EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104575/2017

Held in Glasgow on 6 and 7 February 2018
(with a Members' meeting on 6 April 2018)

Employment Judge: Lucy Wiseman
Members: John McElwee
John Hughes

Ms Mandy Davies	**Claimant** **Represented by:-** **Ms K Osbourne - Solicitor**
Scottish Courts and Tribunals Service	**Respondent** **Represented by:** **Mr B Nicol - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided:-

(a) the claimant was unfairly dismissed;

(b) the respondent shall reinstate the claimant by the 20 June 2018, and shall pay to her the sum of Fourteen Thousand and Nine Pounds, Eighty Four Pence (£14,009.84) in respect of arrears of (net) pay for the period between the date of termination of employment and the date of reinstatement. The respondent shall also restore to the claimant all rights and privileges including seniority and pension rights;

(c) the claimant's dismissal was because of something arising in consequence of her disability in terms of section 15 Equality Act 2010, and the respondent could not show the treatment was a proportionate means of achieving a legitimate aim and

(d) the respondent shall pay to the claimant the sum of Five Thousand Pounds (£5,000) in respect of injury to feelings.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 14 September 2017 alleging she had been unfairly dismissed and discriminated against because of the protected characteristic of disability.

2. The respondent entered a response admitting the claimant had been dismissed for gross misconduct, but denying the dismissal was unfair. The respondent also denied the allegation of discrimination.

3. We heard evidence from Mr Stephen Bain, Sheriff Clerks Manager, who took the decision to dismiss; Mr Eric McQueen, Chief Executive, who heard the appeal; and the claimant.

4. We were also referred to a jointly produced bundle of documents.

5. We, on the basis of the evidence before us, made the following material findings of fact.

Findings of fact

6. The claimant commenced employment with the respondent on 27 July 1997. She was employed as a Court Officer, responsible for assisting the Clerk in the running of the Court. The claimant earned £1,315 gross per month, giving a net monthly take home pay of £1,112.42.

7. The claimant experienced, over the last 2 – 3 years, the onset of menopause which resulted in very heavy bleeding (generally referred to as flooding). The claimant became severely anaemic due to the heavy bleeding, and also felt "fuzzy", emotional and lacking in concentration at times.

8. The claimant was referred to a menopause clinic where she was put on a form of hormone replacement therapy. This has helped to the extent the bleeding is more regular, but still severe.

9. The claimant informed her line managers, Ms Jean Kerrachan and Ms Anne McKechnie, of her condition in or about April 2016. It was agreed the claimant would no longer do jury court and she was also taken off mail duties. It was also agreed with Ms McKechnie that on weeks when the claimant's bleeding was very severe (and she required to change sanitary protection twice an hour) that she would work in a Court where there was easy access to a toilet.

10. The claimant consulted a nurse in February 2017 because she felt she may have cystitis. The claimant was told to take Cystopurin. This medication comes in a granular form to be diluted in water. The claimant took the medication to work with her on 22 February with the intention of diluting and drinking it during the course of the day.

11. The claimant, on the 22 February 2017, was working in Court Room 23 because it had easy access to a toilet. The claimant had made the Sheriff aware she would require to take toilet breaks during proceedings.

12. The claimant placed her pencil case and other items on the Court Officer's desk in Court. The claimant uses a large pencil case because she carries her

sanitary protection in it. The claimant had also placed her medication in the pencil case.

13. The claimant escorted the Sheriff off the bench for an adjournment and when she returned to Court she noticed the items on her desk had been moved and the water jug on her table had been emptied. The claimant noticed two men in the public area of the Court drinking water.

14. The claimant was concerned the men were drinking the water from her desk because she could not remember if she had diluted her medication into the water. The claimant approached the men, asked where the water had come from, and was told the Clerk had given it to them. The men asked the claimant why it was of any concern, and the claimant informed them her medication may have been in the water. The claimant was asked what medication was in the water, and she refused to confirm this because it was in open Court.

15. One of the men (Mr J) launched into a rant and made comments to the effect of 'trying to poison the two old guys in the court' and asking if he would grow "boobs".

16. The other man (Mr M) told Mr J to stop otherwise he would remove him from Court. Mr M spoke to the claimant after his case had been dealt with, to ask if there was anything in the water to do him harm, and the claimant confirmed she did not think so.

17. Mr McGhee, the Clerk, returned to Court in the middle of the situation.

18. The Health and Safety team was notified at or about 4pm on 22 February of the incident. They ascertained what medication had been involved, and took medical advice about the medication and the potential risks of taking it. A Health and Safety Officer attended at the homes of Mr J and Mr M to inform them of the name of the medication and to advise them to seek medical advice.

19. The following day (23 February) the claimant was asked by Ms Margo Mackie to provide a written account of what had happened. The claimant did so by email (page 175 sent at 10.16) with an amended version (page 176 sent at 10.44). The claimant, in the email, stated she had put the medication into the jug.

20. The claimant was called to a Health and Safety investigation meeting held by Mr Vincent (Dusty) Miller and Mr Paul McClintock on 23 February. The claimant was told Mr Miller and Mr McClintock wanted to have "a wee word" with her about what had happened in Court.

21. Mr Miller, by the time he met with the claimant on 23 February, knew the medication had not been added to the water. This had become clear upon learning the medication would have turned the water pink, and would have given it a cranberry taste. Mr Miller told the claimant this during the meeting on 23 February.

22. Mr Miller produced a Health and Safety Investigation report (page 193). The report noted Mr McGhee, Clerk; Mr J; Mr M and the claimant had been interviewed as part of the investigation. The report not only dealt with health and safety issues, but went far beyond that in giving Mr Miller's opinion about various matters including the conclusion that "*there can be no doubt that Mandy would have known that [that is, that there was medication in the water] not to be true as the water jug was clear and had no taste. In addition Mandy showed no remorse for her actions and did not appear worried they had taken this medication."*

23. Mr Miller noted there were no immediate health and safety issues surrounding the incident, but he went on to make various recommendations regarding the claimant, which included that the claimant had not shown the values and behaviours held by the respondent and had behaved inappropriately; that she had breached section 7 of the Health and Safety Act; that that caused Mr

Miller concern because it could cause embarrassment for the respondent and that the claimant should be considered for formal disciplinary action for her actions, which constituted gross misconduct.

24. The claimant, having spoken with Mr Miller and Mr McClintock on 23 February, acknowledged she had been wrong about the medication being in the water, and she provided an amended statement (page 181) to Ms Margo Mackie.

25. Mr Alan Pirie, Business Support Team Manager, was asked to carry out a disciplinary investigation into the incident on 27 February 2017. Mr Pirie was provided with a copy of the Health and Safety Investigation Report as part of his investigation.

26. Mr Pirie interviewed Mr McGhee, Mr J, Mr M and the claimant. Mr Pirie concluded there had been an incident on 22 February 2017 whereby two members of the public were advised by the claimant that water they had ingested from a court water jug contained medicine belonging to the claimant.

27. Mr Pirie noted the claimant had told him that her pencil case was open upon her return to court, and that she had medication and personal items in there. She had been flustered and agitated and that explained why she could not remember precisely what had been said in respect of the water. The claimant also explained she could have anxiety attacks when she did not remember things, and the fact her pencil case was open made her panicky and forgetful.

28. Mr Pirie concluded the claimant's conduct was a breach of the respondent's values and behaviours.

29. Mr Stephen Bain, Sheriff Clerks Manager, was appointed to hear the disciplinary hearing. He, upon receipt of the Investigation Report from Mr Pirie, decided a supplementary investigation should be carried out because the claimant had not seen the Health and Safety report.

30. Mr Bain also took the decision not to suspend the claimant. The respondent's Conduct and Discipline Policy (page 139) provides that suspension will seriously be considered where the case to be investigated is thought to involve serious or gross misconduct. Mr Bain decided not to suspend the claimant because there was a "workable solution" involving moving the claimant to work in a witness muster role.

31. The claimant was referred to Occupational Health on 9 March 2017 and a report was produced (page 219). The report confirmed the claimant had been suffering from peri-menopausal symptoms which included "heavy bleeding which can continue for several weeks, and also stress, anxiety, palpitations, memory loss and pins and needles in hands and feet." It was further noted the "heavy bleeding has also caused severe anaemia, causing tiredness, light headedness and fainting." The report concluded the claimant was fit for work with adjustments.

32. Mr Pirie concluded the supplementary investigation and produced a report (page 269). Mr Pirie noted that Mr J had lost his case in court on 22 February, and had brought an appeal based on being upset by the incident in court which had caused him to lose concentration and focus on his case. Mr Pirie concluded that had the claimant not acted in the way she did, then the appeal would not have had any basis. The appeal would have to be heard and "SCTS will not be shown in the good light" and this aggravated the breach of conduct (the appeal was subsequently dismissed because there was no legal basis for it).

33. Mr Bain wrote to the claimant by letter of 24 April 2017 (page 281) inviting her to attend a disciplinary hearing. The allegations to be considered were:-

    1. On 22 February 2017 .. you failed to manage your personal medication, Cystopurin, with sufficient care and attention and knowingly misled two party litigants into believing the water they had

ingested from the [water jug] contained the said personal medication; you did so by shouting at said party litigants in the presence of other court users and as a result the said Mr J appealed against the final decision in his case, citing your actions as the reason he was unable to properly conduct his case;

2. On 22 February 2017 you knowingly misled local SCTS management and the SCTS Health and Safety Officer into believing that water that the two party litigants had ingested contained the said personal medication and as a result action was taken by the SCTS officers to investigate the matter as a matter of urgency in order to ensure the health and safety of said party litigants;

3. You failed to comply with section 7 Health and Safety at Work Act 1974 which states that "*it shall be the duty of every employee while at work (a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work";*

4. You failed to meet the staff responsibility for Health and Safety as set out in the SCTS Health and Safety Policy at 2.1.1 "*staff have a responsibility to do everything they can to prevent injury to themselves or others affected by their actions or omissions at work"*;

5. You failed to comply with the SCTS values and behaviours then in force, in particular"

    a) Commitment and Professionalism – and the associated behaviour of projecting a positive image of yourself and the organisation;

    b) Providing a high quality service – and the associated behaviours of recognising and being responsible to

customers/visitors and their individual needs, recognising the importance of your work to others and helping to support colleagues and working as a team player;

c) Integrity and impartiality – and the associated behaviours of treating everyone with courtesy and dignity, setting out facts openly and taking action to correct errors as soon as possible, using your best judgement and being objective when making decisions, displaying SCTS values and behaviours and challenging inappropriate behaviours;

d) Using resources effectively – and the associated behaviours of taking care of all SCTS equipment and resources recognising their cost and value;

6. You failed to comply with the values and behaviours set out in The Civil Service Code, in particular: -

(a) Integrity – and the associated behaviour of fulfilling your duties and obligations responsibly, always acting in a way that is professional and that serves and retains the confidence of all those with whom you have dealings and dealing with the public and their affairs fairly, efficiently, promptly, effectively and sensitively to the best of your ability;

(b) Honesty – and the associated behaviours of setting out the facts and relevant issues truthfully, and correcting any errors as soon as possible, and not deceiving or knowingly misleading ministers, Parliament or others.

7. You have by your actions brought the SCTS into disrepute.

34. The claimant was provided with copies of all relevant documents, which had also been provided to Mr Bain in advance of the disciplinary hearing.

35. The disciplinary hearing took place on 30 May 2017. The claimant was accompanied by Mr Brian Carroll, the trade union (PCS) branch secretary. Mr Carroll presented objections to the Health and Safety report in terms of the way in which the meeting had been conducted with the claimant, who had not been given the right to be accompanied and who had not been told the reason for the meeting. Mr Carroll further objected to the fact the report had gone far beyond its remit in giving opinions and making conclusions. He submitted the report was fatally flawed and should be disregarded.

36. Mr Bain retired to consider the matter and upon his return he informed Mr Carroll that the process had not been prejudiced by the health and safety report and that Mr Bain would place appropriate weight on it whilst disregarding the opinions expressed.

37. The claimant told Mr Bain that she had taken her medication to work that day because she had intended to take it. She had not been feeling her best that day, and she could not remember if she had taken the medication or not. She genuinely thought the sachet had been put into the jug, particularly when she saw her things had been moved. She wondered “what if someone has taken it” and that is when she spoke to the two men.

38. Mr Carroll’s closing submission focused on the fact the claimant had 20 years unblemished service with the respondent, and that there had never been any issues regarding her conduct, performance or attendance during that time. Mr Carroll also focused on the medical information which had been produced, being a personal statement from the claimant explaining the impact of the condition (page 317) and a booklet on the menopause, a letter from the claimant’s doctor and the occupational health report.

39. Mr Bain confirmed the outcome of the disciplinary hearing in a letter dated 21 June 2017 (page 327). Mr Bain concluded the claimant was aware from the outset that there was no medication in the jug and knowingly misled the two party litigants and SCTS management. In reaching this conclusion Mr Bain attached weight to his belief the claimant had been using the medication for some time and would have known it turned water pink, and because the claimant had changed her story and been inconsistent regarding some facts. Mr Bain acknowledged the claimant's medical condition but concluded the symptoms of inability to remember appeared only to have started after the Health and Safety interview.

40. Mr Bain concluded the claimant's actions were "so serious" and amounted to such a serious breach of trust that the damage was irretrievable. Mr Bain decided to summarily dismiss the claimant for gross misconduct.

41. The claimant appealed against the decision to dismiss (page 337). There were two grounds of appeal and they were firstly that there had been a fatal flaw in the procedure in respect of the way in which the initial health and safety investigation had been conducted and the fact it had strayed far outwith its remit; and secondly, the decision to dismiss was too harsh.

42. The appeal was heard on 24 July 2017 by Mr Eric McQueen, Chief Executive. The notes of the hearing were produced at page 349. Mr McQueen spoke with Mr Bain regarding the health and safety report and was satisfied with Mr Bain's explanation that he had not relied on the opinions expressed in that report.

43. Mr McQueen, in considering the second ground of appeal, felt the claimant's position had been clear and consistent and that she had given precise details, for example, about the medicine being in the water and not raising her voice. He was of the opinion the claimant's story only changed once the health and safety report had been produced, and the claimant adopted the position that

the medicine might have been in the water, and she had only raised her voice because it had been loud and busy in the court room.

44. Mr McQueen concluded the claimant had lied because her version of events changed after the health and safety report. He further concluded the claimant had shown no genuine remorse. Mr McQueen (and Mr Bain) confirmed that if the claimant had accepted she had been wrong, the outcome could have been different.

45. Mr McQueen had regard to the occupational health report and the letter from the claimant's GP. He found the documents helpful, but concluded the claimant's condition had not been a factor in what had happened because the claimant had been clear regarding the details.

46. Mr McQueen concluded dismissal was an appropriate sanction because lying was contrary to the respondent's core values and broke trust. Mr McQueen did not consider the claimant's lengthy service and unblemished record to be relevant because the issue was serious. Mr McQueen's decision was confirmed in a letter to the claimant dated 26 July (page 347).

47. The claimant was in receipt of Jobseekers Allowance from 28 June until 18 October 2017 at the rate of £73.10 per week. The claimant was thereafter in receipt of Employment Support Allowance from 19 October until 28 December 2017.

48. The claimant was signed off as unfit for work in August 2017. The GP diagnosed reactive depression and prescribed anti-depressants.

49. The claimant tried to find alternative employment (page 33) prior to being signed off as unfit for work. The claimant's confidence to find alternative work has been affected by these events. The claimant would also experience difficulty travelling any distance on public transport because of her condition, and this limited the scope of jobs for which she could apply.

50. The claimant wished, if successful with her claim, to be reinstated. She considered support/adjustments had been in place for her prior to her dismissal and her line managers had been very supportive. The claimant acknowledged she was currently signed off unfit for work, but she had discussed reinstatement with her GP and it was felt she would be able to return to work if reinstated because this would have a positive impact on her mindset and she would be supported.

51. Mr McQueen confirmed there were vacancies at the claimant's grade, but considered reinstatement would be very difficult because trust had been broken in respect of one of the fundamental values, and he did not consider the relationship was recoverable. Mr McQueen is based in Edinburgh. Mr Bain is retiring at the end of this year.

Credibility and notes on the evidence

52. We found the claimant to be a wholly credible and reliable witness. She gave her evidence in a clear and straightforward manner and tried very hard to remember as much detail as possible about what had happened.

53. We also found Mr Bain and Mr McQueen to be credible witnesses who were able to explain the decisions made and the reasons for them. The one question they could not however answer was if they believed the claimant had lied about this matter, why she had done so.

Respondent's submissions

54. Mr Nicol noted the respondent conceded the claimant was a disabled person in terms of section 6 Equality Act, and that she was so as at the date of dismissal.

55. The issues to be determined by the Tribunal had been agreed and were as follows:-

- What was the reason for the claimant's dismissal and was it for a reason falling within section 98(1) Employment Rights Act;
- Was the claimant's dismissal fair under section 98(4) Employment Rights Act;
- If the answer to (2) is yes, was the claimant's dismissal because of something arising as a consequence of her disability;
- If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim and
- Remedy (including Polkey/contributory conduct/ whether an order for reinstatement should be made).

56. Mr Nicol submitted the reason for the claimant's dismissal was misconduct. Mr Bain believed the claimant had lied about the medication being in the water jug and that she had lied about this to the two men in court, to the health and safety investigators and throughout the disciplinary process. Mr Bain also believed the claimant raised her voice to the two men in court. Mr McQueen also believed the claimant lied, and that this was the principal reason for her dismissal. The claimant was not asserting the reason was anything other than conduct. In those circumstances, Mr Nicol submitted the reason for dismissal was conduct, which is a potentially fair reason for dismissal in terms of section 98(1) Employment Rights Act.

57. Mr Nicol referred to the case of **British Home Stores Ltd v Burchell 1978 IRLR 379** and submitted the respondent did genuinely believe the claimant was guilty of misconduct. Further, there were reasonable grounds for that belief in circumstances where Mr Bain believed the claimant was well

acquainted with the medication and would have known it turned the water pink and tasted of cranberry. The claimant had been clear the medication was in the jug and her story only changed when the health and safety investigators told her the medication could not have been in the water. The claimant then changed her story. Mr Bain believed the claimant only started to say she could not remember clearly once she was caught out in the lie.

58. Mr Bain did not believe the claimant was confused or had a poor memory, he considered that if that had been so, the claimant would have acted differently upon returning to court.

59. The medical report from occupational health and the claimant's GP were taken into account but did not explain the claimant's lying.

60. Mr Bain also believed, having had regard to the statements of Mr McGhee, Mr J and Mr M, that the claimant had shouted at the two men in court.

61. Mr Nicol submitted that at the time the employer formed their belief on those grounds, it had carried out as much investigation into the matter as was reasonable. The only criticism of the investigation was that the health and safety investigation had been disciplinary in nature. Mr Bain and Mr McQueen both rejected that suggestion and confirmed the health and safety investigators had no locus to come to disciplinary conclusions. Both only considered the factual content of the health and safety report and not the opinions expressed.

62. Mr Nicol referred to the case of **Iceland Frozen Foods Ltd v Jones 1983 ICR 17** and submitted the respondent's decision to dismiss had been within the band of reasonable responses. This was so because there had been a significant and repeated lie; the two men in court had been told they had ingested medication when they had not; this could have had serious health consequences for the two men; the claimant's actions caused a statutory appeal and the claimant had not shown remorse.

63. In the case of **Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09** the EAT summarised the law on what amounts to gross misconduct and found it involved either deliberate wrongdoing or gross negligence. The respondent considered the conduct so serious, deliberate and sustained in this case that it went to the root of the contract. Honesty goes to the core of the respondent's values.

64. Mr Nicol submitted the respondent was entitled to conclude the actions of the claimant destroyed trust and confidence, and that dismissal fell within the band of reasonable responses. Lack of remorse had been an issue and both Mr Bain and Mr McQueen stated that if the claimant had accepted early on that she had got this wrong, and apologised, things could have ended up differently.

65. The claimant's representative had sought to make something of the fact the claimant had not been suspended. Mr Bain and Mr McQueen's evidence regarding suspension had been clear that it is a last resort. The respondent had moved the claimant and put safeguards in place pending the outcome of the investigation.

66. The disability discrimination complaint was brought under section 15 Equality Act. The unfavourable treatment was the dismissal and the Tribunal had to ask whether dismissal occurred because of something arising from the claimant's disability. Mr Bain was aware the claimant's condition could cause memory loss, but he concluded the claimant's actions were not due to disability –related memory loss, but due to the claimant being intentionally dishonest and maintaining that lie. He did not believe the claimant's conduct was the cause of her behaviour which led to dismissal.

67. The respondent genuinely believed on reasonable grounds that the claimant lied and that was the cause of the dismissal, not anything arising in consequence of disability.

68. Mr Nicol submitted the respondent would be objectively justified in dismissing the claimant given the nature of the work, the organisation and the requirement for high levels of honesty. Mr Nicol submitted the legitimate aim of the respondent was to have an honest and trustworthy staff.

69. Mr Nicol invited the Tribunal to dismiss the claim. If however, the Tribunal found the dismissal unfair, there should be a Polkey deduction of 100%; and a deduction for significant contributory fault. Reinstatement would not be practicable in the circumstances because the claimant was dismissed for a repeated and significant lie which broke trust and confidence; she contributed to her dismissal and did not mitigate her loss.

70. Mr Nicol invited the Tribunal to dismiss the complaint of disability discrimination. However, if the Tribunal upheld the complaint, he submitted the only appropriate award would be injury to feelings which should be at the low end of the Vento scale.

Claimant's submissions

71. Ms Osbourne referred to the provisions of section 15 Equality Act and to the cases of **Trustees of Swansea University Pension and Assurance Scheme v Williams 2015 IRLR 885; Basildon & Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305; Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893; Paisner v NHS England 2016 IRLR 170** and **Nagarajan v London Regional Transport 1999 IRLR 572** in respect of the approach to be adopted by Tribunals when considering cases brought in terms of section 15 Equality Act. Ms Osbourne also referred to the case of **Hardy and Hansons plc v Lax 2005 ICR 1565** regarding the test for justification.

72. Ms Osbourne noted the claimant had depression, cystitis, gynaecological issues which cause excessive bleeding, anaemia and is peri-menopausal.

The claimant's conditions amounted to a disability in terms of section 6 Equality Act. The Tribunal heard evidence regarding the impact of those conditions on the claimant's day to day living and her performance at work. The claimant gets anxious and upset; suffers short term memory loss and becomes confused; bleeds heavily and needs to attend the toilet frequently to change sanitary protection and she becomes weak, dizzy and disorientated because of the anaemia. The respondent knew of the claimant's condition.

73. The claimant's dismissal was an act of unfavourable treatment. The reason for the claimant's dismissal was her conduct. It was submitted that it was clear from the evidence that the claimant's conduct was affected by her disability. The claimant mistakenly advised the two men in court that they may have drunk water containing her medication due to her memory problems which arose from her peri-menopause and anxiety. These issues also impacted on the accuracy and consistency of the information provided by the claimant during the investigation. The claimant raised her voice to be heard and her reaction can be attributed to her heightened anxiety.

74. Ms Osbourne submitted there was a clear causal link between the effects of the claimant's disability and the unfavourable treatment. Accordingly, it was for the respondent to show dismissal was a proportionate means of achieving a legitimate aim. The respondent had not set out in their response, or in initial submissions, what their legitimate aim was. Further, the question of whether there was any alternative to dismissal was relevant to the issue of proportionality and it was noted the respondent had moved the claimant to another role during the investigation.

75. Ms Osbourne submitted the reasonable needs of the business did not outweigh the discriminatory effect of the respondent's act. Dismissal was not a proportionate means of achieving the legitimate aim and the respondent had discriminated against the claimant.

76. Ms Osbourne referred the Tribunal to the terms of section 98 Employment Rights Act and also to the cases of **British Home Stores Ltd v Burchell** (above) and **Strouthos v London Underground Ltd 2004 IRLR 636** regarding length of service being a factor which can properly be taken into account.

77. Ms Osbourne challenged whether the respondent had a reasonable belief in the claimant's guilt because Mr Bain could not have believed the claimant had been dishonest about putting the medication in the water and that she had breached health and safety rules. Ms Osbourne submitted the respondent had been determined to dismiss the claimant because of Mr J's appeal.

78. Ms Osbourne submitted there were not reasonable grounds upon which the respondent could sustain their belief in the claimant's guilt. The respondent accepted the claimant had a condition which affected her memory, and it had not been reasonable to fail to consider this medical evidence which suggested that what had occurred was attributable to her disability. Further, there was no credible evidence that the claimant's actions had brought the respondent into disrepute, or that she had acted negligently.

79. Ms Osbourne submitted there was no plausible motive for the claimant to act dishonestly, and the respondent had failed to consider Mr J's motive in using the claimant's conduct as the basis for an appeal when trying to avoid liability for the debt for which decree had been granted. Mr J had not been interviewed and therefore his credibility could not be tested. The respondent had also failed to have regard to Mr J's conduct in court and had too easily dismissed his comments.

80. The respondent had not carried out as much investigation into the matter as was reasonable in all the circumstances. It was submitted that further detailed evidence should have been obtained regarding the claimant's memory loss.

81. Ms Osbourne submitted the dismissal had been unfair because the health and safety report prejudiced the investigation; the sanction had been excessive and there had been a failure to consider and attach sufficient weight to the claimant's 20 years of service and unblemished record. The respondent did not suspend the claimant: they allowed her to continue, without supervision, to work with the public. This, it was submitted, undermined the respondent's belief in the claimant's guilt particularly as the claimant was permitted to undertake this role after the allegations had been investigated and the charges formulated.

82. Ms Osbourne invited the Tribunal to find the dismissal was unfair and to order reinstatement or re-engagement, failing which compensation. The fact the claimant was not suspended undermined the respondent's position that trust had been broken. There was, and remains, a workable solution. The respondent has vacancies at the claimant's grade and reinstatement would be practicable.

83. Ms Osbourne invited the Tribunal to find any contributory conduct to be at the lower end of the scale particularly given the claimant's medical condition.

84. The claimant had attempted to mitigate her loss in the period prior to be signed off as unfit for work.

Discussion and Decision

85. We firstly had regard to the terms of section 98 Employment Rights Act which provide:

> "*(1) In determining for the purposes of this Part, whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal and*

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

(a) …

(b) relates to the conduct of the employee ..

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

86. Section 98 sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages: first, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) or (2). Second, if the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was fair or unfair under section 98(4). The respondent's position was that the reason for the claimant's dismissal was conduct. We noted the claimant did not assert there had been another reason for her dismissal. The claimant did challenge whether the respondent had reasonable grounds to sustain their belief, but that is a different matter and one we shall deal with below. We were satisfied,

having had regard to the matters set out below, that the respondent believed the claimant guilty of misconduct. The respondent has shown the reason for the dismissal was conduct, which is a potentially fair reason for dismissal falling within section 98(2)(b) Employment Rights Act.

87. We must now continue to consider the fairness of the dismissal in terms of section 98(4) Employment Rights Act. This requires the Tribunal to consider whether the respondent acted reasonably in dismissing the employee for the reason given. We were referred to the ***Burchell*** case and it is helpful to set out the guidance from that case. The EAT held that the employer must show:-

- it believed the employee was guilty of misconduct;
- it had in mind reasonable grounds upon which to sustain that belief and
- at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

88. We decided to firstly consider the investigation carried out by the employer. We had regard to the fact an employer should carry out a full investigation before deciding whether dismissal is a reasonable response in the circumstances. The employer's task is to gather all available evidence (including evidence in support of the employee) and, once in possession of the full facts, the employer will be in a position to make a reasonable decision about what action to take. The ACAS Guide emphasises that the more serious the allegations against the employee, the more thorough the investigation conducted by the employer should be.

89. There was no dispute in this case regarding the fact an incident occurred on 22 February 2017 when the claimant told two men in court that the water they had consumed may have contained her medication. The first people to

interview the claimant were the health and safety investigators who met with the claimant on 23 February. They had, prior to speaking to the claimant, interviewed Mr McGhee, Sheriff Clerk; Mr J and Mr M the two men in court. They had also established that the water consumed by the men had not contained the claimant's medication.

90. The health and safety investigation was undertaken because the respondent has a duty to investigate incidents or accidents that occur to ensure there is an evaluation of the cause, and to assess current preventative measures and make improvements to prevent a recurrence. The report (page 193) produced by Mr Miller went far beyond this remit. Mr Miller conducted a wholesale investigation into the incident, made assumptions and reached conclusions far outwith his remit. For example, Mr Miller's report included the following assumptions/conclusions:

- there was an exchange of words between all parties in which Mr J made adverse comments "*most probably to diffuse the situation"*;
- Gerry McGhee gave *"an honest account"* of the incident;
- During the interview process it was perceived by both investigators that *"although she was accepting responsibility with her words, she by no means thought that this situation was at all important and was in many ways complacent about the whole incident and potential consequences for both the individuals concerned and SCTS";*
- *"The overall view of both Paul and I was that Mandy was not telling the whole truth about what had occurred";*
- *"she began to backtrack on what had happened blaming the lack of clarity on her illness and work";*
- It is clear that Mandy had returned from her duty to escort the sheriff off the bench, on entering the court room had seen Mr M and Mr J

drinking her water and overreacted to the situation, this resulted in Mandy stating to Mr M and Mr J that there was medication in the water, *"there can be no doubt that Mandy would have known that not to be true as the water jug was clear and had no taste. In addition Mandy showed no remorse for her actions and did not appear worried they had taken this medication.."*

- Mandy Davies has clearly not shown the values and behaviours held by SCTS and behaved inappropriately.

- This contravention (of the Health and Safety at Work Act) causes me concern as should a claim be made by Mr M or Mr J, I firmly believe that a Sheriff or Judge would have no hesitation in highlighting this staff member's contravention which would be embarrassing for our organisation and costly.

- *Mandy Davies should be considered for formal discipline procedure for her actions which fall within the gross misconduct area ..*

91. Mr Miller was not conducting a disciplinary investigation. The claimant had attended the meeting with the health and safety officers on the understanding they wanted to have "a wee word" with her about the events the previous day. She was not accompanied or represented and not prepared for the route the meeting took. Further, she had no opportunity to respond to the assumptions/conclusions reached until well into the disciplinary process.

92. There was no evidence to suggest whether Mr Miller was aware of the claimant's condition and, if so, whether he took it into account. There was reference in the report, at paragraph 11, where Mr Miller noted the claimant began to "*backtrack on what had happened, blaming the lack of clarity on her illness and work"*. There was nothing in the report to explain what weight, if any, Mr Miller attached to this. The tone of the report and the language used tended to suggest Mr Miller was not aware of the claimant's condition and did not take it into account. For example, he referred to the claimant taking

Cystopurin for a kidney problem, when the packet clearly stated the medicine was for the treatment of cystitis.

93. Mr Miller strayed far outwith his remit and produced a damning report which, we considered, tainted the subsequent process. We reached that conclusion because Mr Pirie, who conducted the disciplinary investigation into the incident, was provided with a copy of the health and safety report, included it as part of his investigation and relied upon it. Further, we considered the report took the disciplinary process in a particular direction which meant the respondent failed to recognise and/or give consideration to what the claimant was telling them. For example, the respondent concluded the claimant lied about there being medication in the water and they failed to consider the claimant's position that she had been confused about whether she had taken her medication and whether it was in the water. Mr Bain and Mr McQueen, at this Hearing, simply dismissed the suggestion that the claimant had been confused and made a mistake. We considered the respondent failed to have regard to this, or to give it sufficient weight, because they were already focussed, as a result of the health and safety report, on the conclusion the claimant had lied.

94. The claimant, and her representative, raised the issue of the Health and Safety report with Mr Bain at the start of the disciplinary hearing. Mr Bain confirmed he intended to place weight on the factual aspects of the report but not the opinions expressed. Mr Bain recognised Mr Miller had strayed far outwith his remit in producing the report. We asked ourselves whether the action of disregarding the opinions of Mr Miller was an approach which fell within the band of reasonable responses which a reasonable employer might have adopted in the same or similar circumstances. We concluded that it was not, and we reached that conclusion because (i) Mr Bain knew the health and safety officers had strayed far beyond their remit; (ii) Mr Bain had, by then, read the report and the opinions; (iii) Mr Pirie had read the report and included it in his investigation and (iv) he was influenced by the report and already

focussed on the claimant having lied about there being medication in the water.

95. Mr McQueen told the Tribunal he did not place any weight on the opinions set out in the health and safety investigation/report. We concluded (as set out below) that this did not rectify the previous error for the same reasons as set out above. The health and safety report had tainted the whole process and that taint was not removed by simply disregarding the opinions of the health and safety officers.

96. We concluded the health and safety report tainted the subsequent disciplinary process and this was not remedied by Mr Bain's (or Mr McQueen's) actions. This was a fundamental flaw in the process followed by the respondent.

97. Mr Pirie conducted the investigation into the incident. He was asked to carry out the investigation on 27 February and he did so by interviewing Mr McGhee, Mr J, Mr M and the claimant. He also had regard to the health and safety report, but did not show this to the claimant or seek her comments. He also had regard to the occupational health report dated 9th March 2017, which confirmed the claimant was suffering from peri-menopausal symptoms which included heavy bleeding, stress, anxiety, palpitations, memory loss, pins and needles in her hands and feet and severe anaemia causing tiredness, light headedness and fainting.

98. Mr Pirie knew, by the time he interviewed the claimant, that there had not been medication in the water consumed by the two men in court. The claimant also knew this. We considered it important to view the questions asked of the claimant, and her answers, in this context. We, for example, noted in Mr Pirie's investigation report (page 169) that he asked the claimant if she had put any other substance or solution in the water jug, and she had replied no. Mr Pirie notes that "given the importance of this evidence" he asked her to confirm that she did not place anything in the water. She replied that she did not. It appeared very odd to this Tribunal for Mr Pirie to ask the claimant these

questions when he knew that nothing had been added to the water. Further, he appeared to attach no weight to the fact the claimant gave that answer because she now knew there was nothing in the water.

99. Mr Pirie subsequently used the claimant's answer to find the claimant's evidence inconsistent. He noted (page 170) that the claimant stated she did not put any solution or substance into the water, yet later the claimant (when explaining what she said to the two men) stated that there may be medication in it. Mr Pirie used the claimant's answers to (i) conclude she lacked credibility and (ii) conclude she had lied about there being medication in the water jug. He failed to ascertain whether the claimant's response that there was no medication in the water was based on her knowledge at the time, or whether it was based on the fact she had been told this by the health and safety officers. This was a crucial and fundamental omission by Mr Pirie and we considered it was an omission caused by the fact the health and safety officers had concluded the claimant was lying and Mr Pirie proceeded on that basis.

100. Mr Pirie's first investigation was flawed because he had the health and safety report but did not disclose this to the claimant or seek her views. Mr Bain rectified that flaw by asking Mr Pirie to carry out a supplementary investigation and disclose the health and safety report to the claimant. Mr Pirie did this, but decided he could not consider the points raised by the claimant's trade union representative, Mr Carroll, regarding the health and safety report.

101. Mr Pirie's supplementary investigation also had regard to the fact Mr J had lodged an appeal against the decree granted against him for a monetary sum. Mr Pirie interviewed Neil Christie, Head of Civil Department, and learned the basis of the appeal was that Mr J asserted he had been unfit to conduct his case due to the incident which had occurred with the water. Mr J maintained he had been distracted and confused and that this had resulted in a complete loss of concentration.

102. Mr Pirie also had before him the Draft Stated Case for the Sheriff Appeal Court (page 257). The document contained the following points:-

- I am unable to discern the point of law upon which the appeal is to proceed. I do not understand my findings in fact or law to be challenged.

- When this matter called before me, no prior incident involving any member of court staff had been brought to my attention nor did the appellant seek an adjournment.

- At no point during the proceedings did the appellant indicate that he was not able to conduct the proof.

- At no point during the proceedings did I have any reason to question the appellant's fitness or his ability to represent himself.

- I explained the procedure to be adopted at a proof and asked the appellant whether he was ready to proceed. He stated that he was.

- The appellant explained the basis for his counterclaim in clear and lucid terms. He was able to explain the history of the action .. the basis upon which he challenged the respondent's decision .. [he] cross examined the respondent's witness .. was able to refer the witness to particular productions.

103. Mr Pirie, in the investigation report, referred to having the Draft Stated Case, but he made no reference to the points made by the Sheriff. We acknowledged the material point was the fact there was an appeal, however, the Sheriff's comments were relevant to consider, and may have been considered as mitigation. We noted there is an onus on an employer investigating alleged misconduct to gather information both for and against the employee. We considered there was a lack of balance in Mr Pirie's report.

104. We further considered that our above conclusion was supported by the fact Mr Pirie found Mr J to be a credible and reliable witness in circumstances where (a) he had never met him and (b) there were inconsistencies in the statements of Mr J and Mr M. Mr Pirie made no reference to this in his report.

105. Mr Pirie was aware (because the claimant had told him) that her line manager was aware of her health difficulties over the last year and that the occupational health report noted it was likely the claimant would be covered by the Equality Act. Mr Pirie, in light of that information, failed to have due regard to the claimant's medical condition. He noted the claimant's position was that *"she could not remember what she did with the medicine, whether it went into the water, she was stressed and confused"* but he simply dismissed this as being "*not credible*" and gave no explanation for his conclusion.

106. We, having had regard to all of the above points, accepted Mr Pirie interviewed the relevant witnesses: the claimant did not suggest others should have been interviewed by Mr Pirie. However, we, in addition to concluding the health and safety report tainted the whole process, further concluded the first investigation was flawed because Mr Pirie had the health and safety report which he did not disclose to the claimant and the second investigation was lacking in balance and failed to give due consideration to the claimant's position that she had been confused about whether the medication had been put into the water jug, and that confusion was caused by her medical condition.

107. We next had regard to whether the respondent had reasonable grounds to sustain its belief that the claimant was guilty of the misconduct alleged. Mr Bain conducted the disciplinary hearing on 10 May. The letter of 24 April (page 281) set out the seven allegations of misconduct which the claimant had to answer.

108. The respondent believed the claimant had informed the two men in court that the water they consumed had her medication in it, and that she had raised her voice in the court room. We acknowledged the respondent had reasonable grounds upon which to sustain their belief in these two matters based on the evidence gathered from the witnesses and the claimant.

109. The key finding, however, made by the health and safety officers; Mr Pirie, Mr Bain and Mr McQueen was that the claimant "knowingly misled" the two men in court, management and the health and safety officers into believing there was medication in the water consumed by the two men. The respondent believed the claimant knew there was no medication in the water, but lied about it. Mr Bain reached that conclusion because the claimant had initially been clear that there had been medication in the water, but changed her position after the health and safety officers told her the medication would have changed the colour and taste of the water. Mr Bain did not consider the claimant's actions in the court room were those of someone who was anxious or unable to remember clearly what happened. He considered the claimant had been familiar with the medicine over a period time and considered it reasonable to expect her to know the medication would change the colour and taste of the water. Mr Bain concluded the claimant's change in position was not down to poor memory, but because she had lied about the medication being in the water and then changed her story once her lie had been exposed.

110. We acknowledged the claimant did initially think there was medication in the water, and that she subsequently changed that view once the health and safety officers introduced the fact the medication would turn the water pink and alter its taste. We also acknowledged that Mr Bain had questioned the claimant about how long she had been taking the medicine. The claimant told Mr Bain that "*it had been a couple of days*". Mr Bain thought there had been reference to her taking it for several weeks, but the claimant told him she took it once per day, and that she had seen the nurse that week and had been advised her symptoms had returned.

111. We considered the respondent did not have reasonable grounds upon which to sustain their belief that the claimant knew there was no medication in the water but lied about it. We say that for two reasons: firstly because the respondent failed to properly consider the claimant's explanation that she had made a mistake. The claimant repeatedly told the respondent she could not remember if she had put the medication into the water and that she was confused and stressed. The respondent simply disregarded this explanation. Mr McQueen told the Tribunal he did not accept the claimant's position that she had forgotten whether the medication was in the water. He gave no explanation why he did not accept her position. He later told the Tribunal that *"stress may have affected the initial outburst"*. He, however, did not see any contradiction in his two statements. The sole focus of the respondent was that the claimant had changed her position and this supported the conclusion she had lied. They gave no thought or consideration to the claimant's explanation: they closed their minds to any other explanation for what had happened.

112. The second reason was because the respondent failed to properly consider the claimant's medical condition There was no dispute regarding the fact Mr Bain had available to him the occupational health report and a personal statement from the claimant explaining the impact of the condition on her. The respondent understood the claimant could be affected by memory loss and confusion. The respondent however, having decided the claimant had lied, focussed on considering whether the claimant's condition would have caused her to lie. This completely missed the point of what the claimant was saying. The respondent failed to have regard to the claimant's explanation that the confusion/memory loss related to her inability to remember whether she had put the medication into the water; and that confusion had caused her to act as she had.

113. The claimant, throughout the disciplinary process, said that she had intended to take her medication that morning, but she could not remember if she had or not. She had been flustered upon returning to court to find lots of people there but no clerk. She could not remember if she had put the medication into

the water, but, when she noticed her pencil case was open, she genuinely thought the sachet had been added to the jug. The claimant's concern was that if she had done that, the two men had consumed water with the medication in it.

114. The respondent attached weight to the claimant being clear that medication had been placed in the water and that items on her desk had been moved. The respondent concluded this did not demonstrate someone who was anxious or unable to remember clearly what happened. This conclusion again misunderstood/misinterpreted the claimant's position that her confusion related to whether the medication had been added to the water. The claimant, thinking the medication had been added to the water, acted as set out above and maintained that position until it became clear she had made an error.

115. We noted that none of the respondent's witnesses could offer any reasonable response when asked why they thought the claimant would lie about such a matter. Mr Pirie noted in his Investigation Report (page 275), and without having asked the claimant, that *"there is no reason I can think of for comments being made re medicine in the water for reasons other than to cause stress or annoyance to the recipients".* There was also a suggestion by Mr McQueen that he could only surmise the claimant was agitated or frustrated about the items on her desk being moved. We considered these responses to be weak and without foundation in circumstances where the claimant was not asked to explain why she had lied. The responses also failed to understand the significance to the claimant of her pencil case having been moved: this was where she had placed the medication and it was where she kept her sanitary protection

116. Mr Bain also concluded the claimant had, by her actions, brought the respondent into disrepute. This conclusion was based on the fact of Mr J's appeal in which he blamed the claimant's actions for distracting him and rendering him unable to properly present his defence. There was no dispute regarding the fact Mr J's appeal was based on the incident which occurred on

22 February. However, Mr Bain, in reaching his conclusion, looked no further than the fact of the appeal. He told this Tribunal that he did not look at the merits of the appeal, but simply took the view that Mr J had been sufficiently affected to lodge the appeal. Mr Bain did not have regard to the Draft Stated Case prepared by Sheriff Anwar which cast doubt on what Mr J said in the grounds of appeal and he did not take into consideration that Mr J, having had decree granted against him for the sum of £1,613.05 may have had a motive for using what had happened to give him the basis for an appeal.

117. We concluded Mr Bain did not have reasonable grounds for deciding the claimant had brought the respondent into disrepute in circumstances where he failed to have regard to material facts, and where his decision was influenced by the fact he believed the claimant had lied. Furthermore, we considered the respondent's position regarding reputational damage was undermined by the fact Mr McQueen relied on a different matter to Mr Bain. Mr McQueen told the Tribunal the reputational damage arose from the fact this incident occurred in open court. This was not a matter previously raised as part of the disciplinary allegations and was not relied upon by Mr Bain.

118. Mr Bain further concluded the claimant had raised her voice when speaking to the two men in court. The claimant accepted she had raised her voice to make herself heard in the busy courtroom, although she denied shouting. We were satisfied, given the claimant's position, that Mr Bain had reasonable grounds to conclude the claimant had raised her voice when speaking to the two men in court.

119. Mr Bain also found the claimant had not shown remorse. He told the Tribunal that "*if the claimant had come in the next day and held up her hands, it would have been significant and I'm sure it would have been dealt with in a different way. People can make a mistake and regret it."* Mr Bain did not explain what he meant by this statement: what did he want the claimant to hold her hands up to?

120. We concluded Mr Bain did not have reasonable grounds to support a conclusion that the claimant had not shown remorse. We, in reaching this conclusion, considered Mr Bain failed to have regard to the remorse the claimant did in fact show. For example, the claimant, in her personal statement which was provided to Mr Bain (page 318) stated that she *"did not mean any harm; I did not have any deliberate intention to and definitively did not want to, upset anyone".* The claimant's representative also noted the claimant had a willingness to learn from these events. The claimant was very upset by what had happened, and was sorry it had come to this.

121. We, in conclusion, decided Mr Bain did not have reasonable grounds to support his conclusion that the claimant had lied, had brought the respondent into disrepute and had not shown remorse. Mr Bain did have reasonable grounds to support the conclusion the claimant had raised her voice.

122. The claimant's appeal was heard by Mr McQueen, whose role it was to review the decision to dismiss and decide if the process was fair and if the sanction was appropriate. We, as stated above, noted Mr McQueen did not rely on the opinions included in the health and safety report, but we considered this did not remedy the flaw because the health and safety report tainted the whole process. This taint was not remedied simply by not relying on aspects of the report when others before Mr McQueen had clearly relied on and been influenced by the report.

123. Mr McQueen also concluded the claimant had lied and he reached this conclusion because the claimant's position had been clear and consistent until questioned by the health and safety officers. Mr McQueen dismissed the suggestion the claimant may have remembered once being told of the change in water colour once the medication is added. In addition to this Mr McQueen did not consider the claimant's medical condition had been a factor because the claimant had been clear and had not given the impression of confusion or memory loss.

124. Mr McQueen was critical of the claimant because she had not shown remorse. We again noted Mr McQueen did not explain what he meant by this. The issue of remorse was a theme focussed upon in the health and safety report. We accepted the claimant's evidence and found as a matter of fact that she did show remorse when she told Mr McQueen at the appeal hearing that she was sorry it had come to this and that she had had no intention to harm or cause upset to anyone. We, in the circumstances, concluded Mr McQueen had no reasonable grounds for concluding the claimant had not shown remorse.

125. We considered, for all of the reasons set out above in relation to Mr Bain's decision, that the appeal did not remedy the earlier flaws in the process.

126. We, in conclusion, decided the respondent believed the claimant guilty of the alleged misconduct, but they did not have reasonable grounds upon which to sustain their belief in the principal issue that the claimant had lied about medication in the water. Further, we decided the investigation carried out by the respondent was flawed because the first investigation had regard to the health and safety report without disclosing it to the claimant and the first and second investigations lacked balance. In addition to this the health and safety investigation and report tainted the disciplinary process, and rendered it fundamentally flawed, because the health and safety officers strayed far outwith their remit and reached conclusions and expressed opinions they were not entitled to reach.

127. The claimant faced seven allegations of misconduct. The third allegation (failure to comply with section 7 of the Health and Safety Act at Work Act 1974) was not taken forward by Mr Bain. We found (above, and in respect of allegations 1, 2 and 7) the respondent had no reasonable grounds upon which to sustain their belief the claimant lied, or that she brought the respondent into disrepute. We considered lying was also at the heart of the remaining allegations (4, 5 and 6).

128. We must now ask whether the decision of the respondent to dismiss the claimant for misconduct in the circumstances was fair or unfair. We were referred to the case of **Iceland Frozen Foods Ltd v Jones** (above) and it is helpful to set out the guidance from that case.

> *"We consider that the authorities establish that in law the correct approach for the Tribunal to adopt in answering the question posed by section 98(4) is as follows:*
>
> *(1) the starting point should always be the words of section 98(4) themselves;*
>
> *(2) in applying the section a Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Tribunal) consider the dismissal to be fair;*
>
> *(3) in judging the reasonableness of the employer's conduct, a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
>
> *(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another;*
>
> *(5) the function of the Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band, it is unfair."*

129 The Court of Appeal in **Foley v Post Office 2000 ICR 1283** confirmed the test as set out above remained binding on employment tribunals.

130. We reminded ourselves that it is not for this Tribunal to decide whether we would have dismissed the claimant. The question we must ask is whether the decision of the respondent to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted in the circumstances. We, in answering the question whether the decision to dismiss fell within the band of reasonable responses, had regard to the following conclusions reached above:

- the health and safety investigation and report strayed into matters far outwith its remit and tainted the subsequent disciplinary process, and we considered this a fundamental flaw;

- the investigation carried out by Mr Pirie was flawed because (i) it initially relied on the health and safety report without disclosing it to the claimant; (ii) the investigation report was not balanced and (iii) it failed to have proper regard to the claimant's explanation and the medical information;

- there were not reasonable grounds upon which to sustain the belief the claimant lied. The respondent's conclusion the claimant lied was blinkered, failed to have regard to the claimant's explanation and the medical information and was one which fell outside the band of reasonable responses;

- the respondent did not have reasonable grounds upon which to sustain their belief the claimant brought the respondent into disrepute in circumstances where they failed to have regard to material facts and were influenced by their belief the claimant had lied;

- the respondent did not have reasonable grounds upon which to sustain their belief the claimant had not shown remorse and

- the appeal process did not remedy the earlier errors but instead compounded them.

131. We also had regard to the following points. Firstly we had regard to the fact the claimant had 20 years unblemished service with the respondent. The Court of Appeal, in the case of **Strouthos v London Undergrounds Ltd 2004 IRLR 636** held that length of service was relevant when deciding the appropriate sanction. They acknowledged there can be conduct so serious that dismissal is appropriate irrespective of service, but held that it had been wrong to say that length of service was not relevant. Mr Bain told the Tribunal he had given consideration to length of service, but he had regarded the incident as "extreme" and he "could not pull it back from gross misconduct". Mr McQueen also told the Tribunal he had taken it into account but as the misconduct was a serious issue it was not as relevant.

132. We acknowledged the responses given by Mr Bain and Mr McQueen, but there was no explanation by them regarding how they had taken it into account, and why the claimant's 20 years of service had not mitigated the seriousness of the offence. This was particularly so given the fact (a) Mr Bain acknowledged the incident had been out of character for the claimant; (b) they knew of her medical condition and (c) the claimant had not been suspended.

133. Secondly, the respondent's Conduct and Discipline Policy provides that the manager will *"seriously consider"* suspension where the case to be investigated is thought to involve serious or gross misconduct. Mr McQueen told the Tribunal the respondent "*tends to only suspend in cases which could be influenced by the person not being suspended".* Mr Bain took the decision not to suspend the claimant because there was a "*workable solution*" and because it is preferable to keep people working.

134. We considered the respondent's reasons, whilst being good reasons not to suspend the claimant, undermined their position regarding the seriousness of the alleged misconduct. This was a claimant who, according to the respondent, was facing allegations of gross misconduct involving lying, a breach of trust and a breach of the respondent's core values. This was a case which Mr Bain told us *"struck at the core of SCTS values and behaviours; the incident was extreme".* We considered that in those circumstances the decision not to suspend the claimant undermined the respondent's position regarding the seriousness of the alleged misconduct, particularly as the claimant was placed in a customer-facing role dealing with witnesses/members of the public.

135. Thirdly, we also had regard to the fact Mr Bain and McQueen told the Tribunal that if the claimant had shown remorse it would have been a mitigating factor and *"it may have been possible for another outcome to have been reached".*

136. Mr Bain recognised that people can make a mistake, however he then dismissed each occasion when the claimant told him this is what had happened. For example, the claimant's representative told Mr Bain *"she was anxious and concerned about what possibly was in the water when she had come back into court. She could not remember if the medication was in the water and this was a symptom of the premenopausal condition. She had seen her desk disturbed. The pencil case was open when it had not been opened previously. She had become anxious and had difficulty remembering."* In addition to this, the claimant, in her personal statement said *"I was anxious and concerned should anyone have consumed what I intended to take."* The claimant also provided details about how she had been feeling that day and referred to "*not being in the best frame of mind, and I wasn't feeling myself. I was bleeding heavily, passing clots, sweating profusely, I was anxious that I had to drink lots of water as I had cystitis, which can occur when I bleed heavily, I was worried about changing sanitary protection as I did not want to leak in front of members of the public and worried about leaving court to get to the toilet."*

137. We decided, having had regard to all of the points set out above, that the decision of the respondent to dismiss the claimant fell outside the band of reasonable responses which a reasonable employer might have adopted. The dismissal was unfair.

138. We next turned to consider the claimant's complaint of disability discrimination in terms of section 15 Equality Act, which provides that a person discriminates against a disabled person if s/he treats the disabled person unfavourably because of something arising in consequence of the disabled person's disability, and the employer cannot show that the treatment is a proportionate means of achieving a legitimate aim.

139. We were referred to the case of **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** (above) where it was stated *"The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something" and therefore has to identify "something", and second upon the fact that that "something" must be "something arising in consequence of [the employee's] disability, which constitutes a second causative link. There are two separate stages."*

140. In the case of **Pnaiser v NHS England** guidance was given as to the approach to claims of discrimination arising from disability. It was said: *"A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied upon by B. No question of comparison arises. The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct*

discrimination context, so too, there may be more than one reason in a section 15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it."

141. The unfavourable treatment in this case was the dismissal of the claimant. We next asked what caused the dismissal of the claimant. The reason for the dismissal was the conduct of the claimant. The claimant's conduct was affected by her disability insofar as her condition caused her to be confused and forgetful about whether she had taken her medication and whether she had put it in the water jug. This situation caused the claimant to advise the two men they had consumed water containing her medication: it also caused her to be anxious and to react to the situation by raising her voice. We were entirely satisfied there was a clear causal link between the claimant's disability and her conduct on 22 February.

142. The respondent did not set out, in their response to the claim, the legitimate aim of the respondent. Indeed, this only formed part of a supplementary submission made by Mr Nicol once Ms Osbourne had identified the omission. The legitimate aim of the respondent was said to be having an honest and trustworthy staff; and it was submitted that dismissal of the claimant was a proportionate means of achieving this legitimate aim.

143. We noted, having had regard to the case of **Hardy & Hansons plc v Lax** (above) that in considering whether prima facie discrimination is justified, it is for the Tribunal to weigh the reasonable needs of the business against the discriminatory effect of the employee's act and consider whether the former outweighs the latter.

144. We also had regard to the Employment and Human Rights Commission's Employment Code which sets out guidance on objective justification. We noted that in terms of a legitimate aim, the aim should be legal, should not be

discriminatory in itself, and must represent an real, objective consideration. Further, as to proportionality, the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective.

145. We accepted having an honest and trustworthy staff could be a legitimate aim and it is an aim which is reflected in the core values of the respondent. We could not accept, however, that dismissal of the claimant in the circumstances of this case, was a proportionate means of achieving that aim. We considered it was not proportionate to dismiss the claimant and fail to have regard to the impact of her disability on her conduct on the day in question. Further, it was not proportionate to fail to have regard to the fact the claimant continued working for the respondent without issue during the period of suspension, and the fact there were other alternatives available to the respondent, such as a warning, which could have achieved the same aim but would not have had the same discriminatory effect.

146. We decided the decision of the respondent to dismiss the claimant in this case was not proportionate, and was not a proportionate means of achieving their aim. We decided the respondent discriminated against the claimant for a reason arising in consequence of her disability.

147. We must now consider the issue of remedy. Mr Nicol, in his submissions, invited the Tribunal to have regard to reducing compensation having had regard to ***Polkey*** and contributory conduct. We shall deal with the issue of contributory conduct below. We concluded, with regard to the issue of a ***Polkey*** reduction, not to make any reduction. We found (above) that the health and safety investigation report tainted the subsequent disciplinary process. The health and safety report was a fundamental flaw in the process followed by the employer. We also considered that if the health and safety investigation report had not far exceeded its remit, there was every chance Mr Bain would have accepted the claimant's explanation for what had

happened: that is, that she made a mistake. We say that because it reflects our conclusion (above) that the health and safety report tainted the subsequent process and influenced subsequent thinking and decisions in this case.

148. Mr Nicol also invited the Tribunal to find the claimant had not mitigated her loss. However, there was nothing to support this submission, and we were entirely satisfied that in the period prior to becoming unfit for work, the claimant had looked, and applied for, appropriate vacancies.

149. The claimant wished, if successful, to be reinstated to the post of Court Officer. We had regard to section 116 Employment Rights Act, which provides that *"In exercising its discretion under section 113, the Tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account (a) whether the complainant wished to be reinstated; (b) whether it is practicable for the employer to comply with an order for reinstatement and (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement."*

150. We have stated above that the claimant wished to be reinstated to her position as a Court Officer. We next had regard to whether it is practicable for the respondent to comply with an order for reinstatement. Mr McQueen told the Tribunal he thought reinstatement would be very difficult because trust had been broken on a fundamental value and the relationship was not recoverable. We have set out (above) our conclusion that the fact the claimant was not suspended, and the fact she continued to work in a customer-facing role dealing with witnesses and members of the public, undermined the respondent's position that trust had been broken. We do not set out our reasons again, but had regard to all of the points made above in this respect.

151. We, in addition to the above, had regard to the fact that it was the claimant's (alleged) lie which caused trust to be broken. We have concluded the respondent did not have reasonable grounds to sustain their belief that the

claimant lied. We, accordingly, were satisfied that if there were no grounds upon which to sustain the respondent's belief that the claimant lied, there was no basis upon which to maintain that trust had been broken.

152. We also had regard to the fact Mr McQueen is located in a different building/city to the claimant and has no day to day dealings with the claimant. Mr Bain is based in the same building but does not directly manage the claimant, and is due to retire shortly. Further, we had regard to the fact the claimant's line managers had been aware of her condition and had been very supportive, ensuring the claimant had easy access to a toilet when required and moving court rooms to accommodate this.

153. We took into account the fact the claimant has 20 years' service with the respondent and an unblemished record. The claimant performed well at work.

154. We also took into account the fact that Mr McQueen told the Tribunal that if the claimant had shown remorse, it would have been mitigation and it may have been possible for another outcome to have been reached. We considered this demonstrated there was, and would have been, scope for a continuing relationship between the parties.

155. We next had regard to the fact the claimant is currently signed off as unfit for work. We accepted the claimant's evidence that these events, leading to her dismissal, have had an impact on her. We had regard to the fact – as set out above – the claimant felt the support she needed had been put in place by her line managers prior to her dismissal, and there was no suggestion this support could not be put back in place if the claimant returned to work. We also accepted the claimant's evidence that she believed her GP would be supportive of a return to work because the claimant's "mindset" would be improved by a finding that she was to return to work.

156. We had to balance what the claimant told us, with the fact we do not know whether the claimant will be fit to return to work. However, the claimant struck

us as someone who wants to work, and who had made an effort to attend for work in circumstances which cannot have been comfortable. We concluded, for these reasons, that the fact the claimant is currently unfit for work should not preclude an order for reinstatement.

157. We concluded, after having had regard to the points set out above, that it would be practicable for the respondent to comply with an order for reinstatement.

158. We next considered whether it would be just to make such an order where the claimant's conduct has caused or contributed to some extent to her dismissal. We considered the claimant did contribute to her dismissal in respect of the manner in which she dealt with the issue. The claimant addressed the two men in a raised voice in an open, busy court in circumstances where it would have been more appropriate, and professional, to have taken them to one side to have a quiet word. We have balanced this, however, with the fact the way in which the claimant behaved that day, was out of character and that her over-reaction was part and parcel of the anxiety caused by her condition. We, for these reasons, considered that notwithstanding the contributory conduct, it would be just in the circumstances to make an order for reinstatement.

159. We decided, having had regard to all of the above points, to make an order for reinstatement. An order for reinstatement is an order that the employer shall treat the claimant in all respects as if she had not been dismissed (section 114 Employment Rights Act). The Tribunal is required to specify (a) the amount payable by the employer in respect of any benefit which the claimant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement; (b) any rights and privileges (including seniority and pension rights) which must be restored to the employee and (c) the date by which the order must be complied with.

160. The Tribunal decided the respondent shall reinstate the claimant by the 20 June 2018.

161. The respondent shall pay to the claimant the sum of £14,009.84 in respect of the (net) arrears of pay for the period between the date of termination of employment (21 June 2017) and the date of reinstatement (20 June 2018). The respondent shall also restore to the claimant all rights and privileges, including seniority and pension rights.

162. The Tribunal further decided, having had regard to our finding that the respondent discriminated against the claimant because of a protected characteristic, to make an award of injury to feelings in the sum of £5,000. We considered this sum appropriate having had regard to the claimant's evidence regarding the impact this matter has had on her.

Employment Judge: Lucy Wiseman
Date of Judgment: 09 May 2018
Entered in register: 10 May 2018
and copied to parties