



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Niksic
Respondent (1): Town and Country Financial Services (UK) Ltd
Respondent (2): Town and Country Insurance Brokers Ltd

Heard: By CVP On: 4, 5 and 6 January 2021
Deliberations: 11 January 2021

Before: Employment Judge T R Smith

Representation

Claimant: In person
Respondent: Mr Price (counsel)

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V-video. It was not practicable to hold a face-to-face hearing because of the Covid19 pandemic.

RESERVED JUDGMENT

1. The First Respondent is dismissed from the proceedings.
2. The Claimant's complaint of an unlawful deduction from wages is not well founded and is dismissed.
3. The Claimant's complaint of unfair dismissal is not well founded and is dismissed.

REASONS

Preliminary matter

1. It became clear there was a dispute as to who was the employer of the Claimant. The Claimant contended it was the First Respondent, Town and Country Financial Services (UK) Ltd ("Town and Country Financial Services") and not Town & Country Insurance Brokers Ltd ("Town & Country").

2. Having discussed matters with both representatives, by consent, it was agreed that Town & Country would be added as a Second Respondent to the proceedings for the oral reasons given at the time.

The Evidence.

3. The Tribunal had before it a bundle of documents totalling 782 pages marked R1. This had been supplemented, prior to the hearing by a number of documents which bore the principal page number of the master bundle but were delineated by letters such as (a) (b) etc. The Tribunal marked this bundle R2. During the hearing yet further documents were produced which the Tribunal marked R3 and R4 respectively.
4. A reference to a page number is a reference to a page in R1 unless otherwise indicated.
5. The Claimant gave oral evidence and was cross examined. She also relied upon evidence from Ms Lauren Ozdemir. Ms Ozdemir was not available to give evidence when her evidence was called on. By consent the parties agreed that her statement, limited to her evidence as regards compassionate leave, was agreed. The Tribunal therefore only had regard to that aspect of her evidence
6. The Respondent called evidence from Ms Faye Mitchell, Ms Jane Iveson, Ms Emma Harvey, Mr John Whitehead and Mr Anthony Dickinson, all of whom were cross-examined.

The Agreed Issues.

7. At the commencement of the hearing the Tribunal agreed with the parties the issues it had to determine, which are set out below.
8. Who was the Claimant's employer?
9. What was the salary properly payable to the Claimant?
10. Did the Respondent make an unlawful deduction from the Claimant's salary?
11. If so, was the Claimant's complaint out of time.
12. If so, was it not reasonably practicable for the complaint to be presented within three months and was it then presented within such further period as the Tribunal considered reasonable.
13. What was the reason for the Claimant's dismissal? The Respondent asserted that it was a reason relating to conduct which is a potentially fair reason under section 98 (2) of the Employment Rights Act 1996 ("ERA 96"). It had to prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.
14. Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds?
15. Did the Respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissal having regard to the factors set out in section 98 (4) ERA96?
16. Was the decision to dismiss a fair sanction, that is, was it within a reasonable range of responses of a reasonable employer?
17. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This required the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged? ("the Contribution issue")

18. Did the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event, and/or to what extent and when? ("the Polkey issue")
19. The parties agreed due to the shortness of time the Tribunal would simply address the issue of liability, contribution and Polkey and, if necessary, would then convene a hearing to address the issue of remedy

Submissions

20. The Claimant made brief submissions of fact. The Tribunal has addressed the principal matters she has raised in its judgement where relevant to the above issues.
21. Mr Price lodged a written submission which whilst referring to a number of legal cases did not raise any specific unusual legal issues which just be necessary for the Tribunal to address in its judgement. The written submission as did his brief oral submission concentrated on findings of fact.
22. The Tribunal means no disrespect to either party by not repeating those submissions. The Tribunal had full regard to the submissions of both parties.

Findings of fact.

23. The Tribunal has not determined each and every factual dispute, which were numerous, only those disputed facts necessary for it to address the agreed issues.

Town and Country.

24. Town and Country (and its associated company Town and Country Financial Services) is a very small employer. At the material time there were a total of seven employees and two self-employed consultants. It sourced external independent HR advice as and when required.
25. Mr Dickinson is the principal shareholder in both Town & Country and Town & Country Financial Services. Mr Whitehead is a minority shareholder.

Who was the Claimant's employer?

The facts

26. Looking at the undisputed contractual documentation (the only document disputed was a contract apparently issued on 15 November 2018) the Claimant's employment originally began with Town and Country Financial Services.
27. The Tribunal found that the Claimant's employment then transferred from Town and Country Financial Services to Town & Country under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006, effective from 01 January 2016 (212). The Claimant was advised in writing of the change. The Tribunal was satisfied that well prior to this date she and other staff had been notified of the proposed transfer.
28. Whilst the Tribunal noted that the Claimant's payslips, post transfer, referred to "Town and Country Financial Services" as did her P45 it was satisfied that was an error made by external accountants. Similarly, there was an occasional document in the voluminous bundles which implied the Claimant was employed by Town & Country Financial Services, for example the heading in a report from Mrs Iverson, but the Tribunal regarded this as an honest mistake, especially given Mrs Iverson was an independent HR consultant who had no detailed knowledge of the business.
29. The Tribunal noted that prior to dismissal the majority of the Claimant's work was within insurance as opposed to financial services which it regarded as a factor that pointed towards the Claimant being employed by Town and Country.

Discussion.

30. In seeking to resolve the dispute the Tribunal was guided by the principles enunciated by the Employment Appeal Tribunal in **Clark -v- HWR UKEAT/18/20**.
31. Firstly, where there was both documentary and oral evidence the identity was a question of law and fact.
32. Secondly, the starting point was any written agreement between the parties, subject to verifying if that truly reflected the intention of the parties.
33. Thirdly, if the documentation didn't show the true employer the Tribunal had to consider whether there had been a change, how it happened and to look at how the parties had acted during the relationship.
34. Applying the above principles, the Tribunal considered that the contractual documentation was clear as to the identity of the employer of the Claimant. The identity of the Claimants employer had never been disputed prior to the commencement of these proceedings and the Tribunal was satisfied the documentation reflected the intentions of the parties. Whilst the Claimant could point to evidence which appeared to contradict the contractual documentation, examples of which have been given above, standing back and looking at all the evidence in the round, and bearing in mind the explanations given, the Tribunal considered the weight of the evidence pointed to the fact that the Claimant was an employee of Town & Country, the Second Respondent.
35. In the circumstances the Tribunal dismissed Town and Country Financial Services, the First Respondent from the proceedings.

The wage properly payable to the Claimant

The facts

36. At the heart of the Claimant's complaint of unlawful deduction from wages was firstly when was she entitled to a pay rise, and secondly whether the pay rise was to a guaranteed salary of £30,000 per annum or to £25,000 per annum plus a non-contractual bonus limited to £5000 per annum.
37. There was also a short supplemental point as regards compassionate leave.
38. Before examining the evidence in detail, it is appropriate to record that Town & Country had no formal bonus agreement with non-directors. The Tribunal found that Mr Dickinson would look at the performance of the group in summer and at the end of the calendar year. If performance was reasonable a bonus was awarded to staff which was wholly within his discretion. It was not contractual and there was no guarantee of payment. The Claimant had in the three years prior to the termination of her employment received £500 on four or five occasions. She was not told how this sum was calculated or what targets she personally had to achieve in order to secure a bonus.
39. As the Tribunal has already noted there was an evidential dispute between the parties as to whether the Claimant had signed a contract issued on 15 November 2018 (242/253) which contained a deduction from wages clause.
40. It is not necessary for the Tribunal to seek to resolve that dispute because in a previous contract which the Claimant accepted, she had signed, on or about 04 August 2015 (220), contained an agreement for deduction from wages. In summary it provided that if the Claimant was for any reason indebted to the employer at termination, the Claimant agreed to the employer making a deduction to discharge that liability from salary or any other monies payable. The right to make deductions included but was

not limited to an overpayment or an advancement of wages, bonus, commission or expenses. Thus, there was a written agreement between Town & Country and the Claimant in force before any of the deductions took place.

41. That clause was repeated in similar terms in the disputed contract.
42. The Tribunal is satisfied that on 10 September 2018 a discussion took place between the Claimant and Mr Dickinson at which the Claimant was offered the role of Associate Director with a basic salary of £25,000 together with a none-contractual bonus of up to £5000, subject to achieving targets. The targets were never specified at the meeting and were to be discussed later if the offer was accepted. The offer was conditional upon the Claimant completing her Chartered Institute insurance examination (“CII”) and recruiting and training a suitable replacement. The Tribunal reached the conclusion that this was the basis of the offer having regard to an email of the same date sent by Mr Dickinson to the Claimant (228). The key extracts of the email read: - *“just to confirm that should you wish to consider the role [associate director] you will need to become qualified and find, train and install your replacement first”*. Pausing at this juncture the Tribunal is satisfied the reference to the word *“qualified”* referred to the CII. The email went on to record, in relation to remuneration: - *“... you would be on £25,000 basic salary with a non-contractual uplift, covered by a side agreement of £5000 per year should you achieve your agreed targets, which we can discuss and agree at a later date”*.
43. This was clearly a contemporaneous document, which the Claimant agreed she had received, and to which the Tribunal gave considerable weight, as it considered it to be the most reliable evidence available to it. Significantly there was no documentation before the Tribunal to show that on receipt the Claimant had challenged the contents of the email.
44. There was then a delay before the Claimant accepted the role in January 2019 (236/237). It was at about this time, before the Claimant had recruited a suitable replacement or passed her CII examination, that Town and Country held the Claimant out as an Associate Director, as evidenced by her business cards and change on her email footer. She remained on her existing salary. The Tribunal did not regard this as being evidence that the two preconditions set out in the email of Mr Dickinson of 10 September 2018 had been varied. Even on the Claimant’s own case she did not contend she was entitled to a salary increase from this date but was to contend it was from March 2019. This supports the Tribunal’s conclusion that there was no agreement to dispense with the two preconditions agreed with Mr Dickinson in September 2018 and the Tribunal’s judgement is further fortified by the fact that the Claimant then went on to recruit a replacement and to complete her CII examinations. Indeed, the Tribunal noted that in a supervision document dated 20 February 2019 (259), which the Claimant did not dispute, in the section headed “training” it was recorded that the Claimant was to apply for the CII exam. This is consistent with the fact that one of the preconditions for the Claimant obtaining the salary increase was the successful completion of the CII exam. It was not, as the Claimant suggested, mere happenstance that she chose to undertake this exam.
45. From March 2019 the Claimant was actively involved in recruiting a replacement to her existing role.
46. On 01 April 2019 an email was sent by the Claimant to Town & Country setting out what she needed to obtain her CII. The Claimant sought financial assistance in paying for various examinations which would lead to her CII qualification. The Claimant entered into various training cost agreements to which approval was granted. The Claimant did not seek to argue that under the wording of those agreements, in the

circumstances in which her employment ended, Town & Country were not entitled to make deductions from any final payments due to her. Again, the fact that Town and Country were prepared to meet the upfront costs of obtaining the CII exam (repayment of which reduced depending upon the length of time following completion that the Claimant remained with Town & Country) was further evidence that it was a precondition of obtaining a salary increase that the qualification was obtained.

47. On 13 May 2019 Miss Faye Mitchell was recruited to replace the Claimant and there then followed a period of approximately three months training undertaken principally by the Claimant.
48. An email exchange took place on 22 May 2019 between the Claimant and Mr Dickinson. The Claimant said “... *I know I haven't fully started the new role however I think I have made some good progress in the last couple of weeks and just wondered when my salary will be increased...*” Mr Dickinson responded, “*we'll talk about it at work however last time we spoke we said three months after they had started...*” The Claimant responded “*that's fine. I just want to know so that we can plan our finances*”. In the Tribunal's judgement this exchange pointed away from the Claimant's subsequent argument that the agreement was she would be paid from zero 1 March 2019.
49. At a meeting held on 04 September 2019 between Mr Dickinson, Mr Whitehead and the Claimant the Claimant was assured that once she satisfied the preconditions for her new role as Associate Director, she would receive the same salary and non-contractual uplift as Mr Whitehead (299). The Tribunal is satisfied, having regard to the documentation in bundle R4, that Mr Whitehead received a basic salary of £25,000 plus a noncontractual bonus of £5000 pa.
50. On or about 05 September 2019 the Claimant informed Mr Whitehead she obtained her CII.
51. It follows that by 05 September 2019 the Claimant had met the preconditions for her promotion to Associate Director. Whilst the Tribunal accepted that the Claimant undertook many of the duties commensurate with those undertaken by an Associate Director well before 05 September 2019 that, with respect, is not the same as what was properly due by means of wages to the Claimant. What was properly due depended upon the agreement reached between the Claimant and Town & Country which was set out in the email of 10 September 2018.
52. The Tribunal was satisfied, looking at all the evidence, including the email of 10 September 2018 and the discussion on 04 September 2019 that the Claimant's salary as associate director was to be £25,000 plus a noncontractual bonus of £5000. It was not a guarantee £30,000 as the Claimant contended. In the Tribunal's judgement it was unlikely that Mr Dickinson would place the Claimant on a higher guaranteed basic salary than Mr Whitehead, a long serving director.
53. In the autumn of 2019, the Claimant's parents were in some financial difficulties. Town & Country had in the past made various, not inconsiderable, advances to the Claimant, which she was regularly repaying from her salary. An agreement was reached that, to increase the Claimant's net income, so she could more fully support her parents, to make an advance of unearned bonus of £2326.98, £1500 net from her role as associate director. This would then be repaid from bonuses earned. Just pausing at this juncture, the Tribunal noted that Mr Dickinson clearly had trust in the Claimant's abilities given the loans that Town & Country had made to her in the past, regarded her as a valued employee, and that she would earn bonus. This was relevant in relation to the subsequent disciplinary proceedings in which Mr Dickinson was involved in, which the Claimant described as a witch hunt.

54. No formal written agreement recorded the advance of bonus although it was not disputed that the transaction took place and it was on the basis of the repayment arrangement outlined above.
55. As will be seen, at a meeting on 06 December 2019 the Claimant was told that her salary increase would be backdated to November 2019. The Claimant became upset and the Tribunal found it is more likely this was what upset the Claimant rather than an argument as regards non-payment of compassionate leave, which in any event Town & Country offered to pay, to resolve matters. The Claimant indicated at that meeting that she no longer wished to be considered as an Associate Director. It is unsurprising the Claimant was upset, given she had satisfied the preconditions placed upon her by Mr Dickinson at 06 September 2019.
56. The Claimant was subsequently to raise a grievance following this meeting, further details of which follow later in the judgement.
57. It is sufficient to record that following a grievance process conducted externally by Ms Iverson and Ms Harvey, Town and Country agreed to backdate the Claimant's promotion to 01 September 2019. The salary been set at £25,000 plus the non-contractual bonus subject to performance of £5000 per annum. She was also awarded two extra days compassionate leave. Payment of the arrears was notionally made at termination.
58. At this point the Tribunal should digress slightly and deal with the point of compassionate leave. The Claimant's grandmother sadly died. The Claimant asked for a day's compassionate leave which was granted and paid but was then absent for a further two days. She did not request prior permission for her compassionate leave to be extended. The Town & Country Handbook made it clear that there was no obligation to pay compassionate leave (109). It indicated that compassionate leave was at the discretion of Town & Country. The policy however did indicate cases where such discretion might be exercised and gave a list of individuals regarded as dependents. A grandparent did not fall within that category. In the past discretion had been exercised in favour of at least one other employee (Ms Ozdemir) who had a relative that did not fall within a category mentioned in the staff handbook. Mr Dickinson agreed at the meeting on 06 December 2019 that he was prepared to pay the extra two days compassionate leave and that sum was paid following the outcome of the Claimant's formal grievance. It followed therefore that even though the sum was not properly payable, it was notionally paid. The real issue was whether that sum could be used, with salary arrears to offset sums owed to Town and Country.
59. The Claimant did not financially benefit from the salary and compassionate leave allowance because of deductions made by Town & Country. The Tribunal examined the nature of those deductions.
60. The mathematics were that the Claimant's salary increased on 01 September 2019 from £23000 to £25,000. She was dismissed on 24 January 2020 and Town & Country rounded up the figures so the Claimant received £833.30 gross arrears of salary (£166.66 x five months).
61. She also received £353.84 representing two days unpaid compassionate leave.
62. However, deductions were made in respect of the reducing balances on two training agreements in the sums of £105 and £173.54. These deductions were not challenged by the Claimant
63. The final deduction was in the sum of £2326.98 representing the advance in the Claimant's November salary used to pay off an undisputed loan that the Claimant owed Town & Country.

64. It was this deduction to which the Claimant challenged.
65. The net effect was there was a deficit owed to Town & Country £1418.38 which Town & Country agreed to write off.
66. The Tribunal having established what was properly payable to the Claimant then turned to the lawfulness or otherwise of the deduction of £2326.98.

Discussion.

67. Sections 13 and 14 of the ERA 96 makes it clear that an employer shall not make a deduction from wages from an employee unless any such deduction or deductions have been made pursuant to a statutory provision, pursuant to the provisions of the employee's contract, the employee has previously signified agreement in writing or the deductions are exempt deductions.
68. A non-payment constitutes a deduction in law, see **Delaney -v- Staples 1991 ICR 331.**
69. Wages are widely defined and include a bonus or commission even if non-contractual, see **Kent Management Services Ltd -v-Butterfield 1992 ICR 272**
70. Section 23 ERA 96 deals with the issue of the time limits for presentation of a claim for unlawful deduction from wages. Put succinctly, subject to any extension under the ACAS early conciliation procedure, the complaint must be presented before the end of three months beginning with the date of the last deduction. Time can only be extended if the Tribunal is satisfied it was not reasonably practicable for the Claimant to present a claim within the relevant period, and if she so established that fact, that it was presented within such further as the Tribunal considered reasonable.
71. The Tribunal found the wages properly payable to the Claimant were £25,000 plus noncontractual bonus from 04 September 2019, that being the first date that she fully satisfied the conditions of the offer. The Claimant was not entitled have her salary backdated to 01 March 2019 as she did not satisfy the contractual requirements of the offer. It follows therefore that there can be no unlawful deduction from 01 March to 04 September 2019 as the sums claimed by the Claimant were not properly payable.
72. The Tribunal found that the two days compassionate leave was not money properly payable to the Claimant.
73. In the Tribunal's judgement there was not an unlawful deduction from wages at termination.
74. The Tribunal reached this judgement for two reasons.
75. Firstly, under the specific deduction clause found in the contract issued 15 November 2018 covered the sums deducted by Town & Country. It follows that there was, in the circumstances no breach of section 13 ERA 1996 as Town & Country were entitled to rely upon a relevant provision as defined in section 13 (2) ERA 96
76. Secondly even if the Tribunal was wrong on the above point section 27 ERA96 defines wages to include any bonus or commission. Town and Country made an overpayment of wages, that is a payment bonus or commission that had not been earned and therefore any such deduction would be an excepted deduction under section 14 ERA 96.
77. If the Tribunal is wrong on the above points then the Tribunal found that the Claimant failed to present her claim within time. The Claimant presented her claim on 20 May 2020. The ACAS early notification occurred on 23 May 2020 and the period ended on 21 April 2020. The last of the series of deductions was when the Claimant walked away from her role as associate director on 06 December 2019 and therefore time would run from that date, **Taylor Plan Services Ltd v Jackson and others [1996] IRLR 184.**

78. There is no evidence before the Tribunal why it would not have been reasonably practicable for the Claimant to have presented the claim at an earlier date. On this ground alone, this complaint would have justified dismissal.

Events leading to the Claimant's dismissal.

79. Given that the Claimant considered that the real reason she was dismissed was for raising a grievance on 06 December 2019 it was necessary for the Tribunal, although it is already touched upon the same, to address the grievance in more detail.

80. Before doing so, however, it is important to make brief reference to a number of Town & Country's policies and procedures.

Policies and procedures.

81. Town & Country has a comprehensive staff handbook.

82. On 05 April 2019 the Claimant received an updated copy of the Town & Country staff handbook. The handbook included sections on disciplinary, grievance and data protection. The data protection section (156 to 171) was comprehensive, explaining in some detail what was personal data and how data should or should not be processed. The section made it clear that a breach of the policy could result in disciplinary action.

83. The handbook gave examples of conduct which Town & Country was likely to regard as constituting gross misconduct. The examples included serious breaches of confidentiality obligations, breach of the employer's email policies and any serious breach of the employer's regulatory responsibilities (63 to 64). The Claimant acknowledged receipt of the amended handbook on 11 June 2019 (288).

84. Thus, the Claimant was aware of the Respondent's policy in relation to data protection and its attitude to certain types of misconduct prior to the incidents that gave rise to the subsequent disciplinary proceedings.

85. In addition, the contract the Claimant accepted she had signed 04 January 2015 contained a confidentiality clause and also recorded that Town & Country had to comply with certain regulatory requirements and all staff had to follow appropriate policies and procedures to fulfil those requirements and a failure to do so could result in dismissal.

The grievance proceedings.

86. At a meeting held on 06 December 2019 between the Claimant, Mr Dickinson and Mr Whitehead the Claimant contended she had been mis-led as to why she'd not been paid compassionate leave. Mr Dickinson represented he was unaware of any difficulty, whereas in fact he had sent an internal email on 21 October 2019 which made it clear that he'd taken the decision that the Claimant would only be paid for one day.

87. Mr Dickinson accepted his error when challenged having checked his e-mails and offered to pay the two missing days compassionate leave. The Claimant refused and indicated it was a matter of trust and she no longer wished to work as an associate director and was planning to look for work elsewhere. She objected to the fact that her pay rise was only to be backdated until November 2019 and as upset.

88. On 09 December 2019 the Claimant raised what the Tribunal regarded as a grievance ("the grievance") with the Respondent even though not formally described as the same. The Respondent's assertion that it was not considered a grievance lacked credibility given Town & Country were in touch with Mrs Iverson of HR with Confidence

Ltd, an independent consultant, following meeting on 06 December 2019. Mrs Iverson accepted the meeting on 06 December 2019 appeared to be the informal stage under the Respondents grievance procedure and the email of 09 December 2019 could fall within stage II of the same procedure. Given the contents of the email the Tribunal did not regard the fact that the Claimant failed to specifically use the word grievance to be determinative. It was clear from the nature of the document and the fact the Claimant stated she would be looking for other employment there was a significant workplace concern. There was before the Tribunal some social media traffic (362) which supported the contention the Respondents considered the Claimant had raised a grievance on or about 09 December 2019

89. There were two strands to the grievance, firstly in respect of alleged non-payment of salary and secondly the failure to pay full compassionate leave coupled with the explanation given by Mr Dickinson which the Claimant regarded as misleading.
90. This is not a case of constructive unfair dismissal and therefore the Tribunal considered it only necessary to briefly summarise the subsequent grievance proceedings.
91. On 20 December 2019 a grievance meeting was held, chaired by Ms Iverson to look at the Claimant's grievance. Agreed notes appeared in the bundle at pages 416 to 418. The Tribunal was satisfied that those notes were reasonably accurate. Ms Iverson made what the Tribunal considered to be reasonable enquiries into the Claimant's concerns.
92. There was a follow-up meeting on 27 December 2019 when Ms Iverson discussed with the Claimant the evidence she had received and rejected the grievance and promised to confirm matters in writing. Ms Iverson did so by means of an email dated 06 January 2020 (424/428). The decision was taken by Ms Iverson. In essence it was not accepted the Claimant had been performing as an associate director since March 2019. There had been a miscommunication between the Claimant and the Respondent in respect of bereavement leave. A recommendation was made to backdate the commencement of the Claimant's associate role to 01 September 2019 with an increased salary of £25,000 plus a discretionary bonus of £5000.
93. On 13 January 2020 the Claimant appealed the grievance outcome (451 to 452)
94. On 27 January 2020 Respondent wrote to the Claimant confirming it has accepted the recommendation made by Ms Iverson and the Claimant's final salary payment would take into account the salary increased plus two additional days compassionate leave.
95. On 29 January 2020 the Claimant's grievance appeal was held chaired by Ms Harvey. Ms Harvey was independent of Town and Country. She was in HR consultant.
96. A note which the Tribunal regarded as reasonably accurate was taken of the meeting (508/511)
97. Ms Harvey viewed documents and spoke to Mr Dickinson as to the Claimant's grievance.
98. Ms Harvey rejected the appeal by letter dated 03 February 2020, sent on 05 February 2020.
99. The tribunal is satisfied that whilst the claimant highlighted some valid procedural issues in the grievance procedure both Ms Iverson and Ms Harvey approached the matter with independent judgement. They reviewed evidence and came to a conclusion that was reasonable on the basis of that evidence.

The disciplinary proceedings.

100. On 09 December 2019 access to work emails by staff who had access from their mobile devices was temporarily terminated. The Tribunal was satisfied this had no connection whatsoever with the Claimant's grievance and impacted upon other members of staff who used mobile devices. Steps were then taken to reinstate access to employees but, as will be seen, this was not done in the case of the Claimant as she was to be suspended.
101. The Claimant was absent from work due to ill-health on 10 and 11 December 2019.
102. On 11 December 2019 Mr Dickinson obtained information from Microsoft which showed the Claimant had sent a considerable volume of emails from her work account to her home email address. Much time was spent in argument as to whether Mr Dickinson obtained the information after being prompted by Microsoft of unexpected activity on the work email or whether he went looking for it. In the Tribunal's judgement it matters not, given there was no dispute that the Claimant did send a considerable volume of emails to her home account from her work email address.
103. On discovering this information Mr Dickinson took advice from Ms Iverson as regards suspension.
104. By 12 December 2019 the Respondent believed the Claimant sent a total of 69 emails between the 05 to 10 December 2019 to either her own personal email account or that of her husband. The parties referred to those emails, and the Tribunal adopted the same nomenclature, as the data breach emails.
105. On the same day the Claimant was suspended on full pay. The Claimant was informed it was due to a data security issue whereby confidential personal information appeared to have been sent from her work email account. The suspension was confirmed in writing (327).
106. Mr Dickinson made arrangements to report the data breach to the Information Commissioner's Office. He also informed staff that there had been an unlawful disclosure of some of their own personal data (salaries). There was no evidence before the Tribunal that the Information Commissioner's Office to any enforcement steps against Town & Country.
107. On 16 December 2019 the Claimant was invited to a disciplinary investigative meeting (376).
108. The Claimant attended the investigatory disciplinary meeting on 20 December 2019 chaired by Mr Whitehead with notes being taken by Ms Iverson (386 /390). The Tribunal was satisfied the notes were reasonably accurate. The Claimant was advised that she had a right to be represented.
109. At the meeting the Claimant was shown copies of the data breach emails. She confirmed that she had signed for receipt of the Town & Country Handbook and also that she completed her GDPR training on 18 December 2018.
110. The Claimant was asked why she had sent emails from her work account to her own or her husband's account and why they were then deleted from her sent folder. The Claimant explained that when she attended the office on 10 December 2019, she had no access to her emails and suspected foul play, so sent evidence to herself in support of her grievance. The Claimant contended she believed that because she had raised a grievance, that was why there was an attempt to dismiss her.

111. The Claimant was asked why one document (a monthly renewal report) containing client confidential data had been sent to her own email. The Claimant said she could have pressed the wrong button. She explained that sending details of Town & Country's bank details and CVs of employees was a mistake. She accepted she sent to herself Town & Country's business plan and employee salaries but this was to support a grievance.
112. On 06 January 2020 the Claimant was invited to a disciplinary hearing arranged for 10 January 2020 (429). The Claimant was expressly warned that her employment was in jeopardy.
113. On 10 January 2020 a disciplinary hearing was held with the Claimant chaired by Mr Dickinson with notes being taken by Ms Iverson (445 to 450). The Tribunal regarded the notes as reasonably accurate. The Claimant complained she had only received the notes of the investigative meeting a few hours previously, having finally receive them by email. The Tribunal was prepared to accept the notes had originally been posted and may have been lost or delayed in the Christmas post. What was clear to the Tribunal was the Claimant was offered further time to consider the notes but indicated she was content to proceed. At the meeting the Claimant accepted she was familiar with GDPR and had carried out in-house training and understood how it applied to her role. The Claimant contended the disciplinary process was a witch hunt because she raised a grievance, and other employees had been pressured not to speak to her. The Claimant accepted she had sent the data breach emails to our own email address and that of her husband but this was simply to protect her position as regards her grievance, given the deletion of emails. Mr Dickinson sought to explain why access from mobile phones had been blocked and this had not been limited to the Claimant. The Claimant expressly denied sending a copy of a spreadsheet containing client data to herself (which differed from her previous account) and alleged Mr Dickinson had attached it to her email. The Claimant also alleged that in the past Mr Whitehead had committed acts of gross misconduct but no disciplinary action had been taken against him.
114. No decision was taken at that meeting. Mr Dickinson was subsequently suspended given the allegations the Claimant made about him and Ms Iverson interviewed various witnesses to address the Claimant's concerns as to Mr Dickinson. Incredibly the one-person Ms Iverson did not interview was Mr Dickinson.
115. On 15 January 2020, at a board meeting, Mr Whitehead together with a temporally appointed non-executive director Mr Taylor, reviewed the evidence from Ms Iverson's interviews and concluded there was no evidence to support the Claimant's assertions as to Mr Dickinson doctoring the data breach emails.
116. The Claimant was informed of the outcome and raised further issues which were investigated by Ms Iverson.
117. On 21 January 2020 Ms Iverson completed her report as regards the allegations the Claimant had made at the disciplinary hearing on 10 January 2020 (477 to 479 and 445 to 450). In essence she found no substantial evidence to support the Claimant's assertions.
118. The Claimant responded on 22 January 2020 and suggested certain matters not been properly investigated to which Ms Iverson responded that same day (480 and 485/487). She had found that Microsoft had contacted Mr Dickinson to appraise Town & Country of unusual activity on the Claimant's email account, she did not accept there was evidence Mr Dickinson had changed the name on a spreadsheet, and she did not accept there been any unfairness with proceeding with the disciplinary meeting.

119. On 24 January 2020 Mr Dickinson wrote to the Claimant and confirmed she was dismissed for gross misconduct namely she had been found guilty of sending the data breach emails (493 to 495). The Tribunal was satisfied on the evidence before it that it was Mr Dickinson who wrote that letter, not Ms Iverson. The Tribunal was further satisfied that simply because the offence was classified as potential gross misconduct it was not automatically assumed by Town & Country that the Claimant had to be dismissed. Regard was had to the seriousness of the breach and the Claimant's previous record length of service.
120. On 30 January 2020 Claimant appealed her dismissal (512/513) and subsequently confirmed that it could be dealt with remotely. Town and Country appointed Ms Harvey to deal with the disciplinary appeal.
121. Given the Claimant had indicated the matter could be dealt with remotely Ms Harvey heard no evidence and simply relied upon representations. She noted the Claimant alleged there had been inequality of treatment between herself and Mr Whitehead, that the Claimant accepted she sent the emails but they were not sent maliciously, it was always possible to remotely access work emails so she did not see how things were now different, she did not send a document containing client data to herself, no proper consideration be given to her record over the previous 7.5 years and she had no proof that Microsoft had contacted Mr Dickinson.
122. The Tribunal was satisfied that Ms Harvey did direct her attention to these concerns and carried out enquiries with both Mr Dickinson and Ms Iverson and that those enquiries were reasonable in all the circumstances.
123. By letter dated 21 February 2020, sent on 24 February 2020 (547 /554) Ms Harvey rejected the appeal.
124. Ms Harvey did not find evidence of inequality of treatment. The Tribunal noted that Ms Hardy gave a detailed account of the specific incidents the Claimant referred to involving Mr Whitehead and the reasons why he was not dismissed. She also looked another incident but noted it involved a self-employed mortgage consultant and not an employee of either Town & Country or Town & Country Financial Services. She found there was no evidence that dismissal was in some way in retaliation to the Claimant raising her grievance.

Discussion

125. The Tribunal applied section 98 (1), 98 (2) and 98 (4) of the ERA 96 which provides as follows: –

“98 (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 either it is 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.*

98 (2) – a reason falls within this subsection if it.....

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

98 (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 the weather in the circumstances (including the size and the 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.”

126. In **Abernethy – v – Mott, Hay and Anderson 1974 IRLR213** the Court of Appeal held that a reason for dismissal was a set of facts known to the employer or beliefs held by him which would cause him to dismiss the employee.
126. The Tribunal was satisfied that at dismissal Mr Dickinson genuinely believed the Claimant had committed an act or acts of gross misconduct. The Tribunal was not persuaded there was some form of witch hunt against the Claimant following the meeting on 06 December 2019. The Tribunal reminded itself that Mr Dickinson clearly thought well of the Claimant hence why she was offered a promotion to associate director. She had also been offered a small number of shares. The fact Town & Country had made a number of loans to the Claimant in the past also pointed towards the fact that Town & Country were keen to retain the Claimant. This was further evidenced by the fact Town & Country were prepared to make a significant advance of commission bonus even though it had not been earned and to defray the initial costs, by way of a loan, of the CII examinations.
127. The Tribunal considered it unlikely that Mr Dickinson wished to dismiss the Claimant over an argument as to back pay. On the Claimant’s position it was to March 2019 and on his position November 2019. The fact Mr Dickinson was prepared to have the matter independently investigated and to abide by that decision was a further factor that detracted from the Claimant’s argument.
128. Finally, and most significantly, Mr Dickinson did not invent the dispatch of emails made by the Claimant to her home or her husband’s email.
129. In the circumstances the real reason in Mr Dickinson’s mind was the Claimant’s conduct and Town & Country have established that was the principal reason for dismissal.
130. Turning to the issue of fairness or otherwise the Tribunal applied the following law.
131. The Tribunal had regard to the guidance given in **British Home Stores Ltd -v- Burchell 1978 IRLR 379**.
132. However, the Tribunal reminded itself that **Burchell** was decided before the alteration of the burden of proof effected by section 6 of the Employment Act 1980.
133. The Tribunal had regard to the guidance given at paragraphs 13 to 15 in the case of **Sheffield Health and Social Care NHS Foundation Trust -v- Crabtree UKEAT 0331/09/ZT**.
134. The approach to fairness and procedure is the standard of a reasonable employer at all three stages: - **Sainsbury’s Supermarket-v- Hitt 2002 EWCA CIV 1588**.
135. The Tribunal reminded itself that when considering the objective standard of a reasonable employer the test was the material which was available the employer at the time. However, the test goes further as it involves information which would have been available had a proper investigation being conducted and this point was emphasised by His Honour Judge Serota QC in the case of **London Waste Ltd -v-Scrivens UK EAT/0317/09**
136. Whilst the Tribunal must have respect for the opinion of the dismissing officer it is ultimately for the Tribunal and not for the Respondent to decide whether the

dismissal fell within or outside the range of reasonable responses open to an employer in the circumstances.

137. Where there is an appeal process and the appeal proceeds by way of review and not a rehearing there is no rule for that earlier unfairness only be cured by means of a rehearing. The Tribunal must examine the fairness of the disciplinary procedure as a whole; **Taylor -v- OCS Group Ltd 2006 ICR 1602**

138. The Tribunal also applied the guidance given in the case of **Iceland Frozen Foods Ltd -v- James 1992 IRLR 439**: –

“The authorities establish that in law the correct approach for an employment Tribunal to adopt in answering the question posed by section 98 (4) is as follows.....

(1) the starting point should always be the words of section 98 (4) themselves.

(2) in applying this section an Employment Tribunal must consider the reasonableness of the employer’s conduct, not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair.

(3) in judging the reasonableness of the employer’s conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(4) in many (though not all) cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take on you, another quite reasonably takes another.

(5) the approach of the Employment Tribunal, as an industrial jury, is to determine whether the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses in which a reasonable employer might have adopted stop if a dismissal falls within the band the dismissal is fair.... If the dismissal falls outside the band it is unfair.”

139. The Tribunal is satisfied that Town & Country held a reasonable and genuine belief that the Claimant had committed acts of misconduct. The basis for this finding is as follows.

140. Firstly, the Claimant herself accepted she had sent from a work email the breach emails to either her home or our husbands email address. Mr Dickinson was entitled to doubt the Claimant’s explanation that she only did this to protect herself in relation to a grievance, when she found emails have been deleted on her phone, given that the Claimant started to send emails prior to the phone blocking 09 December 2019.

141. Secondly Mr Dickinson genuinely believed there had been a breach of the GDPR. This is evidenced by the fact that he reported matters to the Information Commissioner’s Office. He also spoke to ACAS and took HR advice. He also held a meeting with staff to appraise them, even before the disciplinary hearing, that it was likely there had been a disclosure of some of their personal data. He did this on the basis of advice from the Information Commissioner’s Office. He took advice from Mrs Iverson.

142. Thirdly Mr Dickinson was entitled to look at the nature of the disclosures and the fact the Claimant had indicated she would be seeking alternative employment. The renewal spreadsheet (704 to 716) clearly contained sensitive information setting out details of client’s names premiums and commission earned. Whilst not the most recent, Town & Country had a high percentage of loyal clients so that did

not distract from the sensitivity of the information. It was unlikely it was sent by error. Details of staff salaries were irrelevant to the Claimant's grievance (except perhaps in respect of Mr Whitehead) but again, Mr Dickinson was entitled to be concerned that information would be of interest to another business if they wished to poach any of Town & Country's staff.

143. Fourthly the fact that the Claimant had deleted her sent emails was a factor he was entitled to regard as having indicated this was a deliberate act.
144. Fifthly the disclosure of CVs which contained a limited amount of personal data of potential candidates had very little to do with the Claimant's grievance. There was ample evidence the Claimant was involved in recruitment of a replacement other than taking the CVs, for example appointment diary entries when candidates were seen. The information, however, would be of interest to another employer.
145. The next question the Tribunal addressed was whether a reasonable investigation had been undertaken.
146. The investigation only needed to be reasonable and what is reasonable depends upon the circumstances. A more detailed investigation may be required where there is an absolute denial of wrongdoing compared with the case where there are admissions.
147. The Claimant knew the case she had to meet and that her employment was at risk at all stages.
148. She was offered the right of representation.
149. The ACAS code of conduct in respect of a conduct dismissal was followed.
150. The appeal was conducted by Ms Harvey who was wholly independent of Town and Country. The Tribunal is satisfied she carefully addressed the points raised by the Claimant. As the Tribunal have already observed disparity of treatment between the Claimant and particularly Mr Whitehead was carefully examined. The Tribunal Was not satisfied it can be said of the Claimant's case was truly comparable applying the test set out in **Hadjiannou v Coral Casinos Ltd [1981] IRLR 352 (EAT)** which it must be, for the Claimant to succeed on this ground.
151. The Tribunal addressed the various challenges made to the procedure undertaken by Town and Country.
152. Firstly, the Claimant contended she was not supplied with a copy of the data breach emails. The explanation of Town & Country was that by supplying further copies they would be repeating the data breach. Whether that was in law correct may be subject to conjecture but that was what the Tribunal found was genuinely in the mind of the employer. The Tribunal was not persuaded in the particular circumstances there was unfairness to the Claimant. It reached this decision because the Claimant actually had the data breach emails herself and they were discussed with the Claimant in the course of the proceedings.
153. Secondly the Claimant alleged the investigation by Ms Iverson into the allegations she made against Mr Dickinson in the course of the disciplinary proceedings were inadequate. There were no direct discussions with Mr Dickinson. The Claimant had raised two central points firstly that there had been no contact by Microsoft to Town & Country, rather that Mr Dickinson had instituted enquiries as to the Claimants emails. The Tribunal did not regard that failure by Ms Iverson to cause significant unfairness as the Claimant herself had admitted she sent the data breach emails. How the information came to Mr Dickinson's attention was not

central to the disciplinary process. The second point was that although the Claimant had originally said that the renewal spreadsheet was sent to herself by accident, she later contended it had been deliberately attached by Mr Dickinson. Ms Iverson made enquiries to see whether such a procedure was electronically possible and found it was not. That was not disputed before the Tribunal. Thus, whilst there was inadequacy in this regard, it caused no unfairness to the Claimant.

154. Thirdly the Claimant raised a concern as to a separation between the investigation and the determination. Ms Iverson certainly produced emails during the course of the disciplinary investigation which were addressed to Mr Whitehead, the investigating officer, but were copied to Mr Dickinson, the determining officer. The Tribunal did not regard that, in the particular circumstances of this very small employer, as being unfair given Mr Dickinson, as the determining officer, would need to have all the information from the investigation before him before he could reach a determination in any event.
155. Fourthly, before the Tribunal the Claimant raised issues as regards the adequacy or otherwise of her GDPR training. The Tribunal did not regard this as a good point because it was not pursued with any force in the internal proceedings and the Claimant accepted, she was familiar with the Town & Country Handbook and had undertaken specific training in 2018. At no stage did the Claimant suggest she did not understand the principles of data protection. Given the Claimant's role in the insurance industry the Tribunal considered the Claimant would have such an understanding even without reference to the detailed guidance in the Town & Country Handbook.
156. Fifthly the Claimant referred to the time given to her to consider the investigatory notes prior to the disciplinary hearing. The Tribunal have already addressed this point earlier in his judgement.
157. The Tribunal then stood back to consider whether even where there were minor breaches whether, taken together, they were sufficient to taint the adequacy of the investigation. The Tribunal concluded they did not.
158. Finally, the Tribunal asked itself whether dismissal was within the band of responses of a reasonable employer having reminded itself that this was the acid question and not whether this Tribunal would have dismissed.
159. The Tribunal was satisfied that dismissal was within the band of responses of a reasonable employer for the following reasons.
160. Firstly, the gravity of the admitted offences. There was a breach of the GDPR. That had the potential to expose Town & Country to enforcement proceedings from the Information Commissioner's Office. There had also been a disclosure of sensitive information including the insurance renewals, all staff salaries and some personal details of candidates who applied for employment with Town & Country.
161. Secondly having regard to the contractual documentation and handbook the offences fell within a category that this employer treated as potential gross misconduct.
162. Thirdly Town & Country did have regard to the fact that merely because gross misconduct was established, dismissal was not automatic (**Brito-Babapulle -v- Ealing Hospitals NHS Trust [2013] IRLR 854**) and took into account the Claimant's previous record. Town and Country were entitled to find due to the gravity of the offences they did not justify a reduction in penalty.

163. For the above reasons the Tribunal concluded that dismissal was fair.
164. If the Tribunal was wrong on that point it then went on to consider the contribution issue.
165. Section 123 (6) ERA 96 states that “[W] here the Tribunal finds that the dismissal was to any extent caused all contributed to by any action of the complainant, it shall reduce the.... compensatory award by such proportion as it considers just and equitable having regard to that finding.”
166. The wording in relation to any deduction from the basic award is set out in section 122(2) and differs from that in section 123 (6) ERA 96.
167. A reduction for contributory conduct is appropriate according to the Court of Appeal in **Nelson-v- BBC (2) 1980 ICR 110** when three factors are satisfied namely: –
- The relevant action must be culpable or blameworthy
 - It must have caused or contributed to the dismissal, and
 - It must be just and equitable to reduce the award by proportion specified
168. For a deduction to be made a causal link must exist between the employee’s conduct and the dismissal. In other words, the conduct must have taken place before the dismissal; the employer must have been aware of the conduct; and the employer must then have dismissed the employee at least partly in consequence of conduct.
169. A finding of contributory fault does not require that the action of the employee was the sole or principal or operative course of the dismissal: – **Polentarutti -v- Autokraft Limited 1991 IRLR 457.**
170. The Tribunal was satisfied the Claimant engaged in blameworthy conduct. It was that blameworthy conduct that was known to Town and Country and was causally connected to her dismissal.
171. Given the nature of that conduct it would be just and equitable to make a 100% reduction.
172. It follows the complaints of the Claimant must be dismissed.

Employment Judge T R Smith

Date: 15 January 2021

RESERVED JUDGMENT & REASONS SENT TO
THE PARTIES ON

Date: 19 January 2021