



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs A Robinson

**Respondent:** The Little Wren Ltd t/a Bluebird Care

**Heard at:** Manchester (by CVP)

**On:** 19 January 2024

**Before:** Employment Judge Dilks

## Representation

Claimant: In person

Respondent: Miss Hall, Field Litigation Consultant, Croner

# JUDGMENT

1. By consent, the respondent's name is amended to The Little Wren Ltd t/a Bluebird Care
2. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.
3. There is a 40% chance that the claimant would have been fairly dismissed in any event.
4. The claimant caused or contributed to the dismissal by blameworthy conduct and it is just and equitable to reduce the compensatory award payable to the claimant by 20%.
5. It is just and equitable to reduce the basic award payable to the claimant by 20% because of the claimant's conduct before the dismissal.
6. The respondent failed to give the claimant itemised pay statements as required by section 8 Employment Rights Act 1996 during her period of employment ending 30 August 2023.
7. The Tribunal does not have jurisdiction in relation to the payments to the claimant's Nest pension as these do not fall within the definition of 'wages'.

# REASONS

## **Introduction**

8. Following her dismissal on 30 August 2023, the claimant brought claims for unfair dismissal, failure to provide itemised pay statements, issues regarding her Nest pension and the claimant also ticked the box for discrimination on the ET1. ACAS was notified under the early conciliation procedure on 1 September 2023 and the certificate was issued on 4 September 2023. The ET1 was presented on 5 September 2023 and the ET3 was received by the tribunal on 16 October 2023.

## **Claims and issues**

9. The claimant confirmed that although she had ticked the box for discrimination on the ET1, she did not have a claim for discrimination because of any of the nine protected characteristics.
10. The claimant confirmed that at her request, since her ET1, she had received copies of all of her payslips for the entire period she worked for the respondent.
11. The claimant confirmed that issues with regard to her Nest pension are in hand.
12. The remaining issues to be determined by the Tribunal in relation to the unfair dismissal claim were agreed at the outset of the hearing as follows;
  - a. What was the reason or principal reason for dismissal
  - b. Was it a potentially fair reason?
  - c. Did the respondent genuinely believe the claimant had committed misconduct.
  - d. Did the respondent act reasonably or unreasonably in all the circumstances in treating the misconduct as a sufficient reason to dismiss the claimant, including the respondent's size and administrative resources in particular?
    - i. Were there reasonable grounds for that belief;
    - ii. at the time the belief was formed the respondent had carried out a reasonable investigation;
    - iii. the respondent otherwise acted in a procedurally fair manner;
    - iv. dismissal was within the range of reasonable responses.
  - e. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
  - f. If so, should the claimant's compensation be reduced? By how much?
  - g. If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?
  - h. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
  - i. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

## **The Evidence**

13. At the hearing, the claimant was unrepresented and gave sworn evidence as did the claimant's witnesses; Lynn Haggan, Alison Freedman and Mandy Neale.
14. The respondent was represented by Miss Hall, Litigation Consultant at Croner. Miss Hall called sworn evidence from the directors of the respondent company, Mrs Evans and Mr Evans, and from Alyson Hartlebury who had worked for the respondent for over 2 years and had been the Care Manger since July 2023.
15. I was also referred to and considered documents contained in a hearing bundle comprising 253 pages and witness statements in a witness statements bundle to page 28.
16. The claimant also provided a typed transcript of the fact-finding meeting which she said a friend had produced from the claimant's recording of the meeting although the claimant did not know how her friend had done this. The claimant said that she had made some amendments to this transcript for example by correcting a name which had been transcribed incorrectly, adding punctuation and adding initials for who was speaking.
17. Miss Hall had no objection to the typed transcript being admitted and I admitted this evidence having regard to rule 41 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 which states that the Tribunal may regulate its own procedure and the overriding objective in rule 2 to deal with cases fairly and justly. The evidence was relevant and the late admission of the evidence did not cause the hearing to be delayed.

#### **Application for a witness order**

18. The claimant had made a written application on 18 January for a witness order for Susanne Whittaker to attend the hearing. Although the claimant had in previous correspondence with the Tribunal also applied for witness orders in relation to a number of other witnesses as well, the claimant confirmed that the application she wished to make was in relation to Susanne Whittaker who was the subject of 'the joke email' which will be referred to below.
19. The claimant said at the hearing that she had messaged Susanne Whittaker last night and asked her to attend today but that she did not respond.
20. The claimant confirmed that she had not asked Susanne Whittaker for a witness statement previously as she presumed that Susanne Whittaker would provide a witness statement on behalf of the respondent, but no witness statement had been served by the respondent and therefore the claimant wished to call her.
21. Miss Hall accepted that the evidence of Susanne Whittaker would be relevant as she was involved in the email that was sent but opposed the application for a witness order.
22. Miss Hall stated that the respondent had spoken to Susanne Whittaker about giving a witness statement for the hearing but she had not wished to. Miss Hall submitted that there was contrasting information in the bundle from Susanne Whittaker such that if she was to give evidence in favour of the claimant or the respondent there was information in the bundle to refute this either way and therefore we did not know how reliable a witness Susanne Whittaker would be.
23. Having taken a short break to consider the application, I refused the application for a witness order.

24. It had been conceded by the respondent that Susanne Whittaker's evidence would be relevant to 'the joke email' and I considered that it may be necessary to compel her attendance, Susanne Whittaker having indicated to the respondent that she did not wish to provide a witness statement and having not responded to the claimant's late request to attend.
25. I took into account the delay that would be caused by adjourning the hearing to issue a witness order and also that the claimant had not spoken directly to Susanne Whittaker about what her evidence may be such that she may not be supportive of the claimant's case. I considered that there was other information in the bundle from Susanne Whittaker namely the witness statement she had provided to the respondent prior to the fact-finding meeting and also the messages between her and the claimant provided by the claimant. There were also other witnesses accounts of their conversations with Susanne Whittaker.
26. Having regard to rule 32 and the overriding objective in rule 2 to deal cases fairly and justly which includes avoiding delay so far as compatible with proper consideration of the issues, I refused the application for a witness order.

### The Law – Unfair dismissal

27. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.
28. The primary provision is section 98 which, so far as relevant, provides as follows:
  - (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 .... Relates to the conduct of the employee...
  - (3) .....
  - (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.
29. The reason or principal reason for dismissal is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

30. If the employer fails to show a potentially fair reason for dismissal (in this case, conduct), dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.
31. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. The “**Burchell test**” involves a consideration of three aspects of the employer’s conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?
32. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.
33. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.
34. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.
35. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23**. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer’s actions and decisions fell within that band.
36. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613**.
37. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and also whether it acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

## **The Law – Itemised pay statements**

38. The relevant provisions of the Employment Rights Act 1996 (“the ERA”) are as follows:

### **8 Itemised pay statement**

(1) A worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.

(2) The statement shall contain particulars of—

- (a) the gross amount of the wages or salary,
- (b) the amounts of any variable, and (subject to section 9) any fixed, deductions from that gross amount and the purposes for which they are made,
- (c) the net amount of wages or salary payable, ...

### **12 Determination of references**

(3) Where on a reference under section 11 an employment tribunal finds—

(a) that an employer has failed to give a worker any pay statement in accordance with section 8, or

[...]

the tribunal shall make a declaration to that effect.

(4) Where on a reference in the case of which subsection (3) applies the tribunal further finds that any unnotified deductions have been made (from the pay of the worker during the period of thirteen weeks immediately preceding the date of the application for the reference (whether or not the deductions were made in breach of the contract of employment), the tribunal may order the employer to pay the worker a sum not exceeding the aggregate of the unnotified deductions so made.

(5) For the purposes of subsection (4) a deduction is an unnotified deduction if it is made without the employer giving the worker, in any pay statement or standing statement of fixed deductions, the particulars of the deduction required by section 8 or 9.

### **Relevant Findings of Fact**

39. The respondent runs a domiciliary home care company which has 53 employees run from one site.

40. On 6 August 2023 during the claimant’s care visit to a client, Susanne Whittaker, the claimant’s supervisor, arrived to do a review during which Susanne Whittaker’s top burst. She covered herself with a book and carried on as normal and once outside the claimant and Susanne Whittaker were laughing about what had happened and the claimant said that she would put together an email regarding breaking professional boundaries which is something they were doing refresher training on.

41. When the claimant and Susanne Whittaker spoke that evening on the phone about what had happened the claimant mentioned to Susanne Whittaker again about sending an email which she agreed was a funny thing to do. The claimant asked Susanne Whittaker where she should send the email to, and she said to send it to the girls in the office at the office email address.

42. The claimant did not show Susanne Whittaker the email before sending it.
43. The claimant sent 'the joke email' entitled 'Personal boundaries and indecent exposure!' on 6 August 2023 to the office email address of the respondent stating, in summary, that Susanne Whittaker had been on a webcam whilst at work with a client, that she exposed herself, that it was reported to the police and that she was no longer welcome at the client's home. A crime reference number was given in the email.
44. The following day, Alyson Hartlebury, the Care Manager, telephoned Susanne Whittaker who was very upset about what was in 'the joke email' and what other staff would think of her given what written and was unable to come into work that day because of this .
45. The claimant was invited to a fact- finding meeting on 14 August which was rearranged to the 18 August so that the claimant could bring her friend and former colleague Lynn Haggan to the meeting with her even though this was not provided for in the respondent's policy.
46. In the meantime, on 14 August the respondent was contacted by Lancashire Safeguarding Adults Team concerning a claim that one of the respondent's client's was receiving unsafe care by a live-in carer.
47. Also, on 14 August 2023 the respondent received, as requested, Susanne Whittaker's account of events in which she stated that not for one minute did she believe that the claimant intended to send an email and that she was *'absolutely mortified and extremely upset by what had been written. It was offensive and degrading and was not in the least bit amusing'*.
48. On 15 August a recently appointed supervisor sent an email to Mrs Evans advising of her decision not to return to work for the respondent giving as one of reasons that 'the joke email' *'scared her'*, a member of staff making jokes about such a serious matter.
49. A fact-finding meeting with regard to 'the joke email' took place on 18 August with the claimant and Mrs Evans. The claimant recorded this meeting without the respondent's knowledge.
50. On 21 August, Mrs Evans sent an email to the claimant inviting her to attend a disciplinary hearing on 31 August with Mrs Evans and with her co-director and husband, Mr Evans, taking the minutes. The email confirmed that the disciplinary hearing was to discuss the following matters of concern;  
*'Misappropriation of company property (email address) causing reputational damage and additional work  
False allegations against a colleague which have caused offence and significant distress'*
51. Enclosed with this email were the following; a copy of 'the joke email', Mrs Evans' notes from the fact finding meeting, Susanne Whittaker's email statement of 14 August and a copy of the respondent's disciplinary procedure. Also included in the body of the email was an extract from the new supervisor's resignation email which cited 'the joke email' as one of her reasons for leaving.
52. On 22 August, the respondent received an information request from the CQC containing 21 charges.
53. On 24 August, the claimant emailed in 10 minutes before a 7am call saying she was running late.
54. On 25 August, the Friday before the bank holiday, the claimant called the respondent stating that she was unwell and unable to work.
55. In response, Mrs Evans sent an email to the claimant on 25 August confirming that *'given the circumstances of your disciplinary hearing and other communications we have had recently , as well as your request not to start until 0730...'* that the claimant's care work hours for the following week

- were removed and the claimant would be paid for that time. Mrs Evans said in this email that she hoped the claimant improved *'soon, in time for the bank holiday weekend'*.
56. The claimant replied by email thanking Mrs Evans *'kindly for the paid holiday'* and referred to an email on 22 May to R and K with regard to her change of availability and adding, *'...but hey, what would you know, as again it was a conversation that you wasn't partial too.'*
57. On 25 August, in response, Mrs Evans sent an email apologising that it appeared that the claimant had not received the email invitation to the disciplinary meeting and offering to change the date to 5 September to which the claimant replied by email confirming that she would attend the meeting on Friday as planned.
58. In her email reply, the claimant again referred to the *'paid... holiday'* Mrs Evans had given her and said that she had made *'exciting arrangements for next week'*. The claimant also referred to the offer the claimant said she had made to Mrs Evans at the fact-finding meeting that Mrs Evans send some flowers to another member of staff by way of a *'...bog offer' for the deep hurt and embarrassment that you caused her having sent an unprofessional email to ALL staff.'* The claimant's email ended with *'See you Friday'*.
59. On 28 August, the claimant submitted a self-certified sick note backdated to 26 August with brief details stating *'Management stress and bullying by Claire Evans...'*
60. Around this time the respondent's received the Claimant's annual staff survey in which the claimant had chosen not to remain anonymous and had answered every question with *'Claire Evans is a bully'*.
61. On 28 August, Mr and Mrs Evans decided to hold the disciplinary meeting without the claimant the following day.
62. On 29 August Mr and Mrs Evans had a disciplinary meeting in consultation with their solicitor about the claimant in her absence.
63. Mr Evans decided that the claimant's actions amounted to gross misconduct and although initially unsure Mrs Evans agreed with Mr Evans. After speaking to their solicitor again and a HR person, Mr Evans decided that the claimant's actions amount to gross misconduct and that summary dismissal was the correct course of action.
64. On 29 August, Mrs Evans informed Susanne Whittaker in confidence that Mr Evans was probably shortly going to dismiss the claimant in case there was any difficulty for her resulting from this.
65. On 29 August a colleague of the claimant sent the claimant a message saying that the *'word on the grapevine is your getting sacked'* and that colleague had spoken to Susanne Whittaker who confirmed that she had just been told this by Mrs Evans.
66. A letter was sent to the claimant from Mr Evans dated 30 August, notifying the claimant of her summary dismissal as the respondent had *'concluded that your employment with Bluebird Care is untenable'*.
67. The section of the letter headed *'The incident'* deals with 'the joke email' and using the company's official email address and the distress caused to Susanne Whittaker who the appellant chose not to share the email with before she sent it and that the joke was also cited as a major reason for a new senior member of staff leaving. The letter states'  
*'This means there has been Misappropriation of company property (email address) causing reputational damage and additional work  
False allegations against a colleague which have caused offence and significant distress'*



68. The second section of the letter headed '*Communication*' states that in relation to '*the incident*' there has been numerous communications between the claimant and the in particular Mrs Evans in which it is said the claimant displays contempt for the company and demonstrates she has no regard for Mrs Evans. Also, that whilst the claimant has been accusing Mrs Evans of bullying, it is the claimant who is harassing and bullying by the language used in her communication. Finally, it is stated that '*...by your negative comments and actions that you appear to be on a campaign to cause mischief, and to damage the reputation of ...*' the company.
69. The claimant was informed in this letter that if she was not happy with the decision, she could appeal against it by writing to the acting care manger, Alyson Hartlebury, giving her reasons why she was appealing.
70. The claimant did not submit an appeal regarding her dismissal.

### **Conclusions**

71. The claimant was dismissed by the respondent on 30 August 2023. I do not have to decide in relation to the unfair dismissal claim whether in fact the claimant is guilty of the different examples of misconduct the respondent has given and I make no findings in relation to this.
72. It is also immaterial how I would have handled events or what decisions I would have made. I must not substitute my view for that of the reasonable employer - **Iceland Frozen Foods Limited –v- Jones [1982] IRLR 439, Sainsbury's Supermarkets Limited –v- Hitt [200]3 IRLR 23, and London Ambulance Service NHS Trust –v- Small [2009] IRLR 563.**
73. The submissions of the parties are as set out below.

### **The reason or principal reason for dismissal**

74. The first question is the reason for dismissal. Miss Hall submitted that the principal reason for dismissal was the claimant's conduct. Miss Hall submitting that 'the joke email' was the principal reason the disciplinary was initiated and then the sequence of behaviour between the sending of 'the email' and the dismissal.
75. Mrs Robinson stated, that whilst according to the directors the dismissal was due to 'the joke email', she saw that there were other matters mentioned in the hearing bundle that had not been mentioned to her prior to the dismissal.
76. Whilst Mrs Robinson's indicated she had not been made aware of all of the matters prior to her dismissal, in my assessment there was no real dispute that the reason the respondent dismissed the claimant was because it believed that the claimant was guilty of misconduct and I find that the claimant was dismissed for reasons relating to misconduct.
77. The respondent is relying on a number of examples of misconduct as a composite reason for dismissing the claimant.
78. In the written and oral evidence, the following main reasons are referred to;
- a. 'The joke email' including sending it to the company email address and distress caused to Susanne Whittaker including the reputational damage of a new senior member of staff citing it as a major reason for leaving
  - b. The sequence of behaviour which followed namely;

- i. The tone of the claimant's emails to Mrs Evans
- ii. Accusing Mrs Evans of bullying
- iii. A campaign to cause mischief and damage the reputation of the company

### **Potentially Fair Reason for Dismissal**

79. Misconduct is a potentially fair reason for dismissal – section 98(2)(b). The respondent has therefore satisfied the requirements of section 98(2).

### **Genuineness of Belief**

80. Having heard the oral evidence of Mr and Mrs Evans, as well as receiving their written evidence, I find that they, and most importantly, Mr Evans who made the decision to dismiss the claimant, held a genuine belief that the claimant was guilty of misconduct.
81. Whilst Mr and Mrs Evans held the disciplinary meeting together Mrs Evans confirms in her witness statement that it was Mr Evans who decided that the claimant's actions amounted to gross misconduct which Mrs Evans then agreed with but that Mr Evans then had further discussions to confirm this with the solicitor and a HR professional before making the decision to dismiss.
82. The claimant had not denied sending 'the joke email' on 6 August which was from her email address. The respondent was also in receipt of the emails from the claimant to Mrs Evans on 25 August and the claimant's annual staff survey and self-certified sick note with the claimant's comments about bullying by Mrs Evans.
83. As set out in the witness statements, I find that Mrs Evans had also conveyed to Mr Evans her genuine belief that the claimant had made the complaints to Lancashire Safeguarding and the CQC. Mrs Evans said in her oral evidence that she could not be fully certain that the complaints to external bodies were from the claimant but said that there was enough evidence for her to believe given the timing and nature of the complaints that they had come from the claimant, and that one could only have come from the claimant. The complaint to Lancashire safeguarding was in relation to a live-in carer who the claimant had already expressed concern about and during the course of the hearing the claimant said that she did send this complaint.

### **Investigation**

84. I must also consider whether, at the time the belief was formed, the respondent had carried out as much investigation into the matter as was reasonable in the circumstances.
85. The respondent is relying on a number of examples of misconduct relating to 'the joke email' and the claimant's behaviour following this.
86. The respondent in this case is a small business, employing around 53 employees at one site and it has 2 directors and a written disciplinary policy.
87. I have the band of reasonable responses and these factors in mind in reaching my decision as to whether the investigation was reasonable in the circumstances.

88. Taking all the circumstances into account, I find that whilst the respondent had carried out a reasonable investigation into some aspects of the allegations of misconduct, the respondent had not carried out a reasonable investigation into other important aspects of the allegations of misconduct and taking into account the nature of the allegations, the position of the claimant and the size and resources of the respondent, I find that overall the respondent had not carried out a reasonable investigation.

### **'The joke email' of 6 August**

89. I find that the respondent did carry out a reasonable investigation into 'the joke email'.
90. Whilst the claimant was critical of the investigation for Mrs Evans not speaking to her and Susanne Whittaker at the time same time as the claimant said had been done in the past with staff, I accept, as stated by Mrs Evans in oral evidence, that it would not have been appropriate for Mrs Evans to speak to them together.
91. The claimant was also critical of the investigation for Mrs Evans not speaking to an employee who the claimant showed the email to after sending it. I do not however find that the investigation flawed as a result of this. As Evans said at the hearing, in my view, the investigation obtained information regarding the incident from the relevant people, namely the claimant and Susanne Whittaker.
92. The claimant was critical of the transcript of the fact-finding meeting provided by Mrs Evans and has since provided a transcript from her recording of the meeting. I accept that the transcript provided by the claimant does record more information than the transcript provided by Mrs Evans which is more than a summary, but I do not consider that the investigation in relation to 'the joke email' was flawed because of this.

### **Communications with the Respondent**

93. In my view it was not necessary to establish the facts further in relation to some matters. With regard to the claimant's emails with Mrs Evans and the claimant's comments on the self-certified sick certificate and the annual staff survey, the respondent was in receipt of these documents from the claimant.

### **Campaign to cause mischief and to damage the reputation of the company**

94. I find that the respondent did not carry out a reasonable investigation into any of the other matters which were part of the composite reason for dismissal on the grounds of misconduct.
95. I find that these other matters were an important part of the reason for dismissal. In my assessment it would appear that Mr and Mrs Evans felt that they needed to act quickly because of their belief that the claimant was on a 'campaign' and, Mr Evans said in his oral evidence, 'attacking' the company. 'The joke email' was something that had happened and the claimant's communications with Mrs Evans were internal matters.
96. The fact-finding meeting on 18 August was only in relation to 'the joke email' as confirmed by both Mrs Evan's summary of this meeting and the claimant's transcript. The claimant was not asked about the other concerns at this meeting.

97. There was no investigatory meeting to establish the facts with regard to Mrs Evans' belief that it was the claimant who had reported a matter to Lancashire and Safeguarding Adults Team received on 14 August and that it was the claimant who had coordinated the 21 complaints received from the CQC on 22 August.
98. There was also no investigation to establish the facts surrounding the claimant calling to confirm she was unable to work a shift at very short notice or of her period of sickness.
99. In paragraph 12d of his witness statement, Mr Evans says that after looking at the information they also concluded that the claimant had contacted several colleagues either encouraging them to leave, go sick, or persuading them to believe the rumours the claimant was spreading about Mrs Evans being a bad manager and bully. In this paragraph of his witness statement Mr Evans refers to evidence in the hearing bundle supporting this belief but I note that the evidence referred to all post-dates the dismissal including the ET1 and emails with the claimant after the dismissal. There was no investigatory meeting to establish the facts with regard to this belief.

## **Reasonableness of the Process**

### **Notification of the disciplinary hearing**

100. On 21 August, Mrs Evans sent an email to the claimant inviting her to attend a disciplinary hearing on 31 August. The email informed the claimant that in the event the matters of concern were substantiated, the claimant may be issued with an appropriate sanction per disciplinary process (page 82). The claimant was also informed of her right to be accompanied at the hearing by a colleague or trade union official.
101. The claimant was informed in this email that the disciplinary hearing was to discuss the following matters of concern;  
*'Misappropriation of company property (email address) causing reputational damage and additional work. False allegations against a colleague which have caused offence and significant distress'*
102. I note that the majority of the other matters had not occurred by the date the notice of disciplinary hearing is dated.
103. By this date, the respondent had not received notification of 21 concerns from the CQC and the claimant had not had the email exchange highlighted with Mrs Evans on 25 August. Nor had the claimant cancelled a shift at very short notice, or self-certified as sick. It is unclear when the claimant's annual staff survey was received.
104. On 25 August, Mrs Evans sent an email apologising that it appeared that the claimant had not received the email invitation to the disciplinary meeting which had been misdirected and it would appear the invitation was resent.
105. By the date the email invitation to the disciplinary meeting was resent on 25 August, the respondent had received an information request from the CQC containing 21 charges and the claimant had been unavailable for a shift shortly before it was due to commence and had called in sick for work that morning on the Friday before the bank holiday.
106. No updated notification of the disciplinary hearing was sent to the claimant setting out the further concerns that had arisen and therefore I find that the notification of the disciplinary hearing was not sufficiently clear or particularised to enable the claimant to prepare to answer the case at a

disciplinary meeting in accordance with paragraph 9 of the ACAS code of Practice on disciplinary and grievance procedures.

### **Disciplinary hearing in the claimant's absence**

107. When Mrs Evans realised that it appeared that the claimant had not received the email invitation to the disciplinary meeting, Mrs Evans offered to change the date of the hearing to the 5 September but the claimant confirmed in her email response of 25 August that she would attend the meeting as originally planned.
108. The claimant subsequently submitted a self-certified sick note on 28 August backdated to 26 August stating '*Management stress and bullying by Claire Evans...*'.
109. It is the evidence of Mr and Mrs Evans that on 28 August they decided to hold the disciplinary meeting without the claimant the following day.
110. In their evidence, Mr and Mrs Evans state that as the claimant was already relieved of her work and on full pay, they therefore assumed that the only intention behind submitting a self-certified sick note was for the claimant to be unavailable to attend the disciplinary hearing and because the claimant had said she would be seeing a GP they assumed that the claimant would be seeking to extend the process.
111. Mrs Evans confirmed in her oral evidence that they did not contact the claimant after receiving the self-certificated sick note to check whether she would still be attending the disciplinary meeting.
112. The claimant having previously clearly confirmed that she would be attending the disciplinary hearing, in my assessment, it was not a reasonable view for Mr and Mrs Evans to take to assume that the claimant would not be attending the meeting without attempting to clarify this with her first.
113. I find that it was not within the band of reasonable responses for the respondent to proceed to make a decision on the evidence available without holding a disciplinary meeting first.
114. I do not consider that the claimant was 'persistently' unable to attend and I do not consider that it could reasonably be said that she was unwilling to attend a disciplinary meeting (paragraph 25 ACAS code) – this was the first occasion on which a disciplinary meeting had been arranged and the claimant had clearly indicated that she would attend.
115. The ACAS guide has a section on what matters an employer should consider if an employee 'repeatedly' fails to attend a meeting including the seriousness of the disciplinary issue under consideration and the employee's disciplinary record. I note that whilst the respondent was concerned that matters were escalating, the claimant had no prior disciplinary issues in her 2-year employment with the respondent.
116. In my assessment neither the claimant's disciplinary record nor the seriousness of the disciplinary issues justified the respondent in going ahead with the disciplinary meeting in the absence of the claimant.
117. The respondents also did not inform the claimant that they had decided that a decision will need to be made in her absence as set out in the ACAS guide.
118. Even if a respondent forms the view that an employee is guilty of gross misconduct, I note that paragraph 23 of the ACAS code makes it clear that a fair disciplinary process should always be followed before dismissing for gross misconduct.

119. Looking at the evidence in the round, I find that the respondent did not follow a reasonably fair procedure, taking into account the band of reasonable responses, the nature of the allegations, and the size and resources of the respondent.

### **Reasonable Belief**

120. In his witness statement Mr Evans referred to bullet point 13 in the list at Section 5.33 of the respondent's disciplinary procedure which lists the type of offence which normally results in summary dismissal, which states;  
*'Actions which damage the Bluebird Care Lancaster & South Lakeland reputation or bring into disrepute – this includes taking part in activities which result in adverse publicity to Bluebird Care Lancaster & South Lakeland or which cause the business to lose faith in the employee's integrity'*.
121. If the respondent had a genuinely held and reasonable belief that the claimant was on a campaign to cause mischief and damage the reputation of the company, which was an important part of the composite allegation of misconduct, I find that it was within the range of reasonable responses for the respondent to characterise this as gross misconduct and to decide that dismissal was the appropriate punishment for such an act.
122. However, although I have found that the respondent's belief was genuinely held, I do not consider that it was reasonably held.
123. The flawed process adopted in respect of both the investigation and procedure meant that the respondent did not gather evidence in relation to this important allegation of misconduct.
124. In paragraph 12d of Mr Evans' witness statement in relation to the belief *'that the claimant had contacted several colleagues either encouraging them to leave, go sick, or persuading them to believe the rumours the claimant was spreading about Mrs Evans being a bad manager and bully'*, there is reference to evidence which is said to support this allegation but I note that all of the evidence referenced in this paragraph all post-dates the claimant's dismissal.
125. There was no investigation into this allegation and it had not been put to the claimant.
126. The claimant had no previous disciplinary record in just over two years of employment with the respondent.
127. In all the circumstances, the deficiencies were such that the respondent could not have had a reasonable belief in the claimant's guilt because of the unreasonable process which led to that belief.
128. I find that it would not have been within the band of reasonable responses to characterise the sending of the email as gross misconduct. Whilst Miss Hall referred to the 7<sup>th</sup> bullet point of Section 5. 33 of the respondent's disciplinary procedure which refers to *'Misuse of property belonging to the company..'* as gross misconduct, I do not find that it would have been within the band of reasonable responses to characterise the claimant sending an email to the company email address from her own device as *'misuse of company property'*.
129. I also find that it would not have been within the band of reasonable responses to characterise the other allegations as gross misconduct. There were no previous incidences of sending inappropriate emails and given that this email had arisen out of a specific circumstance,

it would have been reasonable to assume that this was unlikely to be repeated. It was only one shift that the claimant failed to turn up for in this period with no evidence of prior incidences. With regard to the tone of the claimant's emails to Mrs Evans and the other communications, the claimant had not been given a chance to explain or to reflect in a disciplinary meeting on her behaviour and to address whether this behaviour was merely the result of passing emotion given the claimant's evident shock at the respondent's reaction to 'the joke email'.

### **Conclusion on Fairness**

130. For the reasons set out above, I find that the claimant was unfairly dismissed by the respondent within section 98 of the Employment Rights Act 1996.
131. I must therefore also go on to consider whether there should be any adjustments to the claimant's award.

### **Compensation**

#### **Polkey**

132. In accordance with the principles in **Polkey -v- AE Dayton Services Ltd [1987] UKHL 8**, I must consider whether any adjustments should be made to the compensation element of the claimant's award on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed, that is, if the procedural and investigative flaws that I have found had not occurred what would be the chance of a fair dismissal?.
133. Miss Hall submitted that there should be a 100% reduction for **Polkey** and contributory fault but did not elaborate further and with regard to whether she might have been fairly dismissed, the claimant pointed out that Mrs Evans in her witness statement said she was initially of the view that the claimant should not be dismissed.
134. Had a reasonable investigation been undertaken including speaking to the claimant about all of the allegations and in particular the allegation that she was on a 'campaign' against the company, contacting several colleagues either encouraging them to leave, go sick, or persuading them spreading rumours about Mrs Evans being a bully, evidence may or may not have emerged.
135. Had evidence emerged supporting the respondent's belief then the respondent's conclusions and the decision to dismiss were not likely to have been different.
136. I conclude that had the respondent put this allegation to the claimant and a reasonable investigation ensued, there is more than a nominal chance that they would not have uncovered evidence and that this may have cast doubt on this allegation.
137. Had such doubt arisen, the respondent may still have concluded that all the remaining allegations together were sufficient and dismissed the claimant.
138. It would not have been within the band of reasonable responses to characterise the other allegations as gross misconduct and therefore the

claimant could only have been fairly dismissed after following a fair procedure including a series of warnings.

139. Given the claimant's intransigence at the fact finding meeting I find that given a period of reflection there is a chance that the claimant's attitude would not have been much different at the disciplinary meeting with regard to 'the joke email' or her attitude following 'the joke email'. In my assessment there appears to have been an inability by the claimant to see or at least concede that she had gone too far in 'the joke email' when, as she said at the fact-finding meeting, she had 'pranked' it up.
140. However, in my view there is a chance that with a further period of reflection following a fair disciplinary process of issuing a written warning and final written warning if necessary that the claimant would have moderated her attitude.
141. I consider though that there is more than a nominal chance that the claimant would not have moderated her attitude and I find therefore that there is a 40% chance that the claimant would have been fairly dismissed following a fair disciplinary process of issuing a written warning and final written warning.

### **Contributory fault**

142. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.
143. Section 122(2) provides:  
"Where the Tribunal considers that the conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."
144. Section 123(6) provides:  
"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."
145. Miss Hall made the submission about 100% reduction in the claimant's compensation. In response, the claimant submitted that her conduct was not blameworthy because she had been angry about the way in which 'the joke email' had been dealt with which she felt was unfair.
146. In determining whether any deduction should be applied to either part of the claimant's award as a result of contributory fault, I must first identify what conduct on the part of the claimant could give rise to contributory fault. I must then also consider whether any such conduct was culpable, blameworthy or unreasonable and whether the blameworthy conduct caused or contributed to the dismissal to any extent.
147. In my assessment, it was unreasonable for the claimant not to use the appeal procedure following her dismissal, but in my view this did not cause or contribute to her dismissal.
148. With regard to the claimant's conduct, I consider that there was no malice from the claimant's in sending 'the joke email' but that she had failed to consider that it might not be regarded as a joke and was unable subsequently to appreciate that she had gone too far and that it was inappropriate to send this email to the company email address. I find that



the claimant showed no real remorse for this, only indicating at the fact-finding meeting that she regretted having sent the email because it upset e Susanne Whittaker.

149. I find that Susanne Whittaker was initially upset by the contents of the email. Her contemporaneous witness statement provided for the fact-finding meeting says this. The claimant suggested that this was not how Susanne Whittaker really felt but I place weight on Alyson Hartlebury's contemporary statement for the fact-finding meeting which records that Susanne Whittaker was too upset to come into work the following day.
150. Although Susanne Whittaker said to the claimant in a message dated 29 August that 'It's water under the bridge now', and other witnesses accounts of conversations with Susanne Whittaker after the event was that the email was not a major issue, I find that by asking not to go into work the day after the email was sent supports that Susanne Whittaker was upset by it.
151. I find that the tone of the claimant's emails sent to Mrs Evans on the 25 August were facetious and disrespectful referring to '*paid holiday*' when she was suspended and suggesting that Mrs Evans buy flowers on a '*bog offer*', presumably meaning 'buy one get one free' offer, when suggesting that if the claimant should apologise to Susanne Whittaker for 'the joke email' then Mrs Evans should also apologise for an email that Mrs Evans had sent to staff regarding an employee. Although the tone was set slightly by Mrs Evans first email to the claimant on that date when Mrs Evans said that she hoped the claimant improved '*soon, in time for the bank holiday weekend*', this was not to the same degree or sustained as in the claimant's email responses.
152. In my assessment it is reasonable to consider that the claimant was showing a lack of respect for her employer in the way she referred to bullying by management and by Mrs Evans on her self-certified sick note and annual staff survey rather than raising any concern through the proper channels.
153. I find that the claimant's conduct in these regards was culpable, blameworthy and unreasonable and I find that this blameworthy conduct significantly contributed to her dismissal.
154. However, I bear in mind that there has already been a **Polkey** reduction of 40% to the compensatory award to reflect the chance of a fair dismissal and therefore I set a further reduction for contributory conduct of 20% to the claimant's compensatory award to avoid the injustice of an excessive and disproportionate reduction.
155. I find that it would be also be just and equitable to reduce the claimant's basic award by 20% to reflect the conduct of the claimant before dismissal.

### **Itemised Pay Statements**

156. In the ET1 the claimant said that she had had less than half of her wage slips in 2 years (pdf 267) and in her 'statement of case' (pdf 271) that the following pay slips were late; 26 June 2022, 25 October 2022 and 21 March 2023.
157. The claimant confirmed at the hearing that she had now received copies of all of her payslips for the entire period she worked for the respondent that she had requested from the respondent's accounts department.

158. Mr Evans said at the hearing that the claimant was not the only one who had not been getting her pay slips and that they had had an imperfect system.
159. I find that the respondent failed to give the claimant itemised pay statements as required by section 8 Employment Rights Act 1996 during her period of employment ending 30 August 2023.
160. In accordance with section 12 of the ERA, it remains to be determined whether any unnotified deductions have been made from the claimant's pay during the period of thirteen weeks immediately preceding 5 September, which is the date the claimant's ET1 was presented to the Employment Tribunal.

Employment Judge **Dilks**

Date : 7 February 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON  
13 February 2024

FOR THE TRIBUNAL OFFICE

### **Notes**

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>