Help might be of benefit to her. She was referred for counselling and signed off work for a further period of time.....*

15 *From my experience in general when a person is suffering from this degree of stress it will generally take several months, sometimes more than six months, for them to deal with their stressers in order to even consider being fit for duty and if they have been off for this period of time certainly returning to reduced hours and sometimes reduced responsibility initially can be very helpful.”*

### **Return to Work**

34. When the claimant returned to work on 1 September the respondent became aware that she had had contact with and met service users when signed off sick.

25 35. Although I did not hear evidence from Viv Caird, there was included with the documentary productions a note which she had prepared (P.170/171). This was not disputed by the claimant and I was satisfied that it was reasonably accurate. It was in the following terms: -

30 ***“Dingwall Drop In Tuesday 1st September 2015, 10am morning session: 8-10 service users attended. One lounge area. Jeanette Wyatt and I inter-acted with the group. (service user) turned to me and asked ‘Do you know how many times I have met with Jeanette during her sick leave?’ She went on to explain that she had met with Jeanette on four occasions. I said ‘No I wasn’t aware of the meeting’ and changed the subject.***

35 ***Tain Drop In: p.m. Tuesday 1 September 2015. No Service Users attended. Jeanette and I were there to run the session. In the course of our conversation about service users, I mentioned my deep concern about the fact that B (a Service User) had finally made a suicide plan. Jeanette said ‘yes I know’. B discussed this with me when we met to visit a mutual friend who was ill. I asked ‘How did this come about Jeanette?’ and she replied ‘I telephoned B to invite her to accompany me to see a friend whom I thought she would like to see.’***

*I said to Jeanette 'You should not be in touch with service users outwith work and especially not whilst on sick leave.' She said 'I know'. I replied 'I'll have to record this and report this to the Regional Manager.'*

5 *On August 25, I attended an appointment with P (a Service User) to discuss his Personal Plan (i.e. his care plan). He said 'Oh, I bumped into Jeanette in Inverness the other day and had a coffee with her. Jeanette had just left A in the town. I never asked when she was due back at work'. A is a Service User. I did not respond to P.*

10 *Phone call to B (Service User), Thursday 3<sup>rd</sup> Sept: General conversation about her health. I also said 'Jeanette tells me you both went to visit a mutual friend recently who was ill'? B replied 'Jeanette phoned me to go along with her to meet M', I asked 'Is M a service user'? She replied 'No'.*

15 *Meeting with Jeanette on Tuesday 8 September. Brought to Jeanette's attention an e-mail I had received from National Office with regard to her mobile phone usage. I had noticed that texts and calls were made throughout the period in which she was on sick leave. Jeanette explained 'I felt that I should let service users know that I was off work.' I replied 'one or two days should have covered this surely'? Jeanette did not reply. I said 'this should have been left to me to contact your outreach service users in your absence'. Jeanette did not reply."*

25 **Suspension**

36. Vic Caird advised Bruce Armstrong, the Regional Manager of her concerns about the claimant having contact with service users when signed off work due to ill health and Mr Armstrong decided that it would be necessary to meet the claimant to discuss the matter. Accordingly, on 9 September he telephoned the claimant that afternoon and asked her to attend a meeting the following day at 9.30am at Companas Cottage with himself and Viv Caird.

37. However, the claimant advised Mr Armstrong that she was not prepared to attend the meeting as she had made arrangements to meet a "high risk" service user in the morning and she had already advised Viv Caird of this.

38. Mr Armstrong told the claimant that he was giving her "a direct instruction to attend the meeting" but she repeated that she was not prepared to attend.

39. Accordingly, Mr Armstrong advised her that she was suspended.

40. Mr Armstrong made a note of that telephone discussion (P.60). I was satisfied that it was reasonably accurate. The following is an excerpt:

5 *"I then told Jeanette that she was suspended from work with immediate effect and until further notice. I told (sic) that this was not a disciplinary measure but was a measure being taken to give Support In Mind Scotland opportunity to investigate the full circumstances surrounding concerns regarding her work. I told her that she was not to have contact with Service Users while suspended, and that she was not to attend Support In Mind Scotland workplaces. For clarity, I repeated that she was to have no contact with Service Users and I emphasised that this included the arrangements she had made to see a Service User on the morning of Friday 10th September.*

10 *Jeanette responded that she was clear about my instructions, and ended the call."*

15 41. On 10 September Mr Armstrong wrote to the claimant to confirm her suspension (P.61/62).

20 42. Despite Mr Armstrong advising the claimant that she was not to have contact with service users while suspended, it came to the respondent's attention that she had met with service user A the following day.

25 43. There was included with the documentary productions a note of a telephone call which Viv Caird received that day at 11.30am (P.59). I was satisfied that it was reasonably accurate. It was not disputed by the claimant. It was in the following terms:

30 *"I took a phone call from A. A is a Service User who has been supported by Jeanette Wyatt, Outreach Worker. Jeanette had an arrangement to see A this morning, in order to accompany her to a passport office interview. Due to Jeanette's recent suspension from work I had phoned A earlier this morning to offer an alternative arrangement in Jeanette's absence. However, there was no answer from A's phone and no answering service in which to leave a message.*

35 *During the phone conversation A asked 'Is the Drop In Centre open today in Dingwall'? I replied 'Yes, it is' and explained that Jeanette was unavailable and that another member of staff would cover the session. A then said 'I'm sat with Jeanette in her car. We have been to the meeting and have just got back'. I said, 'You have been to the meeting with Jeanette this morning?' A replied, 'Yes'.*

*A went on to ask 'who will be opening the Drop In and at what time?'. I replied, 'Christine will open the Drop In at 1pm'. A said 'Oh, I think I've met her before, thanks.'*

5 **Disciplinary**

44. On 26 September Mr Armstrong wrote to the claimant to advise her that she was required to attend a Disciplinary Hearing on 2 October (P.66/67). The following are excerpts from his letter: -

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*"At the hearing the question of disciplinary action against you will be considered with regard to the following allegations in relation to your conduct:*

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1. *Undertaking work and engaging with service users during a period of absence from work when you were signed off as unfit for work, from 17 June to 28 August 2015, without the knowledge or authorisation of your employer.*

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2. *Failing to update service user Personal Plans and other case note documentation in relation to work and engagement with service users during the period from 17 June to 28 August, despite having previously received training and instruction confirming that you were required to do so on an ongoing basis.*

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3. *Failing to adhere to risk management provisions, by engaging with service users and attending upon them during the period when you were signed off sick from work (from 17 June to 28 August 2015), in the absence of adequate risk assessment and risk management documentation, without the knowledge of management and without management oversight or supervision.*

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4. *Refusing the reasonable instructions of a manager to attend a meeting on Thursday 10 August 2015 and not to attend upon service users on that date.*

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*Support In Mind Scotland consider the above allegations to be potential gross misconduct. If the allegations are proven against you, one of the outcomes of this meeting may be dismissal.*

40

*I enclose Support In Mind Scotland Disciplinary Procedure from the Employee Handbook. I also enclose copy telephone records, notes of meetings held in advance of your recent period of sickness absence, notes of discussions between service users and a manager (P.170) and notes of discussions between yourself and a manager."*

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**Disciplinary Hearing on 2 October 2015**

45. Minutes of the Disciplinary Hearing were produced (P.68-77). I was satisfied that these were reasonably accurate. However, they did not include the claimant's  
5 "written statements" (P.101/105) despite the fact that Mr Armstrong had undertaken to "*take the written statement texts as part of the record of the meeting*" (P.68). In these "written statements" the claimant responded to each of the four allegations levelled against her.

10 46. Whilst she admitted that she had had contact with service users when signed off she had left an answerphone message on her work mobile directing callers to the Companas number and intimating when she would return. However, she continued to receive texts from service users and she claimed that she had had no guidelines about what she should do in such circumstances; further, she  
15 claimed she wasn't working as almost all her contact with service users was "*at a trivial or a mundane level which could not be regarded as requiring documentation*".

47. So far as Allegation 4 relating to her refusal to attend a meeting on 10 August  
20 was concerned, she claimed that she was "*offered no explanation as to why this meeting had to take priority over my commitment to accompany my client to a Passport interview*" and she explained the reasons why she felt that she could not "*let down a vulnerable client at this short notice*" (P.104).

25 48. The following are excerpts from the Minutes of the Disciplinary Hearing: -

***"Allegation 1***

.....  
*Jeanette confirmed that:*

- 30
- *She had some contact with service users during the period in question.*
  - *She had met two or three service users by chance, in the street.*
  - *She had arranged to meet two service users.....*

35 *Bruce referred to one of the evidence documents (dated 1 September 2015) P.170) which records a discussion between Viv Caird (Service Manager) and Jeanette on 1 September. This indicated that Jeanette had*

5 told Viv that Service User B had discussed a suicide plan with Jeanette, including a date on which the service user planned to commit suicide. Bruce asked Jeanette about this discussion and Jeanette confirmed that the service user had discussed a suicide plan with her. The discussion had taken place following the visit to the mutual friend.

10 Bruce asked for more information about this discussion. Jeanette said that the service user had spoken about a date in which she was planning to commit suicide. Jeanette discussed this with her and confirmed that the service user had also discussed it with her G.P. Jeanette wanted to be sure that she was not the only person to whom the service user had disclosed this information. Jeanette said that she had told Viv Caird (Service Manager) about this on 1 September because it was 'particularly alarming' .....

15 It was noted that Jeanette had agreed that she had carried out support work with service users during the period when she was signed off as unfit for work. He asked her to explain why she had done this. Jeanette said that it was part of her work to 'respond to those in distress even when I'm not at work'. Bruce said that he understood that when Jeanette was working she might need to be flexible about her working hours and that she might respond to service users at times outwith her usual working hours. However the allegations related to the period during which she had been signed off as unfit for work. He asked Jeanette again why she had arranged meetings with service users and engaged in support work with service users during this period. Jeanette said that she had never been in the position of being on sick leave and had 'no guidelines for this'. Bruce said that the fact that Jeanette's G.P. had signed her off work meant that she was unfit for work and therefore should not be working. Jeanette said that she was signed off from work because she was experiencing stress. She said that it would have been stressful for her not to respond to service users and this would have made her situation worse. She said that she was 'simply responding to work issues as they arose, in terms of contacting clients and updating them to the situation. My situation would be more stressful if I did not contact service users.'

35  
40 Bruce asked Jeanette why she did not inform a manager about the contact she was having with service users during her sick leave. Jeanette said 'It did not cross my mind to do this'.

45 Bruce pointed out an apparent contradiction between the fact that, on the one hand, Jeanette had been signed off as unfit for work by her G.P. and, on the other hand, the fact that she had carried out support work during the period when she was signed off. This seemed to indicate the fact that she did have capacity to do some work, contrary to what she had agreed with the G.P. Jeanette said that although the G.P. had said she should not be working, 'elements of avoiding work would be more distressing' .....

**Allegation 2**

.....  
Bruce asked if Jeanette had made any notes of her interactions with service users during the period when she was signed off as unfit for work. Had she kept notes in any form during his period? Jeanette said that 'In most cases this didn't apply'. Bruce asked why she had not kept notes, given that the very high importance of doing so had been discussed with her at lengths during several meetings. Jeanette replied that she did not think this was important and that she did not consider it a priority.

Jeanette stated that she had kept very brief notes in her diary, regarding her discussion with Service User B, about the service user's suicide plan. She had then raised her concerns about Service User B at a meeting with Viv Caird on September 1. Bruce asked if she had transferred these diary notes to the service users' case notes. Jeanette said that she had not.....

**Allegation 3**

Bruce noted that, during the period when Jeanette was signed off work, she carried out work with service users who, to her knowledge, did not have adequate Risk Assessment and Risk Management Planning or documentation in place. In addition she did not inform management about this activity. This meant that management was unaware of her contact with service users. She had thereby undermined another aspect of risk management, namely management oversight of work carried out with service users.

Jeanette stated that she was 'not at all sure' what this allegation meant. She had thought that it had related to risk assessments for outings. Bruce asked if Jeanette was clear now about what the allegation meant. Jeanette said that she was 'a little clearer'. Bruce said that the allegation was very serious and so he would explain it again, as it was important that Jeanette understood the allegation. Bruce explained the allegation again and Jeanette confirmed that she 'clearer now'. Bruce asked Jeanette if she needed further clarification; Jeanette said that she did not.....

Bruce commented that while the service user may not have considered that Jeanette was working, Jeanette herself had a professional responsibility in this situation. He asked Jeanette if she had thought that Risk Assessment and Risk Management had any bearing on her contact with the service user. Jeanette said that she did not feel responsible because the service user had informed 'others besides me' about her suicide plan. She said 'I could wash my hands of it' and that 'I did not think any of this was a priority'.....

Bruce asked Jeanette why she had done work with service users while, to her knowledge, Risk Assessment and Risk Management measures and documentation were not in place, and without keeping management informed. Jeanette stated that her engagement with service users had not been work because she had been on sick leave. Bruce noted that

*Jeanette seemed to be making a circular argument, namely that she had not carried out work with service users during her sick leave because, by definition, anything she did during her sick leave, was not work.*

5 *Jeanette responded that she was on sick leave and therefore her interaction was 'voluntary work'. Bruce asked if she meant that she considered the work she had done with service users to be voluntary work and that it therefore did not entail the same responsibilities as work she did when not on sick leave. Jeanette confirmed that this was her view.*

10

.....

***Allegation 4***

15 *Bruce referred to evidence that Jeanette had refused a direct instruction from him to attend a meeting with him and Viv Caird on the morning of 10 September 2015, and not to attend an appointment with the service user on the morning of 10 September ('phone discussion with Jeanette Wyatt, Outreach Worker).*

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*Bruce asked Jeanette to explain her actions. In response, Jeanette read from a written statement (P.104/105).....*

25

*Jeanette said that she thought she was being manipulated into a trap. She had thought that she was being deliberately put in a position where she had no choice but to go to the meeting with the service user, because she had received no reassurance that alternative support would be put in place. Jeanette said 'I thought you were trying to trap me'. Bruce asked, 'Are you saying that your perception at the time was that I was engineering the situation so that you could not comply?' Jeanette confirmed that this had been her view. Bruce asked 'Do you think that now?' Jeanette said 'I don't think that particularly, no'.*

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**Dismissal**

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49. On 19 October Mr Armstrong wrote to the claimant to confirm her dismissal and the reasons for it (P.79-85). The following are excerpts from his letter: -

***"Response to the first allegation***

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.....

*I noted with concern that whilst engaging with a service user during this period a suicide plan was revealed to you which you did not make your line manager aware of until your subsequent return to work.....*

45



5 *You stated that it had not crossed your mind to contact a manager in order to advise them that you were having contact with and engaging with service users during this period of absence. In your absence you stated that you had made your line manager aware of this activity via a text on 31 August; however it was confirmed this was not during the period when you were signed off by your G.P.*

10 *My finding in relation to this allegation is that during a period when you had been signed off by a doctor as unfit for work on account of stress, you were in fact continuing to work and engaging with service users without the knowledge of management. You agreed that you were engaging with support work at times during this period. In effect you were fit for work during this period as demonstrated by the fact that you were actually undertaking work without management being aware of this. I believe you have sought to deceive your employer on this manner because you were fit for work at the relevant time. This deceit was confirmed by your failure to advise management that you were continuing to engage with service users and provide them with support. While you have sought to contend that you are merely providing assistance to service users, you were signed off as unfit for work at the time and should not have been engaging at all with service users as colleagues were covering for you in this regard. I believe that you have acted dishonestly and that your actions in this regard amounted to a serious breach of trust and confidence.*

25 *In response to the **second allegation**.....*

30 *My finding in relation to this allegation is that despite the training and instruction provided to you prior to your recent period of sickness absence (from 17 June to 20 August 2015), you have consistently ignored the professional obligation to maintain service user records. Despite the considerable management time spent with you following the recent Care Inspectorate Inspection, you continued to refuse to maintain records as required. I consider you have failed to follow reasonable management instructions in this regard. It has been explained to you why this record-*

keeping is an essential aspect of your work yet you refused to act accordingly. I consider that this is a further instance of a serious breach of trust and confidence on your part and I do not consider it likely going forward that you will discharge your professional obligations to maintain these records.

5

*In response to the **Third Allegation**.....*

*My finding in relation to this third allegation is that during the period of sickness absence you were actively engaging with service users without following any of the professional requirements that you were obliged to adhere to in respect of risk assessment and mismanagement documentation. Management were kept unaware of your involvement with service users during this period and accordingly a risk arose in respect of the fact of your engagement with those service users was not subject to management oversight or supervision.....*

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*In response to the **Fourth Allegation**.....*

*My finding in relation to this fourth allegation is that you failed to follow a reasonable management instruction to attend an urgent meeting. You initially failed to follow that instruction responding to a text from Viv Caird. You then further failed to follow the instruction after I spoke to you personally to confirm the instruction and advise you that it was a direct instruction. You maintained your position of refusal to attend the meeting that was scheduled.*

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*At the point in time when you refused to attend the meeting by text and then verbally, you were not aware and had not enquired as to what alternative arrangements would be put in place in respect of the meeting you had scheduled the following day with the service user. An instruction was given to you by your Line Manager and subsequently reiterated by your Area Manager was reasonable in the circumstances. Your rationale as presented at the hearing – that you were concerned that no-one from*

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*the organisation would attend the scheduled meeting with the service user – does not explain your blatant disregard for the instruction to attend a meeting (sic).....*

5                    *Given the above findings, it is my decision that you have to be summarily dismissed on the ground of gross misconduct due to you having acted in a dishonest manner, committed three serious breaches of trust and confidence and failed to follow a reasonable management instruction on two separate occasions. As per the organisation’s Employee Handbook*  
10                    *each of these transgressions is considered gross misconduct.”*

50.    As it transpired, on 27 October Mr Armstrong issued a revised letter confirming the claimant’s dismissal with effect from 29 October 2015 (P.86-92).

15    **Appeal**

51.    Having been advised that any appeal would be heard by Frances Simpson, Chief Executive Officer, the claimant wrote to Mrs Simpson to intimate that she wished to appeal and to respond to the four allegations on the basis of which Mr  
20    Armstrong had taken the decision to terminate her employment (P.95-98).

52.    Mrs Simpson responded on 5 November. She advised that she found it difficult to identify the specific grounds of appeal and she asked the claimant to provide her with “*a brief statement of your position in writing in advance of our meeting*”  
25    (P.93).

53.    The claimant responded by letter dated 13 November 2015 (P.94) in which she enclosed further details of the grounds for her appeal (P.99-105).

**Appeal Meeting on 17 November 2015**

54. Notes of the “Appeal Meeting” were produced (P.107-115). I was satisfied that they were reasonably accurate.

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55. In advance of the Appeal Meeting Mrs Simpson had read all the relevant papers and prepared a list of questions. The following are excerpts from the Notes: -

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*“FS said she wanted to be clear that in all the notes in summary it seemed that JW was not denying that the actions happened, that the behaviour has happened and on the whole accepted that these things happened but what JW is disputing is the reason for those things and the conclusions which were reached. FS asked if that was correct.*

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*JW said more or less. JW said she thought there were some allegations around timing or interpretation which she found to be wrong but generally speaking JW said she does not deny that she had contact with some clients while off on sick leave nor did she deny she attended a meeting with a client that she had been told not to attend on her return to work.....*

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*FS moved on to the next allegation which was that between June and August while JW was off sick she was still having contact with her clients. This had only come to the attention of the organisation when we had received the mobile phone bill and saw calls were still being made by JW. This raised an issue with the Managers that JW was in contact with the clients while off sick. In her letter JW indicated that she thought that the organisational duty of care towards JW and should have redirected her calls and let clients know that she was off sick.*

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*JW does not deny having contact with her clients. She does not find having interaction with clients stressful. JW does not think it was a secret from her Line Manager that she had contact with clients as she will have told her when she first off sick that she would cancelled appointments (sic). She changed her message on her mobile phone saying she was off sick, and directed them to Companas and updated it each time she received a new sick note, but clients still left messages or texts her (sic). She felt it would have been good practice that the organisation had diverted these calls. JW said that the calls she made were reactive calls to messages left and not proactive.....*

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*FS asked when it was clear in JW own mind what role you are playing, when did she know she had crossed a boundary between working and not working and how can you be confident that the client knows when the boundary has been reached as boundaries are very important. FS asked what criteria JW uses to know when she is working when she is not working. FS asked JW how did she make that decision and what difference would that make in the interaction between JW and her clients.*

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5 *JW said that it would make little difference how she would interact with clients but this client was fully aware that JW was not working. JW believes that she was the best person to support the client and complete this task.*

10 *FS asked what is the difference between interacting with someone while at work and while not at work and what issues/problems might arise. JW didn't see a problem in that respect. While at work JW offers social support whatever that entails including filling in forms so it is indistinguishable. FS then asked where that would leave JW if something went wrong if she was interacting with a client, who would be protecting her or the client, if JW is not clear if she was at work or not. JW said she would be clear. When asked again who would be responsible JW did not think this was an issue and she did not see where FS was getting at. FS explained that this came down to risk and led to record keeping and risk assessment as the CI had been quite clear there had been a poor paper trail of risk assessment. The question of risk was looming large for FS. FS explained that there is an issue of, if you are a member of staff and you are in work mode then there are certain things I would expect a certain member of staff to do. If a client goes on to commit suicide and the fatal accident enquiry that would follow would speak to all people concerned. The people concerned would be protected and supported by practice and performance. If you are not in work mode and something happens then it leaves the whole thing open to interpretations so this comes down to risk. So FS asked again about boundaries as a member of staff and where did she see in term of risk and how JW and clients are protected through our Policies and Procedures. FS asked if JW could distinguish when she was in work or not. JW says that she knows how to distinguish between them both.....*

35 *FS said it was a mystery to her why JW had concerns for the passport client but not the one with the suicidal thoughts who has a date in mind for this event. FS said there was a real difference in these examples which she was struggling to understand and was still struggling at JW's approach to risk."*

56. On 27 November Mrs Simpson wrote to the claimant to advise that her appeal had been unsuccessful (P.161-122). The letter was lengthy and gave reasons for her decision to reject the appeal.

57. After the Appeal Meeting Mrs Simpson had carried out further investigations, as she had undertaken to do (P.115). In particular, she contacted Bruce Armstrong and Viv Caird to clarify matters which had been raised by the claimant at the Appeal Meeting (P.117). She referred to these further investigations in her letter of 27 November (P.117/118).

### **Respondent's Submissions**

58. The respondent's Counsel made written submissions which were communicated  
5 by way of e-mail on 27 October 2016. These are referred to for their terms.

59. In these written submissions, he first made observations on the evidence.

### **Relevant Law**

10 60. He then addressed the relevant law with reference to s.98 of the Employment Rights Act 1996 ("the 1996 Act").

15 61. He further submitted with reference to **British Homes Stores Ltd v. Burchell [1978] IRLR 379** and **Iceland Frozen Foods Ltd v. Jones [1982] IRLR 439** that:  
*"Given the conduct forming the subject of the charges itself was not disputed it is questionable whether the tripartite Burchell test arises in this case. The focus would appear to be on procedural focus and whether, based on the substantial merits and the equities of the case, the decision to dismiss for misconduct in  
20 question fell within the band of reasonable responses"*.

62. So far as the issue of procedural fairness was concerned, Counsel referred to the following cases:

25 **Taylor v. OCS Group Ltd [2006] ICR 1602;**  
**Slater v. Leicestershire Health Authority [1989] IRLR 16;**  
**Strouthos v. London Underground Ltd [2004] IRLR 636**

30 63. So far as the issue of the substantive fairness of the decision to dismiss was concerned Counsel referred to:

35 **Auguste Noel Ltd v. Curtis [1990] IRLR 326;**  
**Airbus UK Ltd v. Webb [2008] ICR 561;**  
**Grant v. Ampex Great Britain Ltd [1980] IRLR 461;**  
**McCall v. Castleton Crafts [1979] IRLR 218;**  
**Alidair Ltd v. Taylor [1976] IRLR 420**

64. He then went on to address the issue of “*dismissed employees subject to regulation by professional rules*” with reference to **Bryant v. Sage Care Homes UKEAT/0453/11/LA**.

5 65. So far as the issue of refusing to follow a management instruction was concerned, Counsel made the following submission:

10 *“The lawfulness of the instruction is not determinative of the fairness of the dismissal of an employee for refusing to obey that instruction (Farrant v. The Woodroff School [1988] ICR 184) per HHJ Peter Clark at 194G and 195F), the primary factor is whether the employee acted reasonably in refusing to obey the instruction (UCATT v. Brain [1981] ICR 542 per Lord Donaldson 550F-551C).”*

15 66. Counsel also referred me to the principles in **Polkey v. AE Dayton Services Ltd [1987] IRLR 503** and with regard to a reduction in compensation on the grounds of contributory fault, **Nelson v. BBC (No. 2) [1979] IRLR 346**. Finally, in this regard he referred to the constitution of the Care Inspectorate and the SSSC.

20 **“Application of Law to the Facts”**

67. Counsel submitted that “*there is little of substantial dispute as to the factual matrix of this claim*”; he enclosed with his written submissions a Chronology which is referred to for its terms.

25 68. While Counsel acknowledged that the claimant was a long-serving support worker she was not dismissed for “*shortcomings*” in the general sense of capability, but rather on the grounds of conduct, “*relating to the specific acts of performing work activities with service users when signed off as medically unfit to work and for refusal to obey a management instruction upon the claimant’s return to work*”; she had attended upon service users whilst off sick and unbeknown to the respondent.

35 69. Counsel then went on to address the “*two elements of procedural attack*”. The first was that as Mr Armstrong was a witness in respect of Allegation 4 it was inappropriate for him to chair the Disciplinary Hearing.

70. Counsel submitted with reference to the evidence of both Mr Armstrong and Mrs Simpson and having regard to the location and size of the organisation (it employs around 90 people in total across the country, with 4 Area Managers): *“It was impracticable to arrange for another Area Manager to be brought to the Highlands.”* Further, and in any event, the matter was not one of factual dispute as the claimant accepted that she had disobeyed the instructions given by both Viv Caird and Mr Armstrong.

71. Further, in any event, it was submitted that even if there was procedural unfairness this was remedied by: *“a full appeal process conducted by Mrs Simpson whose objectivity did not appear to be the subject of any quarrel either at the time, or during these proceedings”*.

72. The second aspect relating to procedural challenge related to Mr Armstrong’s conclusion in Allegation 1 that the claimant was guilty of “dishonesty” which was an ‘offence’ that had not been charged prior to the Disciplinary Hearing. In this regard Counsel made the following submissions: -

*“Mr Armstrong considered the matter as one of natural deduction from the factual matrix of the allegations and whilst one could follow that line of thought it is accepted that the claimant may not have been aware of such an allegation during the disciplinary stage of the process. It is accepted, therefore, that the case enters **Strouthos** territory. However, it must be emphasised that the claimant was not dismissed on the basis of Allegation 1 and any possible permutation of that allegation, alone. There were three other charges levelled against the claimant. That is a significant difference between this case and the factual matrix of **Strouthos**. That is all the more so when Mr Armstrong indicated in his evidence that he would have dismissed for any one of the allegations 1 to 3. Furthermore, whilst there was no notice of the word dishonesty at the stage of the Disciplinary Meeting, the matter was at large, and canvassed at the Appeal Hearing. In any event Mrs Simpson considered the matters of Allegations of 1 to 3 closely connected as she considered they flowed from the core point of working with vulnerable service users while signed off sick, and further compounded by the presence of allegation 4. Whilst the respondent accepts that **Strouthos** territory is entered in this case. It is done so in a marginal sense, and not to result in a conclusion of unfair dismissal.”*



73. So far as the issue of the substantive fairness of the decision to dismiss was concerned, Counsel submitted that this appeared to focus upon the issue of “fair warning”, the potential seriousness of the view of the conduct in question and the reasonableness of any management instructions.

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74. In this regard Counsel referred me to **Bryant** which “*acknowledged that an employer did not need to repeat the procedure regime of a statutory regulator of an employee in order for it to be able to rely upon a breach of such statutory codes of guidelines in a disciplinary context*”. In this regard Counsel referred to the “*Aftermath of the Care Inspectorate Report*” and submitted that “*the claimant could have been in no reasonable doubt as to the requirements of paperwork as a tool to manage questions of risk at the point in which she engaged with service users whilst off sick.*” Further, he submitted that “*the claimant accepted that the issue of risk related to not only the well-being of service users but also to protect the respondent and its staff.*” In conclusion, it was submitted that “*the respondent was entirely entitled, as a reasonable employer, to consider that the claimant was aware of these considerations and that they would be affected by the nature of her interactions with Service Users A and B during her period of sickness absence.*”

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75. Further, so far as the apparent contention that the absence of a specific instruction to the claimant not to work when signed off sick meant there was an absence of fair warning was concerned, Counsel submitted that “*it would be overly exacting for the Tribunal to consider that the reasonable employer would require to make such a trite matter the subject of written instruction before dismissal for such conduct would be considered within the band of reasonable responses.*” Indeed, the claimant herself appeared to understand this as she had recorded a voicemail on her mobile telephone advising that the service was not available.

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76. Finally, in this regard, Counsel said this:

“*Whilst the respondent likewise issued no specific instructions in respect of the completion of paperwork when off sick, it is submitted that to focus on*

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5            *that level of exactitude misses the broader point that lies at the heart of this conduct dismissal: the conduct was the fact that there was interaction 'indistinguishable from work' at a time when the claimant was signed off sick, and as a result the employer had no indication that such interactions were taking place, and which triggered significant considerations of risk management at a time when the respondent was being placed under search and scrutiny for its risk management processes by the regulator. This was thrown into sharp focus with the added development that such interactions included disclosure of a suicide plan during interaction with a service user that would have been considered a work-related provision of support had the claimant not been signed off ill. Whilst the claimant's job was not one at which any minor lapse of any exercise of judgment could have disastrous consequences, that consideration would be engaged in a situation where suicide of a service user was at play."*

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77. Counsel then went on to address Allegation 4 relating to the refusal to follow a management instruction. The issue was whether it was reasonable for the claimant to refuse a legitimate instruction. While it was accepted that the claimant's position was that she refused out of concern for service user A it was submitted that "*that must be viewed as a matter of degree*". It was submitted that there was "*no compelling reason why the appointment could not be rearranged*" and this required to "*be balanced against Mr Armstrong's considerations of potential risks to service users in light of the picture that was by that stage emerging of the claimant's contact with service users whilst absent.*" It was submitted that "*it was not reasonable of the claimant to refuse such an anodyne instruction.*"

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78. Finally, Counsel addressed "*the overarching question of whether the reason was sufficient to justify dismissal.*" Counsel submitted that:

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*"it was conduct of a type that conflicted against the questions of risk assessment and management that had been the subject of supervision and instruction, and heavy criticism from the regulator, but weeks beforehand. It blurred the boundaries of personal and professional contact, conflicting with common sense views of boundaries and the question of appropriate relationships set down by the SSSC guidelines. It included the disclosure of the utmost potential severity (suicide) which did not prompt any further action on the part of the claimant until her return to work and done solely on assurances given to the claimant by the service user in question. It included disobedience of a management instruction that appeared to demonstrate where the claimant did not agree with the instructions from her managers she would choose simply not to comply with them. Even accounting for an element of potential confusion in*

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5 *respect of the conclusion of dishonesty as regards Allegation 1, the substance of the concerns outlined above remained apposite in respect of Allegations 2 and 3, and any such confusion bore no relation to the issue of disobedience contained in allegation 4. During the hearings, both disciplinary and appeal, the claimant did not appear to demonstrate either insight into the risks attaching to her behaviour, or indeed a clear position whether her activities were work or not. The decision to dismiss the claimant fell within the band of reasonable responses and was accordingly fair. The claim should be dismissed.”*

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79. In the alternative, Counsel addressed the issue of remedy in the event of a finding of unfair dismissal. It was submitted that the claimant had failed to mitigate her loss and went on to make submissions in relation to what would be a ‘just’ award of compensation. He also separately made submissions in relation  
15 **Polkey** and contribution.

### **Claimant’s Submissions**

20 80. The claimant’s solicitor also made written submissions. These are also referred to for their terms.

25 81. At first he set out the principal issues in the case namely whether the claimant was unfairly dismissed and whether she was wrongfully dismissed and he explained that his submissions had been structured with reference to: whether the dismissal was for a substantially fair reason in terms of s.98(2) of the 1996 Act; whether the dismissal was procedurally fair with reference to s.98(4); whether the test in **Burchell** was satisfied; whether the respondent’s procedures had complied with the ACAS Code; whether the dismissal fell within the range of reasonable responses; and if the dismissal was unfair what was the appropriate  
30 remedy. He then set out what he described as the “background facts”.

### **“Was the dismissal for a substantively fair reason under s.98(2)?”**

35 82. It was not disputed between the parties that the reason for the dismissal was conduct which is a potentially reason.

**“Was the dismissal procedurally fair under S.98(4)?”**

83. In this regard the claimant’s solicitor referred to **Burchell** and **Distillers Co. (Bottling Services) Ltd v. Gardner [1982] IRLR 47.**

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84. So far as the three-fold test in **Burchell** was concerned, the claimant’s solicitor accepted that the respondent believed the claimant was guilty of the misconduct alleged.

10 85. However, so far as the second branch was concerned, he invited me to find that there was insufficient evidence for the respondent to base a reasonable belief that the claimant was guilty of breaching the respondent’s disciplinary procedure. Primarily, this was because the respondent had not informed the claimant of the expected standards of conduct during her absence off work.

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86. While a considerable amount of evidence was heard about the training given by the respondent following the Care Inspectorate Review, it was the claimant’s position that this was not substantive in nature but rather simply an introduction to new documents and her evidence was clear that she had complied with the standards set by her previous Line Manager, Sharon Morris.

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87. Further, it was the claimant’s position that she was not fully aware of what risk assessment procedures were. Her evidence was that the training she received comprised Ms Morris standing over her and dictating what information should be inserted into risk assessment documents.

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88. While the respondent’s witnesses referred to the importance of “boundaries”, no “boundaries policy” was produced and none was referred to in the course of the disciplinary process.

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89. It was submitted that the: “*crux*” of the evidence put forward by Bruce Armstrong was that there should not be friendships with service users. His evidence was to the effect that if an Outreach Worker met a service user when he or she was unfit for work then they should keep the meeting brief, give information if requested

and then explain to the service user that they were not working. It was submitted that this was what the claimant did.

- 5 90. So far as Allegation 2, relating to updating client records, was concerned, it was submitted: *“this presupposes the assumption that the claimant was working and therefore required to do so.”* In any event, the claimant was not advised that records had to be updated when she was absent.
- 10 91. Allegation three relating to risk assessments also presupposes that the claimant was working whilst absent and once again, the claimant was not aware of what this allegation related to and was unclear as to what it was that she had done wrong.
- 15 92. It was submitted that Allegations 1, 2 and 3 were “intrinsically linked to each other” and accordingly should Allegation 1 fall then it followed that so should Allegations 2 and 3.
- 20 93. It was further submitted that there were insufficient grounds on which to base a belief that the claimant was guilty of a breach of the respondent’s standard contract.
- 25 94. So far as Allegation 4, relating to the claimant’s refusal to follow a management instruction, was concerned, this related to a failure to attend a meeting. It was the claimant’s evidence that, while she was not prepared to attend the meeting, she was flexible as to when the meeting would take place, her main concern being to support the service user. It was submitted that this called into question the “reasonableness” of the management instruction.
- 30 95. It was further submitted that the notes of the Disciplinary Hearing were not an accurate record. The claimant was not given an opportunity to agree the notes and there were inconsistencies.
96. In all these circumstances, it was submitted:

5 “That the Tribunal must find that the respondent did not believe that the claimant was guilty of the misconduct alleged. For the simple reason that it could not be said that the claimant was working whilst on sickness absence. That being so, Allegations 1, 2 and 3 must fall. The request to attend the meeting was not reasonable and therefore it cannot be said that the claimant acted unreasonably in not attending.”

10 **“At the time the respondent formed the belief of the claimant’s guilt had the respondent carried out as much investigation was reasonable in the circumstances?”**

97. In this regard the claimant’s solicitor referred to the following cases:

15 **Trusthouse Forte v. Aquilar [1976] IRLR 251;**  
**Panama v. London Borough of Hackney [2003] IRLR 278 CA;**  
**Strouthos**

20 98. It was submitted that the matter was not thoroughly investigated and the evidence was not clear. While the respondent took the view that the claimant had been “working” whilst absent through illness and as such breached the rules, the respondent had not given any instructions to the claimant as to what the limits of her contact were to be with service users. Nor did the respondent give any guidance to the claimant on what she was to do in the event she was contacted by, or approached by a service user.

25 99. Further, there was no investigation as to what took place by way of investigation of the level of interaction between the claimant and the service users.

30 100. While the Disciplinary Hearing notes suggest that the claimant agreed that she was “working” there was different evidence at the Tribunal Hearing. The claimant disputed that she was working in the course of her evidence and maintained that any meetings she had with service users were “*incidental to ordinary every day courtesy.*”

35 101. With reference to **Panama** it was submitted that where there are serious allegations of dishonesty: “*fairness demands that these must be put forward with*

*sufficient formality and at an early enough stage to provide full opportunity for answer.”*

102. Also, with reference to **Strouthos**, “*an employee should only be found guilty of the offence with which he has been charged*”. However, Mr Armstrong made a finding of dishonesty but such an allegation had not been put to the claimant before the Disciplinary Hearing. This meant that dishonesty was introduced as a new allegation.

103. Further, when it came to the Appeal although Frances Simpson maintained that she had looked at matters anew it was submitted that the Appeal was no more than a re-hearing of issues already heard at the disciplinary stage.

**“Was the Disciplinary Process compliant with the respondent’s procedures and ACAS Code of Practice on Disciplinary and Grievance Procedure?”**

104. In this regard the claimant’s solicitor referred to **Polkey**. The claimant was found guilty of dishonesty and breach of trust and confidence and yet these allegations were not put to her in advance of the Disciplinary Hearing.

105. It was submitted, with reference to **Alexander v. Brigden Enterprises Ltd [2006] IRLR 422**, that the claimant had not been given sufficient notice of the allegations.

106. It followed, therefore, that, as the claimant had not been given sufficient detail of the case against her, the respondent had not acted reasonably and had not acted in line with the ACAS Code.

**“Was Dismissal within the Band of Reasonable Responses?”**

107. In this regard the claimant’s solicitor referred to:

**Trusthouse Forte;**  
**Iceland Frozen Foods;**  
**Elliot Brothers (London) v. Colverd [1979] IRLR 92;**

**Smith v. City of Glasgow District Council [1987] IRLR 326;**  
**J Ferrie v. Western No. 3 Glasgow [1973] IRLR 162;**  
**Slater;**  
**Distillers Co. (Bottling Services) Ltd;**  
**Frances v. Ford Motor Co. [1975] IRLR 25.**

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108. He invited me to find that dismissal was outwith the band of reasonable responses. He reminded me that the Tribunal was not a re-hearing but rather was “limited to reviewing the respondent’s decision”.

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109. He invited me to consider the nature of the respondent’s organisation which has the purpose of providing social support. The respondent was aware that the claimant was ill, but took no steps to engage occupational health with a view to determining the effect that her illness had on her ability to work.

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110. He also submitted: *“In this instance we have an example of an employee who did not know what standards were expected of her. The claimant received no guidance from her employer about her conduct whilst absent. The respondent displayed her contact details on her literature and left her with a mobile phone.”*

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111. The claimant’s solicitor also drew to my attention the evidence of Bruce Armstrong that he believed that each of the four allegations, if proven, would be sufficient for dismissal. He submitted, with reference to **Smith** that this gave rise to a risk: *“that if a particular allegation forms part of the reason or principle reason for dismissal and that reason is neither established on the facts nor believed to be true on reasonable grounds, the Court will find that the employer has not acted reasonably in all the circumstances in relying upon the reason for the dismissal.”*

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30 112. However, it was submitted that even if it was established that the claimant “worked” during her absence, no reasonable employer would have dismissed in the circumstances as the claimant was not advised of what standards were expected of her.

35 113. On her return to work the respondent failed to give the claimant an opportunity to complete the service user information; in respect of Allegation 3 the respondent



failed adequately explain what procedure should be in place and what rules had been breached; in respect of Allegation 4 the reasonableness of the Manager's instruction is questionable. In all these circumstances, it was submitted that no reasonable employer would have dismissed the claimant.

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114. Further, so far as Allegation 4 was concerned, it was submitted there are circumstances where an employee will be justified in refusing to obey an instruction even where it appears to be in the scope of the employer's powers.

10 115. It was submitted that, in all the circumstances, the instruction given by Bruce Armstrong to meet with him the following day, was not reasonable.

116. There was also the evidence of Frances Simpson who accepted there was scope for a potential conflict of interest as Mr Armstrong had given the instruction which gave rise to Allegation 4 and then chaired the Disciplinary Hearing and took the decision to dismiss and that as a consequence he "*had no interest in giving the claimant a fair hearing and did not do so*", but rather presented her with a "*fait accompli*".

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#### 20 **Wrongful Dismissal**

117. The claimant's solicitor submitted that in the event of a finding of unfair dismissal it followed that the dismissal was wrongful as the respondent did not have contractual authority to dismiss summarily unless there was gross misconduct.

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118. Finally, so far as remedy was concerned, the claimant's solicitor submitted there was no contributory fault and he made submissions with regard to the calculation of the compensatory award.

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#### **Respondent's response to the claimant's submissions**

119. These are to be found at Paras. 32-40 of the written submissions by the respondent's Counsel.

120. He questioned whether the test in **Burchell** applied at all, given that the claimant accepted that she had behaved in the manner alleged.
121. He also disputed that the training which the claimant had been given following the Care Inspectorate Report was “*superficial in nature*”. In this regard, he referred me to the detailed oral evidence of Mr Armstrong.
122. Further, so far as the third limb of the **Burchell** test was concerned it was disputed that there was an inadequate investigation having regard, in particular, to the fact: “*the very behaviour alleged is admitted during the course of proceedings*”. There was no suggestion as to what further investigation might have gleaned.
123. While it was accepted that the first reference to “dishonesty” was contained in Mr Armstrong’s dismissal letter, this was not the only charge to which the claimant was subject. Moreover, there was a substantial Appeal Hearing by which time the claimant was aware that such an allegation had been made.
124. The respondent’s Counsel submitted, with reference to **Taylor**, that the Tribunal was required to consider the matter of fairness “*in the round and having regard to both limbs of the process.*”
125. It was also disputed that the respondent was in breach of the ACAS Code as “*the matter of dishonesty relates to the substantive procedural fairness of the decision to dismiss.*” It does not also arise as a breach of the procedure outlined in the ACAS Code as Para. 9 of the Code “*is couched in advisory, not mandatory terms, in respect of the content of correspondence.*”
126. It was also submitted that the claimant had every opportunity to state her case at both the Disciplinary and Appeal Hearings.
127. The respondent’s Counsel also sought to distinguish **Smith** in relation to the issue of the band of reasonable responses. He submitted that:

*“The fact that such behaviour exposed the respondent, and the claimant, to a number of different risks is not a ground for determining unfairness if one of those bases of dismissal is found unfair, but the remaining three stand.”*

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128. Counsel also maintained that Mr Armstrong’s instruction to attend the meeting was reasonable. He sought to distinguish the facts of the present case from those in **Ferrie**. It was submitted that the claimant did not demonstrate an “*imminent risk*” to service user A having regard to the fact that the claimant herself said that she was not able to form any sort of medical risk assessment during the course of her duties. He submitted that:

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*“The entire approach of the claimant in this respect is inconsistent and contradictory and further provides credence to the concerns expressed by Mr Armstrong and Mrs Simpson in respect of the conduct of the claimant as being eminently reasonable concerns in the circumstances.”*

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### **Claimant’s response to respondent’s submissions**

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129. These are underlined in the written submissions by the claimant’s solicitor.

### **The Issues and the Tribunal’s Decision**

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130. In every unfair dismissal case where dismissal is admitted s.98(1) of the Employment Rights Act 1996 (“the 1996 Act”) requires the employer to show the reason for the dismissal and that it is an admissible reason in terms of s.98(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. An admissible reason is a reason for which an employee may be fairly dismissed and among them is conduct. That was the reason which SIMS claimed was the reason for Mrs Wyatt’s dismissal.

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131. While the claimant did not dispute that she had contact with service users when she was signed off work due to ill health, as I record below I was not persuaded that the claimant was in breach of contract or that she was made aware that she

5 should not have contact with service users when signed off sick or that she was given any guidance as to how she should act if contacted by a service user in such circumstances. However, in addition there was the fourth allegation of failure to comply with management instruction. Whether the instruction was reasonable in all the circumstances was an issue, but there was no doubt that the claimant did refuse to attend the meeting with Mr Armstrong.

10 132. It was with some hesitation, therefore, that I decided that the claimant was dismissed for that reason. However, that is not to say that I was of the view that she was guilty of the conduct complained of, only that SIMS believed that she was and that was the reason for the dismissal.

15 133. The remaining question which I had to determine, therefore, under s.98(4) of the 1996 Act, was whether SIMS had acted reasonably in treating that reason for dismissing Mrs Wyatt as a sufficient reason and that question had to be determined in accordance with equity and the substantial merits of the case.

20 134. To determine whether a dismissal for misconduct is fair valuable guidance was provided in the well-known case of **Burchell**, to which I was referred. Mr Justice Arnold gave the following guidelines in that case at page 380: -

25 *“What the Tribunal have to decide every time is, broadly expressed whether the employer who discharged the employee on the ground of the misconduct in question, (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of that employee of that misconduct at that time. That is really stating shortly and compendiously what in fact is more than one element. First of all, there must be established by the employer the fact of that belief: that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief and thirdly, we think that the employer, at the stage at which he formed that belief, on those grounds, at any rate at the final stage at which he formed the belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.”*

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35 135. While the claimant readily admitted to having contact with service users when signed off and that she had refused to meet Mr Armstrong despite his instruction, I was not satisfied that the respondent had made the claimant aware of the “boundaries” were such a situation to arise as a reasonable employer would have

done and this was something the claimant drew specifically to the respondent's attention at the Disciplinary Hearing (P71); whether or not it was reasonable to say that the claimant was actually working at the time was debateable; there was an issue relating to the nature of the contact; and there was also the issue of the reasonableness of Mr Armstrong's instruction. Considering these factors, I was satisfied, despite Counsel's submission to the contrary, that the test in **Burchell** did apply.

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136. I should perhaps record at this stage that the claimant gave her evidence at the tribunal Hearing in a consistent, refreshingly straightforward and open manner and presented as entirely credible and reliable.

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137. So far as the first branch of that three-fold test in **Burchell** was concerned, despite my reservations, I was satisfied that SIMS believed that Mrs Wyatt was guilty of misconduct.

138. What then of the second branch of the test, namely whether SIMS had reasonable grounds for its belief?

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139. It was the respondent's position that each of the four allegations constituted gross misconduct. So far as Allegations 1, 2 and 3 were concerned, I agree with the claimant's solicitor that they were "*intrinsically linked with each other*".

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140. The claimant did not dispute at any time that she had met service users while signed off sick. She was entirely open about this. However, was that sufficient to enable the respondent to form a reasonable belief, in all the circumstances, that this constituted gross misconduct?

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141. At the core of this issue was the contractual position between the parties; what, if anything, had been communicated to the claimant in respect of contact with service users when signed off work due to ill health – the so-called "boundaries"; and what had actually been the nature and extent of the interaction between the claimant and the service users when she was signed off.

142. As the claimant's solicitor drew to my attention, both the respondent's witnesses spoke of the importance of "boundaries" when it came to Outreach Workers dealing with service users. However, no "boundaries policy" was lodged as a production or spoken about in evidence and nor was a copy provided to the claimant during the disciplinary process. As the claimant's solicitor put it: "*the claimant did not know the standards expected of her*".

143. Mr Armstrong did say that Outreach Workers were cautioned against developing "friendships" with service users and that if an Outreach Worker met a service user when signed off work the meeting should be brief, information should only be given if requested and the service user should be advised that the Outreach Worker was not working. However, essentially, that was what the claimant did although she did go further and arranged proactively to take one service user to meet someone and to assist another with her passport application.

144. There is also a provision in the SSSC Codes of Practice that a social service worker should not: "*Form inappropriate personal relationships with service users*" (P202), but that provision, in my view, does not relate to the circumstances of the present case and, in any event, no reasonable employer, acting reasonably could have taken the view that the claimant had formed such a relationship.

145. Further, a reasonable employer acting reasonably would view any contact with service users outwith work, whether signed off or not, in the context of a small community and the employee concerned dealing at work with several service users on a one-to-one basis. It was not surprising, therefore, that she would meet them by chance or that they would contact her direct.

146. Nor was I satisfied, in light primarily of the claimant's evidence as to the relatively informal nature of her meetings and the lack of investigation by the respondent, that a reasonable employer acting reasonably could have concluded that she was working at the time which, of course would give rise to the requirement to keep notes of the meeting and assess risk. Nor was the claimant ever advised that records should be updated when she was absent from work.

147. As I recorded above, Allegations 1, 2 and 3 are linked. I was not satisfied, therefore, in all the circumstances and in the absence of a clear contractual provision

relating to “boundaries” or clear, unambiguous instructions to the claimant, that a reasonable employer acting reasonably could have concluded that the claimant was guilty of gross misconduct; I was not satisfied, with reference to the second branch of the test in **Burchell**, that the respondent had reasonable grounds for its belief that the claimant was guilty of gross misconduct in respect of each of Allegations 1, 2 and 3.

148. Nor was I satisfied, in respect of Allegations 1, 2 and 3, and with reference to the third branch of the test in **Burchell**, that there had been: “*as much investigation into the matter as was reasonable in all the circumstances of the case.*” I was satisfied that the submissions by the claimant’s solicitor in this regard were well-founded. While the claimant, a credible and reliable witness, admitted that she had had contact with service users when she was signed off work she maintained that such contact had only been “*at a trivial or mundane level*”; she told the respondent that she did not consider herself to have been working at the time; she had left a voicemail message on her mobile telephone to that effect; and a reasonable employer acting reasonably could not have concluded, in all the circumstances, that she was definitely working as the position in this regard was not at all clear.

149. In such circumstances, no reasonable employer acting reasonably, especially when misconduct and summary dismissal were being contemplated, would not have made enquiries of the service users as to the interaction between them and the claimant.

150. So far as the Allegation 4 was concerned, the facts were not disputed and no further investigation was required. I was satisfied, therefore, that as far as this allegation was concerned the respondent did have reasonable grounds upon which to sustain its belief.

151. However, while the claimant had refused a management instruction it was not a case of her refusing to attend any meeting, but rather that she was of the view that she had in the circumstances to support the service user at an appointment which had already been arranged and she had a genuine and understandable

concern that if she did not do so this would cause unnecessary stress to the service user.

152. I was of the view, therefore, that, while the claimant was not blameless, no reasonable employer acting reasonably could have concluded in relation to Allegation 4 that this constituted gross misconduct.

### **Dismissal**

153. Further, so far as the decision to dismiss was concerned, while I was conscious of the background and the terms of the Care Inspectorate Report and the pressure the respondent was under to address the Inspector's concerns and criticisms, it was very clear that the claimant was a conscientious and loyal employee who was passionate about her work and cared a great deal about the service users with whom she worked. Also, she had over 20 years' service with the respondent. In light of all of this, and having regard to the guidance in such cases as **Iceland Frozen Foods**, I was not satisfied that in all the circumstances dismissal was within the band of reasonable responses open to a reasonable employer not only in respect of Allegation 4, but also in respect of Allegations 1, 2 and 3.

154. Moreover, in all these circumstances and having regard, in particular, to the claimant's length of service, commitment and attitude to her work and the service users, not only could no reasonable employer acting reasonably have concluded that the claimant was guilty of gross misconduct, but also they could not have concluded that the claimant was guilty of "deceit", "dishonesty" and a "serious breach of trust". Such allegations had never been made prior to dismissal and it seemed to me that they were designed for the sole purpose of reinforcing the allegations of gross misconduct.

155. I concluded, therefore, that the claimant was unfairly dismissed.



**Remedy**

156. The remedy sought by the claimant was compensation. Her solicitor produced a Schedule of Loss (P35-37).

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157. So far as the **Basic Award** was concerned, this was agreed between the parties to be **£12,989**.

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158. So far as the **Compensatory Award** was concerned, I decided that it would be just and equitable to award her compensation to reflect her financial loss as a consequence of her unfair dismissal. However, I had reservations as to the steps taken by the claimant to mitigate her loss.

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159. While I was mindful of her age, the fact that she had been dismissed for gross misconduct which would make it more difficult for her to secure suitable alternative employment, particularly in the care sector, and the fact that she had worked exclusively for the respondent for over 20 years, the only evidence which she gave about mitigation was that she had: *“gone along to the job centre”* to enquire about employment; there was little further evidence as to steps she had taken to secure alternative employment.

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160. I decided, therefore, in all the circumstances that it would be just and equitable to award the claimant compensation to reflect her loss of earnings for the 31.57 week period from the date of dismissal to the Hearing date which, was agreed, amounted **£12,247**, but that it would not be just and equitable to make any further award beyond that.

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161. I was also satisfied that it would be just and equitable to award her compensation in respect of so-called “loss of statutory rights” in the sum of **£350**.

162. The total Compensatory Award, therefore, amounts to **£12,597**.

163. With some hesitation, having regard to **Strouthos**, in particular, and the lack of proper investigation, I was satisfied that there was no procedural unfairness.

Apart from the failure to allege “*deceit*”, “*dishonesty*” and a “*serious breach of trust*”, the claimant was made aware of the allegations against her, afforded ample opportunity to state her case and allowed an Appeal. Nor was I persuaded that Mr Armstrong’s involvement in the disciplinary proceedings rendered the dismissal unfair and, in any event, any possible unfairness was cured by the Appeal. I was satisfied that the respondent had complied with the ACAS Code and accordingly that no uplift was appropriate.

164. Accordingly, the total Compensatory Award is **£12,597** and when the Basic Award of **£12,989** is added the total Monetary Award is **£25,586**.

### **Contributory fault**

165. While the claimant had not been given clear, unambiguous guidelines in relation to contact with service users when she was signed off work and while she had been contacted by service users despite leaving a voicemail message on her telephone to the effect that she was not available, I was satisfied that there was fault on her part in respect of Allegations 1,2 and 3 which contributed to her dismissal. She proactively contacted at least two service users and arranged to meet them; she herself accepted that she should not have *been* in touch with service users “*outwith work and especially not whilst on sick leave*” (P170).

166. Further, while I did not consider that Allegation 4 constituted gross misconduct, it was clear that there was contributory fault on the claimant’s part. She chose not to comply with what was a clear management instruction from Mr Armstrong.

167. In the circumstances, I decided that the degree of contribution should be fixed at 50% and that both the Basic and Compensatory Awards should be reduced by that percentage. Accordingly, the Monetary Award is **£12,793**.

168. Finally, I wish to thank the claimant's solicitor and the respondent's Counsel for the manner in which they conducted these proceedings, for their researches and helpful written submissions. I also wish to apologise to the parties for the time it has taken to issue this Judgment and Reasons. It was due to several factors, but I apologise if any inconvenience has been caused as a consequence.

10 Employment Judge: Nicol M Hosie  
Date of Judgment: 16 March 2017  
Entered in Register: 16 March 2017  
and Copied to Parties