EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mrs E Emeruwa		**London Community Rehabilitation Company Limited**

Heard at:	London South Employment Tribunal	**On:**	29 & 30 July 2019 11 October 2019

Before: Employment Judge Hyams-Parish (sitting alone)

Representation:
For the Claimant: **Mr Cohen (Litigation Friend)**
For the Respondent: **Mr G Burke (Counsel)**

RESERVED JUDGMENT

The claim for unfair dismissal is not well founded and is dismissed.

REASONS

Claim(s)

1. By a claim form presented to the Tribunal on 11 April 2018, the Claimant brings a complaint of unfair dismissal against the Respondent.

2. The Tribunal queried another claim identified from box 8.1 of the claim form (page 4) headed "I am bringing another claim.." but upon enquiry it became clear, and the Claimant accepted, that the complaint she was making arose out of a separate contract with the National Probation Service to be allocated paid probation work on a number of Saturdays throughout the year, which she was not able to do once she was suspended from the Respondent. It was accepted that the National Probation Service was not a respondent to this claim and the Respondent had nothing to do with the arrangement and therefore the Tribunal could not make progress with such

a claim. However, it was suggested by the Tribunal that the sums the Claimant was claiming may or may not form the basis of losses which might be claimed if she were to be successful in her claims of unfair dismissal.

Questions to be determined by the Tribunal

3. The parties agreed the questions the Tribunal needed to answer in order to determine this claim were as follows:

    a. Did the Respondent genuinely believe the Claimant to be guilty of misconduct?

    b. Was that belief based on reasonable grounds?

    c. At the time of forming that belief, had the Respondent carried out as much investigation as was reasonable in the circumstances?

    d. Was it reasonable for the employer to regard that conduct as gross misconduct on the facts of the case?

    e. Did the dismissal fall within the range of reasonable responses open for the Respondent to take?

    f. Was the dismissal procedurally fair?

    g. If the Claimant's dismissal is unfair, should there be a "*Polkey*" reduction in the compensation awarded and if so, by how much?

    h. Did the Claimant contribute to the dismissal and if so, by how much, if any, should the basic and compensatory award be reduced?

Legal principles relevant to the claim(s)

4. The right not to be unfairly dismissed is set out in sections 94 and 98 Employment Rights Act 1996 ("ERA"). Section 98 ERA provides:-

> ***(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) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,***
>
> ***(b) relates to the conduct of the employee,***
>
> ***(c) is that the employee was redundant, or***

> ***(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.***

5. Section 98(4) ERA provides:

> ***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.***

6. In the case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT**, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances 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.

7. In the case of **Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23CA**, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal.

8. The Tribunal is mindful of not falling in to a substitution mindset. The Court of Appeal in **London Ambulance NHS Trust v Small [2009] IRLR 563** warned that when determining the issue of liability, the Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct. In **Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82** the court said it is irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "substitute its view" for that of the employer.

9. In the case of **British Home Stores v Burchell [1978] IRLR 379 EAT**, the court said that a dismissal for misconduct will only be fair if, at the time of dismissal: (1) the employer believed the employee to be guilty of misconduct; (2) the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and (3) at the time it held that belief, it had carried out as much investigation as was reasonable.

10. Whether an employee's behaviour amounts to misconduct or gross misconduct can have important consequences. Gross misconduct may result in summary dismissal, thus relieving the employer of the obligation to pay any notice pay. Exactly what type of behaviour amounts to gross

misconduct is difficult to pinpoint and will depend on the facts of the individual case.

11. During submissions by the Respondent, the Tribunal's attention was drawn to the case of **Quintiles Commercial UK Limited v Barongo EAT/0255/17** where the Tribunal had unduly restricted its assessment of fairness of the dismissal by assuming as a general rule that conduct that was not labelled gross misconduct meant that dismissal for a first offence was necessarily unfair.

12. In **Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09** the EAT summarised the case law on what amounts to gross misconduct and found that it involves either deliberate wrongdoing or gross negligence. In cases of deliberate wrongdoing, it must amount to wilful repudiation of the express or implied terms of the contract (**Wilson v Racher [1974] ICR 428 (CA)**). It is generally accepted that it must be an act which fundamentally undermines the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract).

13. The ACAS Code states that the employer's disciplinary rules should give examples of what the employer regards as gross misconduct, i.e. conduct that it considers serious enough to justify summary dismissal (see para 24). The Code suggests this might include theft or fraud, physical violence, gross negligence or serious insubordination. Although there are some types of misconduct that may be universally seen as gross misconduct, such as theft or violence, others may vary according to the nature of the organisation and what it does. A failure to list certain types of behaviour as gross misconduct may mean that the employer cannot rely on them to dismiss summarily **(*Basildon Academies v Amadi EAT 0343/14*).** Conversely, a dismissal will not necessarily be fair, just because the misconduct in question is listed in the employer's disciplinary policy as something that warrants dismissal.

14. In **Sandwell**, the EAT held that the Tribunal must consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case. On the facts of **Sandwell**, the EAT held that the employee's breach of her employer's policy did not necessarily amount to gross misconduct simply because the employer's disciplinary code stipulated that it would. When considering whether conduct should be characterised as gross misconduct, employers should bear in mind that:

    a. The conduct must be so serious that it goes to the root of the contract, that is, the conduct must be repudiatory, entitling the employer to dismiss with immediate effect (**Wilson v Racher**)

    b. The conduct must be a deliberate and wilful breach of the contract or amount to gross negligence (**Sandwell**).

15. In **Mbubaegbu v Homerton University Hospital NHS Foundation Trust EAT 0218/17** the EAT held that there was no authority to suggest that there

must be a single act of gross misconduct to justify summary dismissal or any authority which states that it is impermissible to rely upon a series of acts, none of which would, by themselves, justify summary dismissal. On examination of a series of acts by M which the Trust believed put patients at risk, the Trust lost confidence that M would not act in the same way again – particularly in light of the continued inconsistency in his responses during the disciplinary process – and the tribunal was entitled to find that the Trust had acted within the range of reasonable responses in summarily dismissing him.

Practical matters and preliminary issues

16. The Tribunal heard evidence from the Claimant, and on behalf of the Respondent, Lucien Spencer and Linda Neimantas.

17. During the hearing, the Tribunal was referred to documents in a hearing bundle extending to 516 pages. References in square brackets below are references to page numbers in the hearing bundle.

18. A witness statement was also provided for Mr Paul Baker who chaired the appeal panel but as he could not attend the hearing, the Tribunal was invited to read his witness statement. The Tribunal was not convinced it needed to do this given that Ms Neimantas, one of the Respondent's two witnesses, was a member of the appeal panel and adopted what Mr Baker had to say about the appeal process. She was cross examined about this by Mr Cohen.

19. Mr Cohen accompanied the Claimant to this hearing and assisted her as a litigation friend. Shortly into the hearing, it was suggested by Counsel for the Respondent that he be allowed to conduct the Claimant's case for her if that is what she wanted. The Tribunal considered that to be a sensible proposal and considered that it would speed things up. The Tribunal is grateful to Mr Cohen for the assistance he was able to provide the Claimant throughout the hearing and for conducting her case very professionally throughout.

20. Having completed the evidence, there was insufficient time to hear submissions and given that the Claimant was not legally represented it was not considered appropriate to order written submissions. The case was therefore adjourned to 11 October 2019 to hear closing submissions. Whilst it had initially been hoped that a decision would also be given at the above hearing, this was not possible and the parties were accordingly informed the the decision would be reserved.

Background findings of fact

21. The following findings of fact were reached by the Tribunal, on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them. Where the Tribunal's findings on disputed fact reflect those represented by one party, it is because the Tribunal preferred the evidence of that party and found on

the balance of probabilities what that party said about a particular matter was correct.

22. Only findings of fact relevant to the issues, and those necessary for the Tribunal to answer those questions at paragraph 3 above, are set out below. It has not been necessary to determine each and every fact in dispute where it is not relevant to the issues between the parties.

23. The Claimant commenced employment with the National Probation Service on 18 April 2006 as a Probation Officer. As part of a nationwide process in 2014, known as Transforming Rehabilitation, the Respondent took over some of the responsibilities of the National Probation Service relating to supervision of offenders categorised as low or medium risk, and a statutory order affected the transfer of employees, including the Claimant, to the Respondent in June 2014.

24. The Claimant was employed under a contract of employment [38] which stated what her core hours were and included a sentence which said "*Your line manager will determine your working pattern which covers these core hours*". Under the heading of "*Annual Leave*" the contract said "*the timing of your leave is subject to the prior agreement of your line manager".*

25. On 9 January 2017, a Senior Probation Officer called Claude Denton became the Claimant's line manager. For reasons which become clear, that relationship was not a good one and deteriorated over time to such an extent that the Claimant conceded in her evidence that the trust and confidence had broken down between them.

26. As a result of a critical review of probation practice in London by HM Inspectorate of probation in October 2016 that highlighted poor service delivery to probation clients, a new model of working was introduced at the beginning of January 2017. The new model resulted in a shift from more agile working to a model of working which involved closer geographical oversight and management. Under the previous model, when staff worked with offenders within a particular category, for example young adult males, several members of staff had to cover relatively large geographical areas, resulting in them having no regular working base and limited oversight of their movements by operational managers.

27. From January 2017 managers were appointed to all teams based within a particular area and there was a new focus on the need for local accountability. This accountability did not just relate to the need to engage consistently with service users, but also related to the effective management of local teams. There was a clear accountability structure in place which required managers to convey expectations to and report on the performance and management of their team. The messaging to all staff included a need to return to a back to basics approach, being the framework for service delivery during 2017.

28. On 11 January 2017 there was a 'catchup' meeting between the Claimant

and Mr Denton [48] as the new organisational structure had just come into effect. At that meeting the Claimant submitted a flexi timesheet requesting that 54.5 hours be carried over. Mr Denton told the Claimant that she had already been advised by him the previous day that he was unable to authorise the carrying over of that number of hours. Mr Denton sought to establish over what period the hours had accrued but the Claimant could not provide any definite dates. However, she did say that she had suffered a death in the family and that with changes in the organisation and the need to take annual leave, she had been prevented from taking the time off that had accrued.

29. The Claimant was informed by Mr Denton that he was not prepared to authorise the requested hours given that under the organisation's policy he could only authorise 14 hours to be carried over from one month to the next. The Claimant said that she would like to take the hours as she had worked the time recorded. Mr Denton advised the Claimant that he had consulted with her previous line manager, Tricia Brooks, and she could not confirm that the hours had accrued. In addition he had also consulted with his superiors and the decision was that the standard policy should apply. This meant that only 14 hours could be authorised as flexi leave in any one month.

30. At the same meeting, Mr Denton raised the issue of working from home. He said that he needed to ensure that the Claimant was familiar with the organisation's policy on working from home. He said that any agreement to work from home was conditional upon Mr Denton being clear about what work was being undertaken at home.

31. The Claimant told Mr Denton that she routinely worked at home on Fridays for a variety of reasons, including as a way to cope with stress. When Mr Denton attempted to explore this in more detail, the Claimant refused to speak about it. Mr Denton told the Claimant that he would not authorise her to work at home each Friday as it was not in line with the Respondent's policy. He said that he would consider each request on a case by case basis. The Tribunal finds that the Claimant did not like to be told that she could not work from home when she wanted and resented Mr Denton for it. The Tribunal finds that the relationship started to deteriorate from this point and that the cause of the deterioration was the Claimant attempting to impose her way of working on Mr Denton and the fact that he was attempting to enforce the Respondent's policy on home working. The Claimant told Mr Denton that she was uncomfortable with what he was telling her and that she had never had such a conversation with any manager before.

32. Following on from their meeting on 11 January 2017, Mr Denton wrote to the Claimant as follows [50]:

> ***Following my meeting with you yesterday I am now confirming my decision for you not to WFH this Friday. As you have stated you WFH each Friday and this is not in line with the policy. Given the organisation changes taking place I am not authorising your WFH at this present***

moment but will as indicated review all request as and when.

33. The Claimant accepted in evidence that the above email accurately reflected what had been discussed at their meeting on 11 January 2017.

34. On 19 January 2017, Mr Denton sent an email to all staff [52] which said the following:

> ***Can you all please let me have your leave request for the next month as the team is likely to be short on the ground.***
>
> ***In terms of Flexi please ensure that you are taking flexi time as and when it occurs as I will only authorise carryover in exceptional circumstances.***
>
> ***All staff who have to work late because of late night reporting need to ensure that you are taking the time as soon as practicably possible. Ideally this should be in the same week if not within the month. Whilst I recognise that it is not always possible to take time as and when it occurs nonetheless I will only authorise the taking of flexi if the hours occurred was agreed with me in advance.***
>
> ***All staff are encouraged to take proper lunch breaks and it is important that you are not using this time to build flexi/toil.***
>
> ***I will also encourage all staff to familiarise themselves with the flexi policy.***

35. On 20 and 27 January 2017 the Claimant worked from home without requesting to do so or obtaining prior approval from Mr Denton. This is despite Mr Denton having made clear his expectations and conditions for working at home at their meeting on 11 January 2017. At that meeting he emphasised that working from home was a management decision and not a staff decision.

36. When on 27 January 20017 Mr Denton enquired as to the Claimant's whereabouts that day, he was met with an email from the Claimant at 10.55 which said as follows [64][sic]

> ***Thank you for your voicemail. In response to your question to my where about this morning. Please be advised that I am working from home as highlighted in my calendar which you now have access to.***
>
> ***Regarding the meeting you scheduled for us today, I am unable to attend as I am not in the office and did not get prior notice. I am happy to have this discussion by telephone conference. However, I am concerned that you have organised to have this meeting with which has never been the case. I also recall informing you of the stress I was under when you were interrogating me at our last meeting.***

37. The Tribunal found the tone of the email one which suggested that the Claimant had little respect for Mr Denton or management generally. It is noted that there is no apology for any misunderstanding and Tribunal concluded from this email that she had not even attempted to secure Mr Denton's agreement to working from home; instead she ignored what Mr Denton had said and had elected to do as she wanted.

38. In an email from Mr Denton to the Claimant at 12.06, which is copied to HR, he states that the invitation to the meeting scheduled for 27 January 2017 was sent to her on 20 January 2017. He ends by instructing the Claimant to meet with him to discuss the issues on 30 January 2017.

39. In response to this email at 14.47 the Claimant refers to there having been a breakdown in the relationship between her and Mr Denton and declines the invite for the meeting on 30 January 2017. She includes in this email the following [65]:

> ***…you have only been my manager for two weeks and all I have had from you is backlash……you have not given me any valid business reason why I cannot work from home….***

40. The Tribunal concludes from this, once again, that the Claimant had no intention of doing what she was told. The Tribunal goes further to say that it displays a level of contempt for Mr Denton. If the relationship had broken down at that stage, the Tribunal concludes it is because the Claimant did not want to do what Mr Denton was reasonably instructing her to do.

41. On 13 and 20 February 2017 the Claimant left work at 1pm and did not return to work in the afternoon. She did not have approval to take either afternoon off. During their meeting on 11 January 2017, Mr Denton had agreed that the Claimant could take a day's flexi leave on 16 January 2017 and half a day's flexi leave on 23 January 2017 and on 3 February 2017. Mr Denton had previously made clear that any other absences needed to be taken as annual leave and requested on Cascade (the organisation's absence recording system). Requests to work half days on 13 and 20 February 2017 were mentioned at the meeting on 11 January 2017 but no formal requests were submitted, whether verbally or in writing to Mr Denton or via Cascade.

42. On 8 and 17 February 2017 the Claimant took leave without submitting a request in advance and without having secured authorisation. Furthermore, subsequent time sheets produced to Mr Denton by the Claimant did not contain enough hours accrued within the month of January to enable the Claimant to take 8 February 2017 or 17 February 2017 as flexi leave. Mr Denton sent an email to the team on 13 February 2017 to remind them that he would be on annual leave from the 13 February 2017 and would not be authorising annual leave or flexi for the coming week, due to staff resourcing issues. His email was not challenged by the Claimant and she did not make contact with the covering SPO's Mark Omorogbe or Sharon Clark to request to take flexi on 17 February 2017.

43. On 6 March 2017 Niamh Farren (Interim Area Manager) wrote to the Claimant [79] following up a meeting between them to discuss a grievance she (the Claimant) had raised about how she perceived Mr Denton was treating her. She complained that Mr Denton had not authorised her to take flexi leave which had accumulated and she complained about the unreasonableness of Mr Denton's challenge to the Claimant's request to

work from home. In an email dated 6 March 2017 from Ms Farren to the Claimant, she concluded that the evidence did not support the allegations made in her grievance. In her assessment, Mr Denton had acted in accordance with the organisation's policy and procedures and appropriately as the Claimant's line manager. She referred to the supervision meeting in January 2017 during which Mr Denton had explained why he was not prepared to allow the Claimant to take approximately 55 hours flexi leave that the Claimant said had accrued. Ms Farren concluded the email by referring to their meeting when she said that the Claimant had stated on a number of occasions that she had not adhered to instructions given to her by her line manager and had acknowledged that despite not having secured permission in advance to take flexi leave and/or work from home, that she had nevertheless continued to do so. She said in her email that as this constituted a breach of the organisation's code of conduct that she would be commissioning an investigation that would be led by a Senior Probation Officer under the organisation's disciplinary policy.

44. On 9 March 2017 Ms Farren wrote to the Claimant [88] confirming that there would be an investigation into alleged misconduct arising from the Claimant working from home without the approval on 20 and 27 January 2017, leaving work at 1pm and not returning on 13 February 2017 and 20 February 2017 and then taking unauthorised leave on 8 February 2017 and 17 February 2017.

45. The Claimant was subsequently signed off work due to work-related stress and therefore didn't attend the investigatory meetings she had been invited to.

46. By letter dated 12 June 2017 Ms Durnin gave the outcome to a formal grievance raised by the Claimant, once again relating to the treatment of her by Mr Denton. An extract from that letter stated as follows [125]:

> ***I have considered both your written and verbal submissions made in respect of your grievance against Claude Denton. I note that you use particularly strong terminology to describe Claude's behaviour towards you including 'bullying tactics", 'discriminatory and threatening behaviour'. You are unable to provide any evidence to support such statements. I consider that Claude Denton had expectations of your working hours and conduct to meet the operational needs of the team.***
>
> ***I do not support your assertion that you consider having to make an application to work from home as bullying and that it should be an automatic, and independent decision that does not require SPO endorsement. I consider Claude's actions to be appropriate in enabling him to manage his team. As an organisation we have now moved back to geographic locations so there is an expectation that staff work in their office base.***
>
> ***It is clear that you have expectations as a member of staff that you should be able to make independent decisions about your working hours, and management of your caseload without authorisation, endorsement or oversight from your manager. This is not the case as all employees are required to seek prior management approval from any time spent away from their office location during working hours. You***

> ***took exception to Claude creating a spreadsheet in relation to your work and felt this was evidence of his micromanagement. Claude and/or any other manager in the organisation have the right to ask what members of their team are doing with their caseload, and to monitor this through appropriate means to ensure tasks are completed to both quality and timely standards.***
>
> ***To conclude, it is evident that the underlying theme of your formal grievance is that you are no longer permitted to work from home and that you personally find this to be an unacceptable position. Unfortunately this is significantly at odds with the organisation's expectations of you as an employee.***
>
> ***I do not find any evidence to support your statements around bullying, threatening and/or discriminatory behaviour. Such is the lack of evidence presented to support such allegations I find your use of this language to be potentially vexatious.***
>
> ***I do not uphold your formal grievance you make in respect of Mr Claude Denton. If you wish to appeal this decision you now have 20 working days from receipt of this letter to do so.***

47. By letter dated 29 June 2017 the Respondent wrote to the Claimant [167] stating that as she had now returned to work following a period of sickness absence, she would be required to attend the investigatory meeting which she had previously been invited to by letter dated 9 March 2017. It contained an additional allegation that on 21 June to 23 June 2017 the Claimant had failed to attend work has expected. She had failed to request annual leave for this period and had not contacted her line manager, Mr Denton, to provide any explanation for her absence. The absence was therefore considered to be unauthorised.

48. On 3 July 2017 at 09:40 the Claimant wrote [174] to Mr Denton as follows:

> ***It is appalling that after the way you have treated me since I returned to work on 20 June 2017, you sent me a letter re-: the above. You are obviously making a case for yourself.***
>
> ***Since I walked into the office at 8:30am on 20 June with the intention to return to work after a long term absence, you have treated me inappropriately. I will not highlight much as I have responded to the 'return to work form' you drafted***
>
> ***However, the incident on Wednesday 28 June was the climax and I had to end the meeting with you as you left me distressed.***
>
> ***After a brief meeting with you on 20 June, you requested to see me again on Monday 26 June at 2 PM. I emailed you back requesting that the meeting be rescheduled for 12:30 PM as I was having a headache. You refused and at 1:50 PM, I informed you that I was going home as I was feeling unwell and left at 2 PM. In that meeting on Wednesday you argued with me that I left work at 1:55 PM instead of 2 PM as I stated and recorded. You interrogated me and insisted that I complete a return to work form for 26 June and I told you that, that is not the case. You also told me that my attendance and absence is being monitored and I asked if you were threatening me as it appeared so to me.***
>
> ***You also told me that I need to complete leave from 21 to 23rd June and***

> ***I told you that I will request leave for 21 June. You also threatened me, that if I don't complete the dates you requested, I will be hearing from the investigating officer, Melodie. It was at this point I asked you to end the session and I called Sarah Skipp to report the matter.***
>
> ***Claude, please refrain from harassing me with your bullying tactics. I returned to work on 20 June although bereaved with the intention to put things behind me but it appears you were making a case for yourself. I came back to get on with my work but you have tried as much as you can to create a barrier instead of giving the necessary support as a manager.***
>
> ***It is understandable that the team moved office space in my absence. However, what is the criteria for seat allocation and also for those who were off sick or is it a way to get them punished for being sick. When I laid my concern around the seating arrangement you were rude to me and to date you have not bothered to do something about it or ask how I am coping with it, rather you are more concerned about policy.***
>
> ***I would like to hear from HR regarding this allegation until then could I ask that you refrain from writing me as you are causing me a lot of stress as I'm trying to return fully to work. Do not come near me. I would rather you email work to me as you intend to accuse me of things I did not say. I've also emailed HR that I'm not willing to engage or attend subsequent meetings with you until these issues are dealt with. Please keep away from me***

49. On 3 July 2017 at 14:47 Mr Denton sent an email [172] to Ms Durnin and Sarah Skipp about the Claimant which said as follows:

> ***I have just seen the above and given her malicious comments I am no longer prepared to work in this environment with her. Her comments and statement is insulting, threatening, harassing, bullying the very things she is accusing me of. It stops short of stating that she is 'is in fear of her safety'.***
>
> ***As a manager there is absolutely no way that I will work in this office until her accusations have been dealt with.***
>
> ***At this stage I am also considering what legal action is open to myself.***

50. Miss Durnin telephoned the Claimant at about 4pm on 3 July 2017. She said that she wanted to speak to the Claimant about a number of emails she had sent to Mr Denton asking him not to speak to her or approach her, making strong allegations of harassment. Having consulted HR, Ms Durnin told the Claimant that she wanted her to work from the Lambeth office on Stockwell Road until further notice. Such a decision would remove her from having to work with Mr Denton whilst still being provided with adequate supervision and management oversight by another manager. When Ms Durnin telephoned the Claimant to instruct her to work from the Stockwell Road office from 4 July 2017 the Claimant stated that she would not do so for health and safety reasons.

51. In evidence she referred to a historical incident involving a person with a knife but could not give any details. Ms Durnin explained that this was a management instruction and asked the Claimant to provide more detail as

to what her concerns were around health and safety. The Claimant refused to provide more detail or context. The Claimant stated "*you can't tell me what to do*".

52. Concerned that the Claimant would ignore her instruction, and bearing in mind how the Claimant had ended the telephone conversation with her, Ms Durnin attended the Merton office the next day on 4 July 2017. When the Claimant attended the office, Ms Durnin made it clear to her that she had failed to follow a reasonable management instruction by not reporting to the Stockwell Road office and explained that she had been given this instruction both verbally and in writing. She instructed the Claimant verbally again but again the Claimant refused to go to the Stockwell Road office. Ms Durnin said that the Claimant could not remain at the Merton office given the issues that she had raised about being harassed and not wanting to speak to her manager. She attempted to explore why the Claimant could not attend the Stockwell Road office and was again told that the reason related to health and safety, albeit no further details were given. The Claimant was told that she was disobeying a clear management instruction and as a result she would be suspended from work with immediate effect.

53. On 13 July 2017 Senior Probation Officer, Chris Parker, wrote to the Claimant advising her that there would be an investigation into various allegations, detailed above at paragraphs 35, 41, 42, 47 and 50 and summarised in a letter to the Claimant as follows:

> ***(1) Worked from home without prior approval of your line manager on 20 January 2017 and 27 January 2017;***
>
> ***(2) Left work at 1pm and did not return on two occasions without line manager approval on 13 February 2017 and 20 February 2017;***
>
> ***(3) Took unauthorised leave on 8 February 2017 advising your line manager that you were using 'flexi leave' the circumstances of which had not been discussed or authorised in advance by your line manager;***
>
> ***(4) Took unauthorised leave on 17 February 2017 without submitting a request in advance and without having secured authorisation;***
>
> ***(5) On 21 to 23 June 2017, inclusive, you failed to attend work as expected. Failed to request annual leave for this period and neither contacted your manager, Claude Denton, Senior Probation Officer, during this period, providing an explanation for your absence. This absence from work is, therefore, considered unauthorised; and***
>
> ***(6) Refusal to follow a reasonable management instruction given to you on 3 July 2017, and again on 4 July 2017 by Charlotte Durnin, Area Manager, in relation to you working at the Lambeth office (Stockwell Road) as an interim measure, further to assertions you had made against Claude Denton, Senior Probation Officer (your line manager);***

54. As part of his investigation, Mr Parker interviewed Claude Denton, Charlotte Durnin (Mr Denton's manager) and the Claimant. The Claimant was accompanied to such meeting by the same Mr Cohen who has assisted the

Claimant with the presentation of her case at this hearing. Mr Parker also considered a number of emails, correspondence and other documents [320]. He produced a 132 page report (including documentary evidence) concluding that there was a case to answer in relation to allegations 1, 2, 3, 4, and 6 in the letter referred to at paragraph 53.

55. During her investigatory interview with Mr Parker, the Claimant said that she could not recall being told that she could not work from home on Fridays. When pressed on the topic, she said it was too long ago to remember. The Tribunal found this surprising and somewhat hard to believe bearing in mind the correspondence between her and Mr Denton on the subject. She also said that she was given verbal permission to take flexi leave on 13 and 20 February, which the Tribunal concluded was most unlikely given that Mr Denton had clearly written to all staff about the issue on 19 January 2017.

56. It became clear during the case that the issue of the Claimant taking unauthorised leave was not simply confined to the period after Mr Denton arrived. The Tribunal's attention was drawn to an email from a previous manager, Mark Omorogbe, who referred to the Claimant being absent on certain Fridays when he was on leave and said that as a result of monitoring, he discovered that she had not been attending NAPO courses which she said she was attending, NAPO having confirmed that they had no knowledge of such courses.

57. On 8 December 2017, Area Manager, Natalie Hubert, wrote to the Claimant [291] informing her there were grounds for proceeding with disciplinary action in relation to the allegations referred to at paragraph 53 above. The letter to the Claimant confirmed that there was insufficient evidence to uphold allegation 5. The letter included the following extracts:

> ***"….If proven, the allegations would constitute a breach of the following rules:***
>
> ***Serious breach of London's CRC's code of conduct (14.2.2)***
>
> ***Core principles 2 - relating to reasonable management instruction and attendance and leave:***
>
> ***Failure to comply with a reasonable management request (14.3.2).***
>
> ***Employees must follow reasonable management instructions (14.8.3)***
>
> ***Employees must regularly and punctually attend for work and should not be absent or late without sufficient cause. Prior approval for authorised absence or lateness should be sought from the employee's line manager, except in emergencies (14.4.1)..***"
>
> ***....Please be aware that due to the seriousness of the allegations if proven, could be considered as gross misconduct and could lead to your dismissal."***

58. The letter stated that the hearing would be conducted by three senior managers, which is standard policy where allegations of gross misconduct are being considered.

59. A disciplinary hearing took place on 2 January and 22 January 2018. Mr Lucien Spencer (Area Manager) was the panel chair and he was accompanied on the panel by Katrina D'Austin (Head of CP) and Cassie Newman (Head of Interventions). The Claimant was accompanied by Mr Cohen.

60. At the beginning of the hearing Mr Spencer explained that the purpose of the hearing was to consider the five remaining allegations of misconduct listed at paragraph 53 above (less allegation no.5) He said that allegations 1-4 would be heard as 'misconduct' and that allegation 5 (referred to as no.6 at paragraph 53 above) would be heard as gross misconduct. At the end of the hearing, Mr Spencer said as follows (which is taken from the minutes at [379]):

> ***Thanks to all for patience after a long day. On the basis of the allegations and evidence provided the panel believe the totality of the allegations 1-4 constitute gross misconduct and the 5th allegation remains gross misconduct. The panel would like to offer the opportunity for EE/JC to provide any additional evidence by 12pm Friday 5 January so the panel can consider and then reconvene for LS to deliver the final decision. Panel would like to offer the opportunity for reflections or evidence or submissions because the meeting started with these allegations as misconduct and therefore any further submission can now be made in light of the move to gross misconduct and would like to arrange a date early next week***

61. The reconvened hearing was scheduled for 22 January 2017. However on 17 January 2018 the panel met in preparation for the hearing on 22 January. During that meeting they reviewed the allegations and the hearing pack of documents, together with the minutes of the previous disciplinary hearing for accuracy. In evidence Mr Spencer said that the period of adjournment had provided the panel with the opportunity to reflect on the first hearing. The panel decided that a decision on gross misconduct for allegations 1-4 could not be substantiated when referencing the London CRC policy and procedure. Section 14.2 of the procedure outlined specific instances of gross misconduct and the panel concluded that on their own each allegation did not meet that threshold. However, the panel decided that they were satisfied that the frequency and type of misconduct displayed by the Claimant was a significant concern and potential risk to the organisation. Importantly the panel concluded at that meeting that whilst individually each allegation may not meet a threshold of gross misconduct, collectively such behaviour amounted to gross misconduct under the label of serious insubordination.

62. It seems that the Claimant did not receive any further information prior to the meeting on 22 January 2019, particularly relating to the shift in the panel's assessment of the allegations.

63. At the reconvened hearing on 22 January Mr Spencer set the context as follows:

The panel sought to reconvene as could not conclude the original hearing date, 2 January 2018, as the panel were minded to consider allegations 1-4 as gross misconduct therefore there was the need to provide another opportunity to provide submissions. After reflection the panel are now no longer minded to do this and will hear allegations 1-4 as misconduct as originally set out and allegation 5 will remain as gross misconduct.

64. The Claimant and her representative were invited to ask questions but as the allegations 1-4 had been downgraded from gross misconduct to misconduct, neither the Claimant or her representative, Mr Cohen, asked any questions relating to those allegations but instead concentrated on allegation 5 which they sought to have downgraded from gross misconduct to misconduct. At the end of the hearing, Mr Spencer outlined the panel's decision in relation to each allegation as follows (this extract being taken from the minutes [385]):

The panel will now outline our decision in relation to each allegation;

In regards to allegation 1, that of you working from home without prior approval of your line manager on 20 January 2017 and 27 January 2017 the panel consider this allegation to be proven;

In regards to allegation 2, that of you leaving work at 1pm and not returning on two occasions without line management approval on 13 February 2017 and 20 February 2017, the panel consider this allegation to be proven;

In regards to allegation 3, that of you taking unauthorised leave on 8 January 2017 without submitting a request in advance and without having secured authorisation, the panel considered this allegation to be proven;

In regards to allegation four, that of you taking unauthorised leave on 17 January 2017 without submitting a request in advance and without having secured authorisation, the panel consider this allegation to be proven;

Finally, in respect to the fifth allegation, which the panel are in agreement to reduce from gross misconduct to misconduct, the panel are of the consensus that this allegation is proven

In reaching our outcome the panel draws specific attention to the pattern of your behaviour, having failed to respond to reasonable management instruction on a total of seven occasions. Although sitting within one investigation process, the panel has viewed each allegation as a separate occurrence.

The panel considered that your actions highlight a number of separate examples of breaches of discipline, constituting unacceptable behaviour. Such examples include that of poor attendance; failing to comply with a reasonable management request; failure to provide an adequate explanation for absence, following a reasonable request to do so; and, breach of London's CRC code of conduct, as outlined in core principle two.

The panel are of the view that the frequency and accumulation of these separate occurrences of misconduct is equal to that of serious

insubordination.

The panel further considers that your behaviour contravenes the London CRC's values as an organisation and has a detrimental impact upon service users and colleagues. As a qualified probation officer, and experienced member of staff, the panel considered that you would have been fully aware of your responsibility to comply with a number of reasonable management instructions and to align to behaviour outlined in the code of conduct.

The need for employees to act in accordance to its values is taken seriously by the organisation. Based on information presented during the hearing, the panel have significant concerns around your capacity to fulfil your responsibilities in post.

As a panel we have concluded that this pattern of behaviour cannot be sustained by the organisation and are in agreement with the outcome reached which is one of dismissal from the organisation. Your dismissal is in lieu of notice, and annual leave entitlement, with your final day of working being today, 22 January 2018. The outcome of this hearing will be sent to you in writing within the next five working days. You have a right to appeal. The procedure for doing so will be outlined in the outcome letter.

65. In a lengthy letter to the Claimant dated 25 January 2018 Mr Spencer confirmed the dismissal without notice and his reasons for it as summarised above.

66. The Claimant appealed against her dismissal by email on 30 January 2018 on the following grounds:

    a. The sanction was too severe;

    b. The panel's conduct of the hearing was confusing, contradictory and inconsistent, thereby prejudicing a fair hearing. This ground related to downgrading each allegation to misconduct but then treating the pattern of behaviour as an act of serious insubordination and gross misconduct;

    c. New evidence – the Claimant indicated that she would be submitting time sheets.

67. The appeal was heard by a panel of three: Paul Baker (Deputy Director of Communities); Emily Martin (Deputy Director of Custody Contracts and Interventions; and Linda Neimantas (Deputy Director Community Payback). The hearing was held on 14 March 2018.

68. By letter dated 28 March 2018 from Mr Baker, the Claimant was informed that her appeal was not upheld and therefore that the decision to dismiss would stand.

Submissions made by the parties

69. The Tribunal considered very carefully the submissions from both parties

before reaching its decision.

70. On behalf of the Respondent, Mr Burke said that the Claimant had shown an utter disregard for instructions and had completely failed to respond to management censure and correction. He said that dismissal was entirely reasonable in these circumstances because no employer could possibly continue to employ someone who so flagrantly ignores and refuses to follow management instructions. Mr Burke referred to his questioning of the Claimant when he asked "*how does one manage a person like you?*" to which the Claimant replied "*I don't know*".

71. During his submissions, Mr Burke drew my attention to the **Quintiles** case which is referred to at paragraph 11 above.

72. For the Claimant, Mr Cohen summarised the case against the Respondent as follows:

    a. the confusion surrounding whether the conduct was gross misconduct or simple misconduct, which resulted in the position changing throughout the disciplinary hearing stage but particularly between the beginning and the end of the disciplinary meeting on 22 January 2018;

    b. the allegations were only worthy of being treated as misconduct, therefore not justifying dismissal. Mr Cohen suggested that the allegations were more akin to allegations of non-attendance at work;

    c. The panel was wrong to treat the allegations as collectively amounting to gross misconduct;

    d. the failure to inform the Claimant that there had been a meeting on 17 January 2018, even at the appeal stage, was dishonest and unfair.

Analysis, conclusions and associated findings of fact

73. The Tribunal is satisfied that the Respondent genuinely believed that the Claimant was guilty of misconduct and that the Claimant was dismissed for that reason. Indeed this was not disputed by the Claimant and neither was any alternative reason for dismissal put forward.

74. The Tribunal is satisfied that the remaining two limbs of the **Burchell** test is satisfied and that the Respondent's genuine belief was based on reasonable grounds following a reasonable investigation into the allegations. The investigation resulted in a comprehensive investigation report comprising 132 pages including notes of investigatory interviews and associated documents such as emails. Once again, the quality of the investigation was not challenged by the Claimant during these proceedings.

75. Turning now to the complaints raised by the Claimant about the dismissal,

the Tribunal accepts that the panel found it difficult to know quite how to present the employer's case in terms of whether they were dealing with acts of gross misconduct or simple misconduct. The Tribunal finds that they considered that they were certainly dealing with serious misconduct on the part of the Claimant and that her conduct overall could justify dismissal. The problem arose because they considered each allegation on their own to be simple misconduct but in totality, bearing in mind the pattern of her conduct and behaviour, they considered that what they were dealing with was gross misconduct as the Claimant had behaved in such a way so as to fall within the definition of serious insubordination and thereby seriously damaged the implied term of mutual trust and confidence.

76. The Tribunal is mindful of the fact that these are legal concepts and the panel are not lawyers. It is also clear that the case evolved during the hearing as they were able to hear the Claimant's responses to the allegations. In many ways the panel did what a panel should and that is to keep an open mind and be prepared to change one's thinking about a given situation.

77. Fundamentally, however, the Tribunal is satisfied that the Claimant knew that she was facing s serious situation which could end with the termination of her employment. The Respondent placed the Claimant on notice, in the formal invite to the disciplinary hearing, that the allegations she needed to answer *could* be treated as gross misconduct and *could* result in the Claimant's dismissal [the Tribunal's emphasis].

78. But for the appeal hearing, the Tribunal might well have been persuaded, on procedural grounds, that the dismissal was unfair. The Claimant and Mr Cohen were led to a hearing on 22 January 2018 without any prior notice of the direction the panel had agreed during their meeting on 17 January 2018. More importantly, even at the meeting when Mr Spencer was outlining the purpose of the 22 January 2018 hearing and going through the labelling of the allegations again, this did not completely and fairly represent the thinking of the panel as concluded in their meeting on 17 January 2018. The Claimant and Mr Cohen would be forgiven for thinking that they had been led down a false trail during the reconvened hearing – even ambushed.

79. However the Tribunal does not accept that there was any intention to mislead. The Tribunal finds that the Respondent went out of its way to give the Claimant every opportunity to state her case, even giving a second hearing, before making a decision.

80. The Tribunal also has to consider the fairness of the dismissal (including the appeal) by looking at the whole process. Even though the Tribunal accepts that there was something procedurally irregular about the way that the meeting on 22 January 2017 was conducted, the final and concluded position of the panel was set out in a lengthy and comprehensive dismissal letter. By the time the Claimant reached the appeal stage, she was clear about the reason why she had been dismissed and was able to argue this

at the appeal hearing. Indeed, the events that occurred on 22 January 2018 and the 'labelling' issue did take up a considerable amount of time during the appeal.

81. In his outcome letter Mr Paul Baker said "*it is unfortunate that the panel appeared to change their view more than once on whether or not the issues raised were misconduct or gross misconduct*". However he went on to say that the conclusion reached by the panel was a reasonable one based on the evidence.

82. The Tribunal considers that the appeal panel looked at the matter very carefully and were open minded to changing the disciplinary panel's decision if they felt it was right to do so. The Tribunal also takes into account the fact that, from the outset, the Claimant was aware that the Respondent would be looking at the allegations as gross misconduct and therefore that her job was at risk.

83. In his submissions on behalf of the Claimant, Mr Cohen said that the appeal could not remedy any unfairness in the process that preceded it because at that stage he and the Claimant were not aware of the meeting on 17 January 2018 and they had only become aware that there was such a meeting during these proceedings. The Tribunal finds that this is somewhat of a red herring. The fact of such a meeting taking place is not unusual and the Tribunal is not satisfied that they deliberately tried to conceal it, or they would not have mentioned it in their witness statement. What was decided at that meeting is the real issue and that has been dealt with above. The fact of the meeting itself does not affect fairness.

84. The Tribunal then turned its attention to whether it was reasonable for the Respondent to treat the allegations collectively as, or alternatively as a course of conduct which amounted to, gross misconduct. The Tribunal considers the term "insubordination" as that which is defined in the Oxford dictionary as a defiance of authority and refusal to obey orders. The term 'serious' simply adds an element of gravity to the description. Whilst the allegation of failure to follow a reasonable instruction is labelled by the Respondent in their policies as simple misconduct, the two terms are related and there is clearly an attempt by the Respondent to allow themselves the scope to take a a more serious view (including dismissing an employee) where the allegations are serious.

85. Regardless of whether a Respondent describes an allegation as gross misconduct in their policies or procedures, by summarily dismissing the Claimant for gross misconduct they are essentially saying that the Claimant has fundamentally breached the contract of employment, including the implied term of mutual trust and confidence. Looking at the evidence and the allegations as a whole, the Tribunal concludes that the Claimant's behaviour, in effect, was to refuse to comply with the essential terms of that contract and by doing so she also fundamentally breached the implied term of mutual trust and confidence that must exist between employer and employee. The Tribunal finds that the relationship between the Claimant

and the Respondent (but particularly Mr Denton) deteriorated very badly and that this was the fault of the Claimant. The Tribunal further finds that the Claimant did not like the new management regime and decided to rebel against it and do what she pleased, knowing that her employer would not agree and knowing full well that there could be consequences. In the Tribunal's view the Respondent acted reasonably in treating this course or pattern of conduct as so serious and in fundamental breach of contract and then as a reason to dismiss. The Tribunal finds that by the Claimant's conduct, the trust and confidence had evaporated.

86. In these circumstances and taking everything into account the Tribunal simply cannot conclude that the dismissal was not within a range of reasonable responses open to it.

87. In all the circumstances the claim is not well founded and is dismissed.

……

Employment Judge Hyams-Parish
16 October 2019