



# EMPLOYMENT TRIBUNALS

BETWEEN

Mrs L Johnson

AND

Smart Parking UK Limited

Appellant

Respondent

HELD AT Birmingham

ON 26 and 27 September 2019, 17 February  
2020 and 16 March 2020 (In Chambers)

EMPLOYMENT JUDGE SELF

## Representation

For the Claimant: Mr S Brochwicz-Lewinski (Counsel)

For the Respondent: Miss L Quigley (Counsel)

## RESERVED JUDGMENT

1. All claims of Marriage and Civil Partnership discrimination are dismissed
2. It is declared that the Claimant was unfairly dismissed.
3. The Claimant would have been dismissed on the same date in any event notwithstanding the unfair dismissal.
4. The Claimant contributed to her dismissal. A 100% reduction should be applied to both basic and Compensatory Awards.
5. There shall be no compensation for the unfair dismissal.
6. The wrongful dismissal claim is dismissed.

WRITTEN REASONS

1. By a Claim Form received by the Tribunal on 26 September 2018 the Claimant asserted that she had been unfairly and wrongfully dismissed, and that she had been discriminated against on the grounds of her marriage. The Respondent denied all the claims in their Response.
2. In a document headed "Further Particulars of Claim" the Claimant clarified that her discrimination claim was made pursuant to sections 8 and 13 of the Equality Act 2010 (hereafter EqA). At a telephone preliminary hearing on 17 January 2019, so far as is relevant, the issues in the case were set out as follows:
  - a) Unfair Dismissal – The Respondent asserts that the potentially fair reason for dismissal was conduct. The Claimant asserts that it was because she was married to Mr Johnson. The Claimant further takes issue with the procedures employed and, in particular, that the whole process was a sham as a decision had already been made at the outset that she was to be dismissed. In the event of a finding of unfair dismissal the Respondent will rely upon Polkey and contributory fault to reduce / extinguish any compensation.
  - b) Wrongful Dismissal – The Claimant was dismissed without notice and asserts that she should have been paid her contractual notice. The Respondent asserts that she was dismissed for gross misconduct and so no notice was payable.
  - c) Direct Marriage Discrimination – The parties are both conscious of the case law surrounding cases such as these where spouses work together and one is dismissed shortly after the other (Hawkins, Dunn, Graham etc.). The specific detriments alleged are fully set out in the document headed "Further Particulars of Claim" and are in bullet point form as follows:
    - i) On 8 May the Claimant was suspended and sent home by Mr Gillespie;
    - ii) On 23 May Mr Gillespie's conduct at an investigation meeting was intimidating;
    - iii) The disciplinary process instigated by the Respondent against the Claimant was a sham because the Respondents had a preconceived view as to the outcome;
    - iv) The Claimant's dismissal.
3. We have heard oral evidence from the Claimant herself and Mr Gillespie and Mr Richards on behalf of the Respondent. We have considered their witness statements and such documents in the bundle as we have been taken to by the parties and their advocates. Both parties submitted initial skeleton arguments on the legal background and authorities. They also produced comprehensive written closing submissions. Although not all matters related to us are referred to within this Judgment all matters have been taken to account.
4. We did not hear any evidence from Mr Mark Johnson. It is a matter for each party whom they call to give evidence but there were a number of matters where Mr Johnson could have given evidence which would have clarified matters and in particular assisted the Claimant. We were given no explanation for why Mr Johnson was not called. Issues where Mr Johnson could have assisted will become clear during the fact finding in this judgment as will our conclusions on such points and whether any adverse inferences are appropriate to be drawn from the absence of Mr Johnson.
5. We find the following relevant facts having considered all of the above. The Respondent is a UK subsidiary of an Australian company Smart Parking Limited which is publicly listed in that country listed on the Australian Stock Exchange.

6. The Respondent designs and installs parking technology and manages the parking requirements of business entities by way of various forms of number plate technology. As an example, it will contract with a hotel to manage their parking on site for a fee and will also issue notices for any infractions of the parking regulations imposed on the site. The Respondent will be responsible for getting payment for these infractions and will either keep the same for themselves or, depending on the agreement, share that revenue with the contracting party.
7. There is an issue as to when the Claimant joined the Respondent and whether it was in November 2014 (the Claimant's case) or July 2015 (the Respondent's case). Within the bundle there is an invoice raised by the Claimant which relate to "Consultant Services." There are in fact two invoices which seem to cover the same period and both numbered 102. They are addressed to Ben Johnson who was the Chief Operations Officer of the Respondent and are for different amounts. The Claimant states that she did not receive any payment for the work she did for the Respondent from November 2014 until July 2015. We consider that to be highly unlikely taking into account that the Claimant's husband was the addressee for the Company and the fact that she has never sought to be paid for the work she has done which is contrary to her willingness to litigate in this hearing.
8. We accept that she did some ad hoc consultancy work over that period but do not accept that her continuous employment actually commenced on 13 July 2015 and this is evidenced by the Claimant's contract of employment. That contract is in the bundle between pages 53 and 62. Relevant provisions are as follows:
  - a) The Claimant was employed as Client Services Director reporting into the Managing Director (who was the Claimant's husband Mark Johnson).
  - b) During hours of work the Claimant was to devote the whole of her time, attention and abilities to the business of the employer.
  - c) The Claimant was to use her best endeavours to promote the interests of the employer and to observe good faith toward the employer.
  - d) The Claimant was to comply with the employer's rules regulations and policies in place from time to time.
  - e) The Claimant's working hours were 40 per week and she would be based at the Respondent's Elmdon facility, which was her contractual base.
9. The Claimant was a senior employee reporting into the Managing Director. Her original salary was £48,000 which rose to £75,000 and that salary was increased by a third on 1 July 2017 from £75,000 to £100,000. She was also given 350,000 shares under a share plan scheme.
10. On 17 April 2018 Mr Gillespie told us and we accept that a whistleblower employed by the Respondent raised a number of extremely serious concerns relating to the financial governance of the Respondent's UK operation which caused Mr Gillespie to fly over to the UK from Australia with the Respondent's Group Chief Financial Officer immediately.
11. Enquiries were undertaken and revealed that there were serious anomalies with the financial affairs of the Respondent and Mr Johnson and Mr Ashby were suspended pending further investigations. Forensic Accountants were engaged and on 15 May Mr Johnson was summarily dismissed. In the dismissal letter (82D) Mr Gillespie explained that he could retain "no vestige of trust in you as a Director of the Company" and that his actions had caused "disruption, damage and embarrassment".

12. The discoveries made have not been described to us in detail but logically must have been extremely serious for the situation to play out in the way that it did. In a letter dated 15 May 2018 to Mr Johnson it is said that he had admitted “originating bogus financial information to give a seriously misleading picture of the Company’s performance”. The removal of the Respondent’s senior management team had to be reported to the Australian Securities Exchange on 17 May, in consequence of which the Group share price fell from AUS\$0.45 to AUS\$0.26. Again, that reflects the seriousness of the situation and the need for prompt action to be taken
13. On 8 May the Claimant left work and did not return thereafter. It was described in a letter from Mr Gillespie as “a period of paid leave in addition to your annual leave” and he was at pains to clarify that the Claimant was not herself suspended. There is an issue as to whether or not this “paid leave” was at the behest of Mr Gillespie or whether it was suggested by Mr Johnson. The Tribunal will return to this point but observe that Mr Johnson would have been able to provide material first-hand evidence on this point.
14. Mr Gillespie remained in the UK following Mr Johnson’s dismissal in order to try and steady the ship in the turbulent waters the Company found itself in. The Tribunal fully accepts that the actions of Mr Johnson and his fellow director was of the utmost gravity and was a very serious issue for the Respondent to address promptly and robustly. There was a very real need for action to be taken and in particular to ensure that there was complete trust in those who remained.
15. Mr Gillespie spoke with the Claimant on the phone around 22 May. By this time he had been in the UK for just over two weeks and had been acting as the MD over that period. His position is that matters had come to light over that time which he wanted to address with the Claimant.
16. In an email on 22 May (89) the Claimant indicates that:
  - a) She will attend a meeting;
  - b) She had not been told of any specific allegations against her;
  - c) She would like copies of any notes taken.
17. Mr Gillespie responded by saying that he was keen to understand some points that he had become aware of since coming to the UK and that he wanted to have a clear understanding about “team culture, process and attendance” (89).
18. A meeting was held at a hotel on 23 May and the notes of that meeting are contained in the bundle at 90-94. There are differences of viewpoint as to what took place at this meeting, but it seems to be agreed that Mr Gillespie expressed concerns about the Claimant in the following ways:
  - a) That the Claimant had engendered a culture of fear.
  - b) That the Claimant’s attendance at work had been sporadic and she was not often there.
  - c) Issues relating to the Claimant’s handling of Mr Johnson’s expenses.
  - d) A process known as a re-wash.
19. The Claimant asserts that during the course of this meeting Mr Gillespie conducted himself in an intimidating fashion, adopting an aggressive tone of voice, standing over the Claimant so that at one point his spittle struck her face. Mr Gillespie denies such behaviour. The Tribunal finds that the Claimant has exaggerated Mr Gillespie’s conduct. The Tribunal accepts that Mr Gillespie was in all likelihood forceful and direct

in his language and conduct but do not accept that his behaviour strayed beyond that which was still within an acceptable professional boundary. We have no doubt that the Claimant felt uncomfortable as she was being questioned for the first time on issues which were potentially very serious and clearly of a nature to be job-threatening.

20. It seems to be agreed that in the course of that meeting Mr Gillespie told the Claimant that he thought she was lying in respect of the rewash issue and that was his genuine view on the basis of her answers and emails that he had in his possession. Mr Johnson says at paragraph 12 of his statement:

***“I was not impressed by her evasive, unsatisfactory and untruthful answers to the issues we had discussed, particularly given her level of seniority. In my opinion her position had become untenable in view of her lack of attendance, the poor culture of the business, the loss of confidence from her team and the fact she was caught lying about her knowledge of the rewash process”***

21. It was apparent to the Tribunal that Mr Gillespie had concluded that the Claimant's days at the business were numbered and that she would be dismissed. He may well have formed that view before that meeting during the course of his enquiries, but he certainly had done so by the end of the meeting. On the balance of probabilities, the Tribunal considers that Mr Gillespie did suggest to the Claimant that she should tender her resignation. That is entirely consistent with the view that Mr Gillespie had formed as to what was to happen (i.e. her employment should terminate) and would certainly make sense in terms of administrative time and effort going forward (i.e. there would be no need for a disciplinary process).
22. On 25 May 2018, the Claimant provided a rebuttal of the matters raised within the meeting (95-98). Despite the rebuttal the Tribunal find that at this particular point in time the Claimant knew full well that there was no prospect of her returning to the business because it would be untenable. Further the Tribunal is of the view that the Claimant did not wish to return to the business. It is highly likely that the Claimant had come to that conclusion shortly after Mr Johnson was dismissed. Both parties knew that the employment relationship was over, that there was no remaining trust and confidence in each other and after this point the primary objective of both was to try and position themselves as best they could for the likely litigation to come.
23. On 29 May 2018, Mr Gillespie responded and in that email (99-100):
- a) He poured doubt upon the Claimant's suggestion that she could regularly attend work without using the biometric system to access doors.
  - b) He indicated that the Claimant's team had commented on the Claimant's lack of direction and leadership and stated that the Claimant was rarely in the office.
  - c) He expressed concern over a lunch Mr Johnson had had and which had been managed by the Claimant. The bill was £500.63 which included £200 for a bottle of champagne and a £150 tip.
  - d) He raised the dishonesty as he saw it from the Claimant's answers re the rewash process.
24. On 30 May 2018, the Claimant responded to the various points and was signed off by her GP for a period of 4 weeks. The Claimant asserted that she was actually fit to work from 21 June. On 25 June Mr Gillespie expressed concerns that there seemed to be a conflict between medical evidence he had received and a letter from the GP finally confirmed the position. The Claimant never presented herself back at work despite

this letter. The Tribunal take the above as further evidence that both parties knew full well that there was no real prospect of the Claimant ever attending work again.

25. On 16 July 2018, the Claimant was invited to a meeting to discuss allegations of misconduct and gross misconduct. The allegations were as follows:
  - a) Poor attendance level between September 2017 and May 2018 (excluding any sickness absence) leading to deteriorating staff morale.
  - b) Authorisation of the business expense claim detailed above.
26. Documents were sent to the Claimant in relation to the allegations and the Claimant was informed of her right to be accompanied. The hearing was to be conducted by Fraser Richards who was the National Accounts and Client Services director. He was a subordinate of Mr Gillespie.
27. The hearing was set for 20 July and the Claimant responded indicating that she would attend on the evening of 18 July. In that letter the Claimant expressed a number of concerns as follows:
  - a) The Claimant objected to Mr Richards dealing with the matter because he was more junior to Mr Gillespie and in no position to overrule the decision that she contended Mr Gillespie had already made that she should be dismissed.
  - b) That she required verbatim minutes to be taken.
  - c) Issues over the biometric report and a request for access to emails etc.
28. Mr Richards wrote on 19 July indicating that those issues would be addressed at the start of the meeting. That meeting started at around 10 am on the following day and at the outset Mr Richards sought to reassure the Claimant that he had not been pressured to make any decision and that he believed it was fair for him to conduct the hearing. The Claimant countered with a short speech in which she continued to indicate that in effect the hearing was a sham as the outcome was predetermined.
29. The notes indicate that after the opening Mr Richards effectively handed over the meeting to Mr Gillespie who asked a number of questions of the Claimant. The nature of those questions made it absolutely crystal clear that Mr Gillespie was is absolutely no doubt that the Claimant was guilty of the matters she was accused of.
30. The Claimant accepted that she filed Mr Johnson's expenses and that she had cancelled the business meeting with the supplier an hour before it was due to take place on Mr Johnson's instructions. The Claimant was asked why, taking into account the business meeting had been cancelled and the size of the bill and tip why it was that she did not question such an extravagant expense. The Claimant's response was that she was told to do it by Mr Johnson and so she did as his "PA". Mr Gillespie opined that in fact she was a very senior director on a substantial salary and she had a duty, even a fiduciary duty, to question it on a number of bases. The Claimant was asked who Mr Johnson had lunch with but was unable to give an answer even though she could have got that information from Mr Johnson in advance of the meeting or indeed Mr Johnson could himself have given evidence about it.
31. Even at this hearing a substantial time later the mystery of whether there actually was a lunch and if so who it was with and whether any part of it was a genuine expense on the business was unanswered. Mr Johnson could have answered that question and provided information about the Claimant's attendance at work and the expenses issue which could have been fully supportive and exculpatory for the Claimant but did not do

so. On key areas such as this and the question of the circumstances around the Claimant's "suspension." the Tribunal considers that his non-appearance at this hearing does merit the drawing of adverse inferences against the Claimant and that her account is not a truthful one.

32. Mr Richards appears to have asked no questions at all in the course of the meeting which was comparatively brief lasting just under half an hour. His input was negligible when compared to Mr Gillespie's. The Tribunal consider that to be reflective of what was the unerring truth of the matter which was whatever the Claimant said she was going to be dismissed.
33. On 30 July, the Claimant received a letter from the Respondent setting out the conclusions from the meeting. Mr Richards indicated that following the meeting he interviewed 8 members of staff "to establish a more complete picture of (the Claimant's) level of attendance". Mr Richards concluded that the two allegations were proven against the Claimant.
34. So far as the attendance issue is concerned he acknowledged that the Claimant had raised issues with the Biometric Access Control System data but following his interviews with staff even if that data was flawed or not fully accurate there were "ongoing and considerable periods of absence over a protracted period".
35. The interviews disclosed that there was a significant lack of supervision and morale was extremely low. When the Claimant did attend work it was normally later in the morning and that the Claimant often left by 1400 or 1430 in the afternoon, often for hair /nail appointments. It was asserted that members of staff had left because of a toxic atmosphere and lack of direction caused by the Claimant. It should be noted that the Claimant had no opportunity to respond to those statements or put forward a contrary view. She did at this hearing which we have been able to consider in terms of the wrongful dismissal and issues of contributory fault
36. The expenses claim matter is dealt with as follows in the letter:

***"With respect to the allegation of gross misconduct you clearly accepted that you had cancelled the meeting with DRPL and that you then submitted without question the expenses for the same..."***

***... as the company's Client Services Director.... the seniority and status of your position for which you receive a substantial remuneration package, entrusts you with a significant fiduciary responsibility. As such knowing that you had previously cancelled the meeting in person, I cannot accept that you would not have known that the expenses claim in issue was suspicious. If you suspected in any way, as you ought to have done that the expenses claim was questionable then as a minimum you should have notified your concern to your COO or in order to maintain complete transparency and impartiality referred the decision to approve or reject the claim to the financial director. I do not accept your explanation that you were entitled to act without question and can therefore abrogate responsibility."***

37. The absenteeism issue is dealt with as follows:

***“My conclusion is that this conduct is not simply characterised as non-attendance but is more accurately described as a dereliction of duty which has had a very detrimental effect on the Company and so also justifies a sanction of dismissal without notice.”***

38. The Claimant was dismissed summarily and given the right of appeal which she exercised by an email dated 3 August 2018. Her appeal was wide-ranging and included her previous observations that the outcome was predetermined and she also raised the fact that Mr Gillespie had effectively run the disciplinary meeting. Further she raised the issue that Mr Richards had utilised statements obtained after the disciplinary hearing in his decision making when she herself had not any chance to comment upon them nor indeed had seen them at the point of dismissal. The Claimant also raised issues in respect of each of the allegations found against her.
39. On 6 August Mr Richards informed the Claimant that it was intended that the appeal was to be dealt with by an external Hearing Officer. The Claimant responded the following day by suggesting that each party should put forward 4 HR specialists and that she would bear 50% of the cost. That seemed to find no favour with Mr Richards who simply indicated that the original plan of the Respondent choosing the appeal assessor would continue and that the person appointed would contact the Claimant in due course.
40. The Claimant responded on 8 August stating that she believed that the person to be appointed would not be any impartial and that was why a mutually agreed HR specialist did not find favour. The Claimant indicated that she had already indicated why she believed the whole process was a sham and she believed that it was therefore pointless to have an appeal which was also predetermined and fixed. The appeal was withdrawn. In the circumstances the Tribunal do not find that to be unreasonable on her part.

#### **41. The Law**

Section 8 of the Equality Act reads as follows:

##### **8 Marriage and civil partnership**

- (1) A person has the protected characteristic of marriage and civil partnership if the person is married or is a civil partner.
- (2) In relation to the protected characteristic of marriage and civil partnership—
- (a) a reference to a person who has a particular protected characteristic is a reference to a person who is married or is a civil partner;
- (b) a reference to persons who share a protected characteristic is a reference to persons who are married or are civil partners.



42. In this case the Claimant asserts that she was directly discriminated against by the Respondent. Direct discrimination is dealt with at section 13 of the EqA which reads as follows (so far as is relevant):

**13 Direct discrimination**

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

43. There has been some judicial debate in the past about precisely what the focus should be within section 8 EqA. In *Hawkins v Atex Group Ltd* [2012] IRLR 807, the EAT (Underhill P presiding) held that the protection in the EqA is limited to prohibiting discrimination against a complainant because of their marriage and not because of the identity of the person to whom they are married.

44. In *Hawkins*, the claimant's husband was the chief executive of the respondent company. In 2009 its chairman told him that it was now company policy (to prevent conflicts of interest and charges of nepotism) that he should not employ any family members. In fact, he employed both his wife (the claimant) and his daughter. When this was discovered in 2010, both (wife and daughter) were dismissed. Mrs Hawkins sought to claim marital discrimination but this was struck out by the Tribunal judge at first instance. On appeal to the EAT, the Tribunal's decision was upheld, with the President stressing that **'it is important to get the emphasis in the right place: the question is not whether the complainant suffered the treatment in question because she was married to a particular man, but whether she suffered it because she was married to that man.'**

45. In *Hawkins*, the EAT looked back to the original purpose of the provision, which was to protect the status of marriage. Thus, if the employer acts because of the closeness of the relationship between claimant and the other person, s.8 EqA would not apply, even if the closeness in issue took the form of marriage. This approach was consistent with earlier EAT authority, *Skyrail Oceanic Ltd v Coleman* [1980] IRLR 226, [1980] ICR 596.

46. In *Skyrail*, a clerk in a travel agency was dismissed when she married someone who worked for a rival agency (thus giving rise to a potential conflict of interest). Mrs Coleman's claim of marital discrimination had been rejected because it was held that the reason for her dismissal was the closeness of her relationship once married and on that basis the relevant statutory provision was not contravened. Particularly important was evidence that the agency would have dismissed others in a similarly close but unmarried relationship, just as—in the *Hawkins* case—the Atex Group had dismissed both wife and daughter once the breach of company rules had been discovered.

47. Ultimately the question we have to ask ourselves are whether or not the specified acts of less favourable treatment actually happened and then ask ourselves the reason why they happened. We are mindful ourselves that discrimination is rarely overt and that we are entitled to draw inferences from surrounding facts to conclude that the reason or part of the reason for the less favourable treatment is the protected characteristic claimed.
48. We are also mindful of the shifting burden of proof provisions within the Equality Act 2010 at section 136 of EqA 2010.
49. Pursuant to section 94 of the Employment Rights Act 1996 (ERA) an employee has the right not to be unfairly dismissed. The Claimant in this case qualifies for consideration of unfair dismissal as she has sufficient service.
50. Under section 98 of the ERA the employer must show that the reason or principal reason for the dismissal was a potentially fair one and if it is the determination of whether it is fair or unfair depends on whether in the circumstances (including the size and the administrative resources of the employer's undertaking) in treating that reason as being a sufficient reason for dismissing the employee. That has to be determined in accordance with equity and the substantial merits of the case (section 98 (4)(a) and (b) ERA).
51. In this case the potentially fair reason for dismissal put forward by the Respondent is conduct which could be a potentially fair reason under section 98(2)(b) ERA. The Claimant asserts that she was dismissed because she was married to Mr Johnson.
52. In so far as the reasonableness test is concerned the Tribunal must guard against and indeed must not substitute their own view. It must ask itself whether the dismissal to dismiss fell within a band of reasonable responses and if it did then the decision to dismiss would be fair. The Tribunal must consider the fairness of the process and procedures used to determine the decision. Assistance can be gained in that respect as to the standards required by a consideration of the relevant ACAS Code of Guidance on Disciplinary and Grievance procedures.
53. In a normal unfair dismissal claim it should ask itself whether or not the employer held a genuine belief on reasonable grounds after a reasonable investigation.
54. If the dismissal is found to be unfair then the Tribunal must consider whether or not the Claimant has caused or contributed to the dismissal (s.123(6) ERA. In that regard the Tribunal must look at the Claimant's conduct and make findings upon whether that conduct can be deemed to be blameworthy and/or culpable. When considering that issue the Tribunal are obliged to make specific findings of whether or not contribution has been made out on the evidence before it.
55. Further there needs to be a consideration of whether a Polkey deduction applies. That requires a consideration of whether or not any flaws in the process would have

made no difference to the outcome or whether there is a chance it would have made no difference to the outcome.

### Conclusions

56. On balance we accept Mr Gillespie's account as to why it was that the Claimant was placed on paid leave on 8 May. We have heard from him directly and we have not heard from Mr Johnson and have not received any explanation or reason as to why he could not give evidence on what is a pertinent issue in this claim. Further we note that Mr Gillespie recorded that the Claimant's paid leave was at the suggestion of Mr Johnson in a letter at page 82A of the bundle and at no point do we have any record of either Mr Johnson or the Claimant indicating that what was contained in that letter was false.
57. The Tribunal have observed how capably the Claimant was able to bring to the attention of Mr Gillespie and indeed this Tribunal any matters which she wishes to convey and to correct any issues that she believes are incorrect. The Tribunal believes that if the letter of 8 May was deemed by the Claimant to be inaccurate she would have brought it to the attention of Mr Gillespie immediately. We find that the Claimant understood the rationale for her not being in the workplace for a short period and acquiesced to the same without complaint.
58. It follows therefore that as a matter of fact the Claimant was not suspended and sent home on the 8 May as alleged in the first discrimination claim but placed on paid leave on that day. There is a clear distinction between the two states.
59. In any event the Tribunal consider that the fact of marriage was not relevant at all to the situation. The Claimant was a very senior employee who worked closely with Mr Johnson and their star had, in recent years, risen together. Serious matters had been raised against Mr Johnson and it was plain that others who worked closely with him and were seen to be aligned with him could possibly be implicated once investigations were undertaken as to what had gone on in the workplace. Clearly the Claimant's close personal relationship would have been a factor which was known and would have been of concern to the Respondent but that would have been the same whether the relationship was one of marriage, cohabitation, any form of close personal relationship or indeed any close working relationship. By applying the former president's guidance from *Hawkins* we are quite satisfied that discrimination is not made out.
60. The Tribunal further do not accept that Mr Gillespie had decided that the Claimant was to be dismissed on 8 May. It was a possibility that there may need to be more dismissals over the course of the few weeks as the extent and the cause of the rot was exposed and the Claimant as a senior employee was clearly one of those who might be implicated. Indeed, there was every likelihood that Mr Gillespie would have to be very reassured by what he found to keep her. The financial seriousness was such that robust action would be required.
61. We find that Mr Gillespie looked closely at the UK business over the next two weeks and that it was from those investigations that he formed the clear view on what he

discovered that the Claimant was to be dismissed. It moved matters from their being a chance she would not be retained to no chance. The Tribunal consider that by the time he telephoned the Claimant on 22 May he was fairly sure that the Claimant would have to be dismissed and as he himself stated he was absolutely sure that the position was untenable after only a short time in the meeting on 23 May because of what he saw as the Claimant's evasion. The Tribunal do not consider the Claimant's submission that she wished to consider the allegations in detail and provide a considered response to be unreasonable.

62. As clear as it is to us that the Claimant was not treated less favourably because she was married is the fact that the Claimant was unfairly dismissed. Mr Gillespie took the decision that she was to be dismissed in May and we are satisfied that all that took place thereafter was a case of going through the motions of what could be seen a fair process superficially.
63. Mr Gillespie needed to be able to trust those who remained in the UK operation following the damage done which included a substantial hit to the share price. We are satisfied that the information that he gained from speaking to staff was accurate and that there were serious questions to be asked about the Claimant's conduct and in particular her attendance. The issue of the Claimant's conduct re the expenses was also, in the Tribunal's view a grave matter.
64. As stated earlier both Mr Gillespie and the Claimant knew what was going to happen from 22/23 May and thereafter simply sought to enhance their positions in what was to be inevitable litigation.
65. We accept the Claimant's contentions that what happened in the "disciplinary process" was a sham. There was never the remotest chance that any explanation she might give would be accepted. Mr Gillespie believed firmly that she had been neglecting her duties by not attending on a regular basis and when she did for short periods of time and also believed that she could not be trusted on financial matters as she had demonstrated on the expenses issue. She could not be trusted in his view and that was that.
66. There was not the slightest prospect that Mr Richards would find anything other than that she should be dismissed for gross misconduct. He was fully aware of Mr Gillespie's views and it was inconceivable that he would go against them. We find that Mr Gillespie did not directly tell him what the outcome should be but his actions left Mr Richards in little doubt as to what his decision would be.
67. From a procedural perspective there was a clear and obvious error where even if there had not been a sham being perpetrated we would have found the dismissal unfair when Mr Richards obtained a number of relevant statements from staff and did not give the Claimant the opportunity to consider or make representations upon them after the disciplinary meeting.
68. We are satisfied that the principal reason for dismissal was conduct i.e. those matters discovered when Mr Gillespie looked into the affairs of the Company. That turned

the Claimant's dismissal from a possibility to a certainty and so can be adjudged as being the principal reason. However, the dismissal was unfair because those conclusions were reached without any due process being undertaken and that which was undertaken was a sham.

69. Having said that we now have to consider whether or not that made any difference at all to the outcome. We think not. We consider that had an open mind been brought to bear on the disciplinary process then the Claimant would have been dismissed at precisely the same time.
70. Taken as a whole and having carefully considered the Claimant's representations on the point we do not accept that she kept a satisfactory level of attendance so as to be able to discharge her duties. There was evidence via the biometrics that the Claimant was not attending regularly (80 from 167 days) and whilst that is by no means the end of the story it does call for an explanation from the Claimant. We considered her explanations to be inadequate.
71. Mr Gillespie gave evidence that he had been told that her attendance was poor and that was supported by the statements Mr Richards obtained. It was asserted that the Claimant needed to be in the office to have a positive effect on her team and the fact that she was not meant that her effectiveness was compromised. Mr Richards commented on that fact.
72. The Claimant suggested that she had been ill in January / February. She was not signed off as sick and did not notify her staff that she was sick. The Tribunal did not consider that she has adequately made out that sickness was a reason for her absence. Mr Johnson could have provided corroborative evidence on all these matters and the fact that she was given permission to do so but he was not called.
73. The Tribunal were satisfied from the evidence that in order to discharge her duties effectively she would need to be in the office for the vast majority of the time. Mr Richards gave clear evidence that the business required her to be there absolutely. The Tribunal were equally satisfied that the Claimant's attendance was sporadic without good cause and that she was prioritising other personal matters as opposed to her very well-paid role. The combination of the biometrics and the witness testimony persuade us of that. The Claimant could give no good reason as to why the individuals who had suggested she was not regularly at work would not be telling the truth.
74. So far as the expenses are concerned the Tribunal considered much of the Claimant's evidence in relation to the same to be incredible. All of the necessary evidence was put to the Claimant and she had all the information both during the original investigation and at the Tribunal. Mr Johnson could have clarified much of the surrounding issues, but he was not called. Indeed, he could have given evidence which minimised the role of the Claimant but he did not. The Tribunal draw an adverse inference against the Claimant that the person who knew the ins and outs of the expenses intimately and their submission was not called because his evidence would not have exculpated the Claimant and she knew that.

75. The Claimant's assertion that she did not know who had dined with Mr Johnson is incredible both at the original disciplinary and to this Tribunal. The business meeting was allegedly cancelled and the Tribunal notes and accepts the points made in the Respondent's closing submissions at paragraph 88 and 89.
76. The Tribunal considers that the Claimant should have known and /or been very suspicious that the expenses being claimed were fraudulent and/or not properly payable by the Company. At the very least it would have been necessary for a full enquiry to be put in place. The Claimant's professed ignorance and lack of recollection was not believable on account of the huge tip and the Cristal champagne on its own which would have been bound to stick in one's mind.
77. The Tribunal considers that somebody of the Claimant's seniority in the Company does hold a duty to raise such conduct and if they did not so they become complicit in the behaviour. Such conduct must go to the very root of the contract and the trust that is required within a contract of employment.
78. The Tribunal has no doubt that the Claimant's failures in relation to the expenses are such that it meets the conduct test set out in **Neary v Dean of Westminster (1999) IRLR 288** approved in **Briscoe v Lubrizol Limited (2002) IRLR 607** that
- “conduct must so undermine the trust and confidence which is inherent in the particular of contract that the employer should no longer be required to retain the employee in his employment.”***
79. In the circumstances we consider that this was a repudiatory breach of contract and that summary dismissal was fully justified. In those circumstances the wrongful dismissal claim must fail.
80. We would find that summary dismissal was appropriate on the expenses issue alone. We also find that the failures to attend work regularly and the failure to undertake her duties adequately and in accordance with paragraph 8 (b) would also lead to a complete loss of trust and confidence which would amount to a repudiatory breach and summary dismissal. It follows that either of the matters individually or together amount to repudiatory breaches of contract on the part of the Claimant.
81. From this finding it also follows that notwithstanding the lack of a proper process had the process been held in an open minded way we consider that there is a 100% chance that the Claimant would have been dismissed at precisely the same time.
82. It also follows that the Tribunal considers that the Claimant's conduct is blameworthy and culpable and the seriousness of that conduct leads us to the conclusion that the Claimant was 100% at fault for the dismissal.
83. In summary the Claimant was unfairly dismissed but we are satisfied that she would have been dismissed on the same date anyway had the process been fair and that she contributed 100% to her dismissal. We take a step back in order to consider the fact that the consequence of these findings is that the Claimant can assert that she



has been unfairly dismissed but that she should not receive any compensation at all either via a basic award or a Compensatory award. We consider that against whether such an outcome is just and equitable (s.122(2) ERA and s.123(1) ERA and conclude that it is.

84. Whilst not making any difference because of our findings, if compensation had been ordered we would have increased the compensatory award by 25% because of the failure to abide by the ACAS Code. We would not have reduced the award on account of the Claimant failing to appeal.
85. Finally, we need to deal with the discrimination claims individually. They were:
  - a) On 8 May the Claimant was suspended and sent home by Mr Gillespie;
  - b) On 23 May Mr Gillespie's conduct at an investigation meeting was intimidating;
  - c) The disciplinary process instigated by the Respondent against the Claimant was a sham because the Respondents had a preconceived view as to the outcome;
  - d) The Claimant's dismissal.
86. We are satisfied that there are facts set out above from which we could decide in the absence of any other explanation that discrimination could have occurred. The circumstances leading up to the matters complained of as acts of discrimination were such that a perfectly credible reason for the reason or part of the reason for them taking place was the Claimant's married status to Mr Johnson.
87. We have however accepted the reasons given by the Respondent for why they decided to act in the way that they did i.e. that it was the Claimant's misconduct that led to the dismissal process.
88. We dismiss all of these claims for the following reasons. We do not accept that the Claimant was suspended and sent home but that she did so by agreement. That does not amount to less favourable treatment and in any event was in no way linked to the fact that she was married to Mr Johnson. Any form of close relationship would have been treated in exactly the same way This has been dealt more fully earlier in this Judgment.
89. We do not accept that Mr Gillespie's conduct was intimidating as suggested by the Claimant. We find that the Claimant has exaggerated and refer back to paragraph 19 of this Judgment. In any event the manner in which the Claimant conducted himself at that meeting whether intimidatory or not had nothing to do with the Claimant's married status and was wholly to do with the disappointment Mr Gillespie felt at the Claimant's conduct and the fact that all trust and confidence in her as an employee had completely disappeared.
90. We accept the factual basis of (c) above in that the process that was followed was a sham etc. It had nothing to do with the Claimant's married status and was wholly to do with the disappointment Mr Gillespie felt at the Claimant's conduct and the fact that all trust and confidence in her as an employee had completely disappeared.
91. We accept the factual basis of (d) i.e. that the Claimant was dismissed. It had nothing to do with the Claimant's married status and was wholly to do with the disappointment

Mr Gillespie felt at the Claimant's conduct and the fact that all trust and confidence in her as an employee had completely disappeared.

92.

Employment Judge Self

09/06/2020