



EMPLOYMENT TRIBUNALS

Claimant: Ms S Ready

Respondent: Nottinghamshire Independent Domestic Abuse Service

Heard at: Nottingham

On: 1, 2 and 3 February 2021

Before: Employment Judge Butler (sitting alone)

Representation

Claimant: In person

Respondent: Mr Z Malik, Solicitor

RESERVED JUDGMENT

The Judgment of the Tribunal is that the Claimant was unfairly and wrongfully dismissed and is entitled to compensation. The claim for holiday pay is dismissed.

The matter will now proceed to a remedy hearing.

REASONS

The Hearing

1. This hearing was partly attended and partly by CVP. Four witnesses gave their evidence by video on the first two days and the parties gave their oral submissions by video on the final day. The parties had consented to the hearing being conducted in this way.

The Claims

2. By a claim form submitted on 20 February 2020, the Claimant brought claims of unfair dismissal, notice pay and holiday pay arising out of her dismissal for gross misconduct on 26 November 2019. The Respondent relied on allegations that the Claimant had breached the GDPR Regulations in failing to prevent or report a data breach, had taken more holiday than that to which she was entitled, had misused the Respondent's bank debit card and attended a networking event

whilst suspended from her role as Director of Service Delivery and Development. The allegations in respect of holidays and the debit card were not pursued at the disciplinary hearing and did not form part of the reason for her dismissal. The Claimant's case is essentially that the investigation carried out by the Respondent was inadequate and summary dismissal was disproportionate and unreasonable in the circumstances. The Respondent argues that the investigation was reasonable and the decision to dismiss the Claimant for gross misconduct fell within the range of responses of a reasonable employer.

The Issues

3. The issues in this case were agreed between the parties at a telephone preliminary hearing before my colleague, Employment Judge Jeram, on 17 June 2020. They are:

3.1 What was the reason or principal reason for the dismissal? Was it a potentially fair reason?

3.2 Where the Respondent relies on conduct, the Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.

3.3 If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

3.3.1 there were reasonable grounds for that belief;

3.3.2 at the time the belief was formed the Respondent had carried out a reasonable investigation:

3.3.3 the Respondent otherwise acted in a procedurally fair manner;

3.3.4 dismissal was within the range of reasonable responses.

3.4 Alternatively, was the reason a substantial reason capable of justifying dismissal, namely a breakdown in trust and confidence?

3.5 If so, did the Respondent act reasonably in all the circumstances in treating that as sufficient reason to dismiss the Claimant?

3.6 In relation to remedy, other issues are likely to be:

3.6.1 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure has been followed, or for some other reason?

3.6.2 Did the Claimant cause or contribute to dismissal by blameworthy conduct?

3.7 What was the Claimant's notice period?

3.8 Was the Claimant paid for that notice period

3.9 If not, was the Claimant guilty of gross misconduct by doing something so serious that the Respondent was entitled to dismiss without notice?

I add here that it was also an issue before me as to whether the Claimant had exceeded her accrued holiday entitlement for the year at her dismissal which entails clarifying the dates of the Respondent's holiday year and calculating whether she was entitled to holiday pay on the basis that she had accrued more than she had taken at her dismissal.

The Law

4. S.98 of the Employment Rights Act 1996 ("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.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted

reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

5. The principal cases I was referred to and considered are:

British Home Stores Ltd v Burchell [1980] ICR 303

Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23

Iceland Frozen Foods Ltd v Jones [1982] IRLR 439

Adesokan v Sainsbury's Supermarkets Ltd [2017] ICR 590

Wincanton plc v Atkinson [2011] 7WLUK 541

Royal Mail Group Ltd v Jhuti [2019] UKSC 55.

The Evidence

6. For the Respondent, I heard evidence from Ms E Dove, Chair of the Respondent's Board of Trustees, Mr S Turton, a Trustee, who chaired the disciplinary hearing, and Mr S Brady, a Trustee, who heard the Claimant's appeal against dismissal. The Claimant gave evidence and called as witnesses Mr S Bernacki, her partner and formerly the Respondent's Director of Business Development & Finance, Ms T Ford, the Claimant's friend, Mr S McCallum, who knew the Claimant through other positions he held, and Mr M Farrell, who met the Claimant when he was appointed by The Association of Chief Executives of Voluntary Organisations ("ACEVO") to assist her in her difficulties with the Trustees. All witnesses produced witness statements and there was an opportunity for them to be cross-examined.

7. There was also an agreed bundle of documents of just over 500 pages and references to page numbers in this judgment are to page numbers in the bundle.

The Factual Background

8. The Respondent is an independent charity providing support for individuals who have experienced any form of domestic abuse. The Claimant was appointed as Director of Service Delivery and Development on 1 August 2016 and was employed until her summary dismissal on 26 November 2019. Mr Bernacki was also dismissed from his post arising out of what I assume to be the same or similar allegations.

9. Ms Dove was Chair of the Respondent's Trustees having been encouraged to take on that role by the Claimant after having been a trustee for approximately one year. Ms Dove was also the Manager of the building which housed the Respondent's offices and saw many of the Respondent's staff on a regular basis as they entered the building.

10. During her employment, the Claimant was involved in initiatives to raise further funding with Mr Bernacki and, no doubt, others associated with the charity. As a result of these efforts, funding of around £450,000 was obtained from the National Lottery.

11. On 31 July 2019 the Claimant and Mr Bernacki were on holiday when Ms L McGachan, who was the Respondent's Family Team Leader at the time, interrupted a meeting Ms Dove was having with another trustee, Ms L Farebrother, to say she had just had a clinical supervision meeting with the staff who had raised various concerns about the Claimant. It would appear that Ms Dove was used to hearing "tittle tattle" from the staff and treated the comments as such until Ms McGachan felt the need to approach her. Both Ms Dove and Ms Farebrother advised Ms McGachan to speak to the Claimant directly about the concerns and if she was unable to resolve them to revert to the board of trustees. The Claimant considers this to have amounted to a breach of her employment rights and also that Ms Dove should have advised the staff to raise grievances if they had concerns.

12. It would appear from Ms Farebrother's email to Ms Dove at page 100 that these concerns related to issues around the Claimant's absences from the office with Mr Bernacki, her office door being shut for a lot of the time, the difficulties arising from the Claimant's relationship with Mr Bernacki, staff being given mixed messages and their suggestions being ignored.

13. Upon her return from holiday the Claimant received an email from Ms Dove dated 2 August 2019 (page 68) indicating that she had been into the office to talk to some of the staff to understand their roles within the charity. The Claimant seems to have taken umbrage with this and, after meeting with Ms Dove on 5 August 2019, at which no staff concerns were raised, sent an email to Ms Dove on 6 August 2019 (page 70) asking for a meeting to discuss the differing responsibilities of the trustees and management as it appeared that some lines were being blurred.

14. The Claimant did then have a meeting with Ms McGachan on 6 August 2019. She said in her witness statement at paragraph 31 that the resolution of any issues or concerns from the staff were not considered to be the core purpose of the meeting. Whilst Ms Dove gave evidence that Ms McGachan told her she had given the Claimant a week to sort out the concerns, the Claimant said in her evidence that this did not happen. What is clear from the Claimant's own notes at pages 71 to 74 is that there were issues with the Claimant's relationship with Mr Bernacki and the Claimant felt that Ms McGachan's direct approach to the trustees gave the team power and undermined both her role and Mr Bernacki's.

15. Ms McGachan then reverted to Ms Dove and an informal meeting was arranged on 14 August 2019 with Ms Dove, Ms Farebrother and another trustee, Ms Bouch, where the concerns previously raised with Ms Dove were repeated. The minutes of this meeting were then sent to the Respondent's advisers, Peninsula. A senior employment law consultant at that firm then unfortunately sent advice by email to a shared email address which included the Claimant. The following day, the Claimant emailed the Respondent's trustees confirming her dismay that the concerns expressed by the staff had been escalated to the Respondent's advisers who had recommended investigating the claims and

holding an informal meeting with the Claimant and Mr Bernacki. She asked for a meeting with the trustees and set out what she thought should have been done, namely, that the individual staff members should have raised those issues informally directly with her (pages 78-79).

16. Ms Dove wrote to the Claimant on 23 August suggesting that the Claimant write to the staff proposing that they find time to meet with Ms Dove and Ms Farebrother, ostensibly to discuss their roles but in reality to understand their concerns about the Claimant. The Claimant refused to sanction this course of action (pages 85-87) but meetings were eventually held as requested by Ms Dove between 27 August and 2 September 2019 as a result of which a list of concerns was prepared (pages 485-486) which the Claimant did not see until she received the result of her data subject access request and which also contained some positive comments about her.

17. An informal meeting was then arranged with the Claimant, Ms Dove and Ms Farebrother in attendance. The various versions of the minutes of this meeting are at pages 102-120. Although the various minutes are in conflict in places, it is clear that staff concerns were put to the Claimant. Further, questions about how much annual leave the Claimant had taken, recruiting new staff without a board member being involved in interviews and the Respondent's debit card were also raised. All of the notes were then sent to Peninsula. Meetings with staff were then held with the trustees as a result of which it was alleged that the Claimant and Mr Bernacki had not been recording their annual leave correctly which, according to Peninsula, amounted to gross misconduct. Ms Dove emailed the other trustees (page 133) suggesting that further investigations should be made without the Claimant's knowledge and she might have to be suspended.

18. At a further meeting on 9 September 2019 between the Claimant, Ms Dove and Ms Farebrother, the Claimant was asked about her holidays, recruitment and the debit card. In relation to holidays, she said she approved her own holidays and said she did not know what kind of bank card the charity had and that only Mr Bernacki had access to it. She said she never used the card (pages 134-136).

19. The Claimant was then suspended by letter dated 11 September 2019 from Ms Dove. The reasons for the suspension was stated to be "holiday irregularities which has resulted in you taking too much annual leave and the unauthorised use of the charity debit card". The letter at page 141 also states, "During this suspension you must refrain from attending the workplace, whether during or outside normal working hours, unless it has been specifically requested by the company or otherwise authorised in advance. You are also instructed not to contact or to attempt to contact or influence anyone connected with the investigation in any way or to discuss this matter with any other employee or client of ours. I am duty bound to inform you that a failure to abide by this instruction would be treated as an act of misconduct." The letter confirmed that an investigation would take place.

20. In an email dated 16 September 2019 to the other trustees, Ms Dove indicated she was sending a report to Peninsula (page 143), that it appeared the Claimant and Mr Bernacki had lied about the use of the bank card, that a policy with ACEVO had been taken out on 2 September 2019 which provided advice for the directors and that an email had been discovered sending staff personal

information and salaries to another charity. By email dated 17 September 2019, the Claimant suggested she had provided all necessary evidence to satisfy any concerns and suggested that the parties enter into mediation to bring the matter to a close (page 144).

21. By letter dated 24 September 2019 (page 147), the Claimant was invited to an investigation meeting to discuss the concerns of the trustees about her conduct. The meeting was to be conducted by a Face2Face consultant, Ms R Laing. Face2Face is a service offered by Peninsula. The Claimant was by now on sickness absence although still suspended. She indicated that she was prepared to engage in the process via email which was agreed. On the day of the meeting, at 11:58 AM, Ms Laing emailed a significant number of queries to the Claimant asking her to respond by 5pm that day (page 157-159). The Claimant said she had childcare issues and could not respond within that timeframe and ultimately offered to respond by 5pm on the following day. In fact, she never did respond.

22. On 27 September 2019, Ms Dove emailed the other trustees to say the Respondent had received a phone call on the previous day from a lady claiming to have met with the Claimant that morning at the Mansfield 2020 breakfast meeting, which is a local networking initiative (page160).

23. Having received no response to her questions, Ms Laing reported to the trustees on 7 October 2019 (pages 161-183). In short, the report recommended that the Claimant be invited to attend a disciplinary hearing to answer allegations in respect of taking excess holidays, misuse of the debit card, a breach of confidentiality in respect of GDPR and attending a work-related function whilst suspended.

24. By letter dated 9 October 2019, Ms Dove invited the Claimant to a disciplinary hearing on 14 October 2019. Full details of the allegations against the Claimant were set out in that letter (page 244). The Claimant replied by email dated 11 October 2019 (page 247) indicating that she would need access to certain areas of the Respondent's computer system in order to be able to respond to the allegations. She also said she would need more time to prepare as she was currently suffering from high levels of anxiety. Accordingly, the disciplinary hearing was rearranged for 21 October 2019 (page 250). The Claimant then made a data subject access request (page 252) and raised a grievance on 17 October 2019 (page 256), that grievance being made against the trustees for ineffective management, conflicts of interest and blurring the boundaries between trustee roles and responsibilities and the management, conducting a grossly disproportionate investigation, providing a lack of support and duty of care towards her and defamation of character (page 257). The grievance ran to 6 pages (pages 258-263). The disciplinary hearing was then postponed in order for the grievance to be heard and a meeting took place on 21 October 2019 chaired by Sharlene Hernandez, a consultant with Face2Face. The Claimant was accompanied by Mr Farrell.

25. Ms Hernandez reported the outcome of the grievance hearing and on 8 November 2019 Mr Brady wrote to the Claimant confirming her grievance was not upheld, although no finding could be made on the defamation point with the Claimant still being subject to a disciplinary hearing (pages 347-348).

26. The Claimant's disciplinary hearing was then arranged for 15 November 2019 and went ahead with Mr Turton as chair. The minutes of the hearing are at pages 352-376. Mr Turton carried out some further investigations in relation to the Claimant's alleged attendance at the networking event whilst on suspension before sending his decision to the Claimant on 26 November 2019 (page 390-392). His conclusions were that the Claimant had failed to comply with the Respondent's holiday procedures and had been absent without leave on a number of occasions. He also upheld the GDPR breach and the allegation that she had attended the networking event whilst suspended from work. He decided that the Claimant should be summarily dismissed. The Claimant appealed this decision (page 396) and also appealed the outcome of her grievance hearing (page 393).

27. Mr Brady invited the Claimant to an appeal hearing to consider her appeal against dismissal (page 402). After some correspondence on the point, the Claimant elected for the appeal hearing to be dealt with on written submissions and on 30 December 2019 Mr Brady sent an email to the Claimant with a number of questions arising from her appeal document (page 410). The Claimant duly responded to these questions (pages 413-420). Mr Brady sent his appeal outcome letter to the Claimant on 4 February 2020. He dismissed her appeal but did find that she had not taken unauthorised leave by way of additional holidays or absences from work. Specifically, in relation to the breach of GDPR and attendance at the networking event whilst suspended, he upheld Mr Turton's findings and concluded that summary dismissal was an appropriate sanction (page 429-434).

28. On 24 February 2020, Ms A Squires, a trustee of the Respondent's, wrote to the Claimant dismissing her grievance appeal (page 450-454).

29. I now move on to consider the factual background in the light of the evidence before me and, in particular, the oral evidence of the witnesses which I consider in the order in which their evidence was given. In doing so, I also bear in mind the issues as agreed between the parties.

30. Ms Dove gave her evidence in a straightforward manner and did not hesitate before answering any questions. It was her view that, having received concerns from Ms McGachan and being told they were not resolved, it would have been remiss of her and the trustees not to seek advice from Peninsula. She accepted that she had spoken to some members of staff before Ms McGachan sought her out but those conversations were mainly office "tittle tattle" about such things as nobody making coffee, spending too much time in the toilets and not answering the telephone. She did not consider these issues to be significant and did not bother the Claimant with them. When she investigated the concerns of the staff she did find evidence that the Claimant spent a lot of time out of the office and seemed to have an excessive amount of time off. She also confirmed that she did not speak to the Ms S White, who it was alleged claimed to have met the Claimant at the 2020 networking meeting to check whether the Claimant had attended whilst suspended. I have no cause to consider Ms Dove's evidence was untruthful.

31. Mr Brady held the appeal meeting although it was considered in the light of the Claimant's written submissions. It is clear from the evidence before me that

Mr Brady considered the Claimant's appeal in great detail and asked further questions of her and also of Mr Turton who was the dismissing officer. In relation to the Claimant's alleged attendance at the 2020 networking meeting, he said he had made his decision that supported Mr Turton's finding that the Claimant had attended the meeting based on the evidence before him and then gave a considered decision. He was clear in his evidence that he considered the breach of GDPR to be very serious. When questioned about this, he said the allegation was that the Claimant had failed to take any action about the breach when she was made aware of it. Whilst the Claimant had said she had not read the attachments which contains the sensitive personal information, it was his assumption that she had read them. The sensitivity of the information disclosed to a third party was amplified because of the sensitive information about clients of the Respondent which it held. This could cause serious reputational damage to the Respondent. Whilst he accepted that sharing the details of the lottery application was meant to be a collaboration with another agency, the disclosure of personal information was serious when the staff members concerned had not consented to the information being disclosed. He confirmed that no staff members complained about this breach. Mr Brady said he had not considered it appropriate for him to make a call to the organisers of the 2020 networking event and he based his decision on the evidence that had been supplied previously by others. I considered Mr Brady's evidence to be truthfully given.

32. Mr Turton was the dismissing officer. Considering the allegations regarding the Respondent's debit card, he said he had no problem with finding it had no merit. In relation to the GDPR breach, he said a draft email of the Claimant was found in her drafts folder which he believed was in the bundle. In fact, there was no such draft in the bundle and he could not explain why. He said it was his responsibility to look for anything that was relevant in making his decision. He said he believed that the data breach was reported to the ICO then said he might be wrong about that. He had not seen the GDPR breach log. Mr Turton confirmed that the lottery funding application and staff names and details were sent to a third party by Mr Bernacki and he felt it was a reasonable assumption that the Claimant had opened the email and the attachment because of the draft email she had started to type. It was therefore a reasonable assumption that the Claimant knew what was in the email especially since his understanding was that she had been involved in the creation of the document. Regarding the Claimant's alleged attendance at the networking meeting, he said he did not think there was any doubt the Claimant had attended whilst she was suspended. In his view, he made a reasonable assumption based on conversations that had taken place previously. He personally spoke to Ms White who had claimed to have met the Claimant there and he tried to make contact with the organiser of the meeting on several occasions without success. He then said that Ms McGachan had spoken to the organiser but he gave no details of what had been said. In his witness statement (paragraph 10), he said he thought the emails generated between Ms White and the Claimant, which did not confirm her attendance, appeared engineered (456-460) but does not say why or how.

33. Of his conversation with Ms White, his evidence was that she had no recollection of meeting the Claimant and then proceeded to make a sales pitch to sell space in her organisation's magazine. Nonetheless, Mr Turton said he maintained a reasonable belief on the evidence presented to him that the Claimant had attended the meeting. He said he did whatever he could to find as

much evidence as possible and had delayed giving his outcome in order to investigate. He denied colluding with the trustees and said his investigation was completely independent. He had volunteered to chair the disciplinary meeting as he was new to the board of trustees, had no emotional attachment to the case and nothing to gain from it. Although I have no concerns about Mr Turton's truthfulness, I gained the impression that his evidence in relation to his conclusions around the Claimant's attendance at the office, the data breach and her attendance at the networking meeting did not totally support his conclusions or that he acted reasonably in reaching them. By way of example, in relation to holidays, he simply reached the conclusion that the Claimant had been absent from the office on holiday or otherwise because the Respondent's policies had not been followed. The Claimant had been clear that not all of her absences had been recorded and that, for the most part, she had been working on the days on which it was alleged she had not attended work. In relation to the data breach, he seemed to base his conclusion that the Claimant was in some way culpable on a draft email which was never sent and not produced in evidence. Finally, his conclusion that the Claimant attended the 2020 networking meeting was reached seemingly when Ms White, who claimed to have met the Claimant there, did not actually confirm she had done so and he did not actually speak to the organisers to ask them to confirm she had attended.

34. Ms Ford is a long-standing friend of the Claimant. She was essentially a character witness and her evidence was totally supportive of the Claimant but based entirely on what the Claimant had told her. Accordingly, I treat it as hearsay evidence and give no weight to it.

35. The Claimant's evidence was not always given in a straightforward manner. On numerous occasions she began answering questions put to her, not with a direct answer, but with a question of her own. There was also a tendency for her to concentrate on her own achievements rather than to deal with the issues before the tribunal. It was also evident from some questions put to her that there was a lack of detail and accuracy in her case. For example her witness statement said she was contracted to work 35 hours per week with 35 days holiday each year inclusive bank holidays (as per her schedule of loss). Her contract of employment at page 40 confirms her contractual hours to be 37 per week with 34 days holiday. She said the reference to 35 days holiday was her mistake. She claims to be carrying over three days holiday from the previous year which was sanctioned by the trustees in a meeting but there was no evidence of this in the bundle. She also accepted that the Respondent's handbook (page 62) required her to have holidays approved by one of the trustees, Ms Bouch, but during the investigation process she said she approved her own holidays (page 134).

36. It was also very clear from the Claimant's evidence that she guarded her position jealously and did not appreciate the trustees attempting to get to know staff members better and to understand the nature of their roles and how they were carried out. Ms Dove wrote to the Claimant on 2 August 2019 setting out proposals to do this and the Claimant's handwritten notes on that email (page 68) and her response on 6 August 2019 (page 70) show her strong opposition to the proposals. Her suggestion that some lines were being blurred ignores the fact that trustees of charities have extremely responsible positions and are accountable for their actions and I consider it eminently reasonable for them to want to understand the workings of the charity and its staff and quite

unreasonable of the Claimant to oppose this. Her allegation that the actions of Ms Dove in particular constitute a breach of the Claimant's employment rights has no basis in law. Further, the allegation that this blurring of roles was due to Ms Dove failing to refer Ms McGachan to the Respondent's grievance procedure is without merit given that the procedure suggests attempting to resolve matters informally first, which is what Ms Dove encouraged Ms McGachan to do.

37. Although this was denied in her oral evidence, the Claimant clearly chastised Ms Fairbrother for attending the office without letting the Claimant know first (page 130). I did not accept the Claimant's explanation that she was merely asking to be notified if trustees intended to come into the office as this is not borne out by asking them to state the purpose of their visit before making it. I also had doubts about the Claimant's evidence regarding the Respondent's debit card but do not consider it further as it was not a reason for her dismissal.

38. I also treat the Claimant's evidence regarding the ACEVO membership with some circumspection. She refers to page 479 of the bundle which merely makes reference to mediation services and says this shows that the membership she took out was a benefit for the whole organisation. Firstly, it is quite apparent that page 479 shows no such thing and, secondly, Mr Farrell's evidence was that ACEVO is an organisation which exists purely to assist chief executives in the voluntary sector in disputes with their employers or trustees.

39. I further have concerns regarding the Claimant's evidence as to why she did not respond, having asked for more time in which to do so, to the questions raised by Ms Laing who was investigating the allegations made against her. She said in answer to my question that she did not reply because she had no access to the Respondent's computer system, could not answer all of the questions in the allotted time and then decided not to respond until she obtained access to the information she needed. I would have thought that a reasonable response would have been to tell Ms Laing that this was the reason she was not replying. In response to earlier questions on this the Claimant initially said she did eventually respond but did not know where her response was in the bundle, then said she was not sure and finally said she did not respond.

40. The Claimant accepted that her diary shows she had booked to attend the 2020 networking event but then refers to page 46 of the witness bundle as evidence that would have meant she was not dismissed if it had been before Mr Turton at her disciplinary hearing. This does, of course, ignore the GDPR breach for which she was held responsible. She did not consider Mr Turton's reasoning was sufficiently strong to warrant dismissing a Director of Service.

41. In relation to the GDPR breach, the Claimant said she was aware of the contents of the initial lottery funding application which was forwarded to a third party and that it contained sensitive information. As the Respondent's GDPR champion she said she took her responsibility seriously. She did not know that staff information was attached to Mr Bernacki's email to the third party and, had she known, she would have acted upon it. She said Mr Bernacki should have known not to include it in the email.

42. Mr Farrell accompanied the Claimant to her grievance hearing and had his own opinion that the allegations against her were minor. Apart from that, his evidence was relevant in that he confirmed he was appointed by ACEVO in

cases where Chief Executives in the voluntary sector were in conflict with their board of trustees. This was in direct conflict with the Claimant's evidence that membership of ACEVO was for the benefit of the Respondent as a whole.

43. Mr Bernacki seemed somewhat evasive in giving some of his evidence. He was slow to acknowledge that the trustees of charities have a responsibility as regards how and where funds are spent. Further, he seemed reluctant to confirm he actually sent the lottery application documents to the third party and then said, "It would have been me maybe as I led on the lottery application. This is my assumption if either of us did agree to send it". This was quite remarkable prevarication given that his email actually sending it was in the bundle. He then said that he did not think sending the information had the potential to cause damage but it was remiss of him not to redact the personal information of staff.

44. Mr McCallum's evidence was largely a character reference on behalf of the Claimant although he did confirm that she had attended and presented at an event on 7 November 2018 which is one of the dates the Claimant was initially alleged to have not been in work when she should have been.

The Facts

51. In relation to the issues, I find the following facts:

(i) The reason for the Claimant's dismissal was breaching GDPR, breaching the Respondent's holiday and absence policies and attending a networking event when suspended. This was the potentially fair reason of conduct. On appeal, it was found there was insufficient evidence of breaching the holiday and absence procedures.

(ii) Due to the Claimant's failure to engage in the investigation into her alleged misconduct, the Respondent genuinely believed the Claimant had committed misconduct.

(iii) There were initially reasonable grounds for that belief but the Respondent did not take the opportunity in the disciplinary or appeal hearings to properly investigate the Claimant's version of events. However, the Claimant did give a detailed explanation in respect of the allegations in the disciplinary hearing. Mr Turton could have made more detailed enquiries himself in relation to the alleged attendance at the networking event and his finding that the correspondence given to him by the Claimant appeared "engineered" was not explained at all. He seemed to have little grasp of the Respondent's data control policy and had clearly taken no steps to ascertain whether the Respondent had reported the alleged breach to the ICO. Mr Brady confirmed the breach was reported to the ICO but no evidence of this was produced and I find it did not happen.

(iv) The appeal process involved a very detailed investigation by Mr Brady. He asked many questions by email, as requested by the Claimant, and she gave detailed answers. However, Mr Brady placed heavy reliance on Mr Turton's findings which, particularly in relation to the networking event, had not been adequately investigated. The detail of Mr Brady's investigation led to the allegation of breaching the holiday and absence policy being overturned. He did not, however, consider the working environment in relation to sensitive personal data and the fact that the Claimant had trained the staff in GDPR matters. He did

not enquire as to whether it was feasible for the Claimant to check all emails for breaches and there seems to have been no investigation as to whether the Claimant actually opened the attachments to Mr Bernacki's email.

(v) The reason for dismissal was not a substantial reason capable of justifying dismissal, namely a breakdown in trust and confidence.

(vi) The Claimant's notice period was one month for which she was not paid.

(vii) The Claimant was not guilty of gross misconduct.

(viii) There is no reliable evidence before me that the Claimant is owed accrued but unpaid holiday pay or that she owes the Respondent any money in respect of salary overpayment.

Submissions

52. The parties both helpfully provided written submissions. I briefly summarise them here but fully considered them in reaching my conclusions.

53. The Claimant submitted that the allegations against her were born out of hostility towards her, particularly that of Ms McGachan. In relation to the alleged attendance at the 2020 networking event, she had produced enough evidence to show she had not attended and this was not reasonably investigated by the Respondent. In relation to the GDPR breach, the Claimant said she had only been copied in by Mr Bernacki for information and not for action. She did not read the attachments. It was not a reasonable assumption for the Respondent to make that she must have read the confidential information because she received it.

54. For the Respondent, Mr Malik argued that the Burchell test was satisfied. The decision to summarily dismiss was a reasonable response in the light of the GDPR breach even though there had been no consequences for the Respondent. The investigation initiated on advice by Ms Dove had been a reasonable one, the disciplinary process was fair and reasonable and the decision to dismiss was within the range of reasonable responses.

Conclusions

55. The starting point in this discussion is to consider the Burchell test. I say at the outset that I find no evidence that the procedure followed by the Respondent was in any way flawed.

56. The issues in this case arose after a conversation between Ms McGlachan and Ms Dove. I find Ms Dove's evidence that she at first considered this to be office "tittle tattle" to be an accurate description. She rightly advised Ms McGachan to speak to the Claimant informally. Ms McGachan reported back that she had done so but the Claimant did not change anything within the seven days Ms McGachan says she gave her. Unfortunately, Ms McGachan was not called as a witness. The Claimant denied that she was given a week to do whatever it was Ms McGachan asked her to do. I prefer the Claimant's evidence as, in the absence of Ms McGachan giving evidence and being cross-examined, the Claimant's evidence stands firm. I also have some difficulty in accepting that someone at Ms McGachan's level could give an ultimatum of this kind to her

Director of Service.

57. Once the investigation began, other comments were made about the Claimant, some of them very positive. Other matters began to emerge as to her attendance at the Respondent's offices and holidays. Her relationship with Mr Bernacki was also cited as a cause for concern. The Claimant was criticised for having her office door closed a lot but, interestingly, there was no evidence that this meant she was not working.

58. After receiving advice from Peninsula, an investigation hearing was arranged through Peninsula's subsidiary, Face2Face. I do consider that the Claimant's attitude to the questions put to her was unhelpful. I have some sympathy in that she was (also unhelpfully) denied access to the Respondent's systems to enable her to answer some of the questions put to her by Ms Laing but she deliberately failed to answer them even when given an extension of time in which to do so. Mr Malik argued that this refusal to cooperate means that the Claimant loses any right to argue under Burchell limbs 1 and 3. He gives no authority for that submission and I disagree with it. In order, for example, for the Claimant's refusal to cooperate being considered to be contributory conduct necessitating a consideration of a reduction in compensation, it must be culpable or blameworthy (**Nelson v BBC (No.2) 1980 ICR 110, CA**). Indeed the scope for finding that a failure to engage in the disciplinary process leads to a finding of contributory conduct is limited. In this case, I do not find that the Claimant caused or contributed to her dismissal by the failure to engage in Ms Laing's investigation as she engaged fully in the disciplinary and appeal hearings (**Sidhu v Superdrug Stores plc EAT 0244/06**).

59. I have already considered Mr Turton's lack of detailed investigation of the Claimant's attendance at the networking event. He seems to have relied on information given to him by others as opposed to making his own enquiries. It seems to me that he gave up trying to contact the organisers of the networking event and his evidence of how many times he tried to contact them was vague. He spoke to Ms White who said she did not recall meeting the Claimant but he decided she attended anyway. He also did not explain how he found written evidence produced by the Claimant to be engineered. Further, whilst criticising the Claimant for an alleged breach of GDPR, he could not say whether the breach, when discovered, was reported to the ICO. I am also confused as to how the Claimant can be criticised for failing to report the breach when she was only notified of it during her suspension with no access to the Respondent's systems. I also take issue with Mr Turton's conclusion that the Claimant had opened the attachments to the email because he assumed she had. His reference to a draft email from the Claimant was vague and confusing and no such draft was produced to me. In my view, this takes this case outside of the decision in **Adesokan** which Mr Malik relies on.

60. I have given due consideration to Mr Brady's detailed investigation of the allegations against the Claimant. This is evidenced by the fact that he overturned Mr Turton's finding in relation to holidays and absences, although I note he remained concerned at the lack of record keeping (paragraph 8 of his witness statement) and did not say whether this influenced his decision at all. He notes that the Claimant was the GDPR champion of the Respondent. He uses this to conclude she has a relaxed attitude to data protection and explains why. But where he departs from the route of a reasonable employer is that he does not

investigate the training given by the Claimant and to whom; nor does he interview Mr Bernacki, the author of the email which caused the breach. Mr Bernacki was trained in GDPR. There was no evidence that he was not. He should have known what he could and could not share with third parties. Further, as with Mr Turton, there was no attempt to ascertain whether the Claimant actually opened the offending attachments. I bear in mind the importance of data protection in the Respondent's work. I would expect that a significant percentage of its email traffic contains sensitive personal information in relation to its clients. The Claimant trained the staff and there must be a significant element of trust in those staff members because the Claimant cannot check every email sent from the system. Mr Brady concludes the Claimant's actions risked financial and reputational damage to the Respondent. However, he holds back from alleging that the Claimant failed to take action when the breach was discovered as Mr Turton did. Further, he says the Respondent actually reported the breach to the ICO when it was discovered but there is no evidence of this. I do not consider that a reasonable employer would criticise an employee for failing to take appropriate action in relation to GDPR when it failed itself to take such action by reporting the matter to the ICO. I consider that a reasonable employer would have taken into account the fact that the Claimant was entitled to expect Mr Bernacki, as a Director himself, would have known that personal and sensitive data should not have been sent to a third party by email and further that the Claimant may not have known what was contained within the attachments.

62. Neither Mr Turton nor Mr Brady considered any alternative explanation for the Claimant's alleged attendance at the networking meeting. Mr Turton spoke to Ms White who allegedly claimed to have met the Claimant there. He spoke to her and she was evasive before trying to sell space in her organisation's magazine. It is accepted that the Claimant was booked in to the event. There is no evidence that the fee payable for breakfast was paid and no invoice was sent to the Respondent. A reasonable employer might well consider that it is usual for these events to have a list of attendees which might be followed up by an eager salesperson. Mr Turton reaches conclusions without proper explanation and Mr Brady just followed his line.

63. I have considered the Claimant's meeting with Ms Dove on 9 September 2019 when she denied knowledge of the Respondent's bank card. This would have been of relevance except that Mr Turton accepted her explanation and did not take it into account in deciding to dismiss the Claimant.

64. Accordingly, I do not think that the decision to summarily dismiss fell within the range of responses of a reasonable employer; nor do I consider that the Claimant was guilty of gross misconduct. In relation to holiday pay, the figures provided are difficult to understand and inconsistent and that claim fails. Whilst noted as an issue in this case, there was no evidence and no submission in relation to the breakdown in trust and confidence which was advanced by the Respondent as an alternative defence. A remedy hearing will now be listed and orders have been made in preparation for that hearing.

65. There are two further matters of note in this case. The Claimant was assisted by a McKenzie friend throughout the hearing. I allowed her time to consult with him several times during the hearing. When it came to her cross-examination, however, I advised her that there could be no consultation with him until her cross-examination had been concluded. It came as something of a

shock, therefore, when Mr Malik advised me that the McKenzie friend had passed a note to the Claimant while she was being cross-examined and while I was attending to my own note taking. I was clear in my verbal communication to the McKenzie friend just how poorly I viewed his conduct. I ensured the note was passed to me and it was advice to the Claimant that the line of questioning being pursued at the time by Mr Malik was irrelevant and the Claimant should make this clear. This conduct was, frankly, outrageous. The McKenzie friend also asked at the conclusion of the evidence whether he could give expert IT evidence notwithstanding the fact that the oral evidence was finished, he was not on the list of witnesses and there was no witness statement from him.

66. At the commencement of the hearing, Mr Malik made an application under rule 50. It was not clear to me exactly what the application was for or why it was necessary. I understood it was to prevent a witness being identified but there was no indication of why that was desirable or what consequences would arise if the application was refused. I also considered it was not actually relevant to the issues before me and there was no need to for any identities and relationships to be referred to during the hearing.

Employment Judge Butler

Date 22 March 2021