



EMPLOYMENT TRIBUNALS

Claimant: Tasneem Kiani
Respondent: Department for Work and Pensions
Heard at: East London Hearing Centre
On: 10-12 January 2024
Before: Employment Judge S Knight

Representation

Claimant: Mrs Louise Mankau (Doughty Street Chambers)
Respondent: Mr Antoine Tinnion (Trinity Chambers)

JUDGMENT

1. All claims for unauthorised deductions from wages and for unpaid holiday pay are dismissed upon withdrawal.
2. The complaint of unfair dismissal is well-founded. The Respondent unfairly dismissed the Claimant.
3. The Respondent wrongfully dismissed the Claimant.

REASONS

Introduction

The parties

1. The Claimant was employed by the Respondent as an Executive Officer. The Respondent is a government department which is responsible among other things for Jobcentres and administration of Universal Credit. The Claimant was employed by the Respondent between 22 June 1997 to 10 August 2020.

The claims

2. On 10 August 2020 the Claimant was notified of her dismissal with immediate effect for alleged gross misconduct. On 28 October 2020 ACAS was notified of the Claimant's claim under the early conciliation procedure. On 11 December 2020 ACAS issued the early conciliation certificate. On 9 January 2021 the ET1 Claim Form was presented in time. Subsequently the ET3 Response Form was sent to the Tribunal.

The issues

3. At a Preliminary Hearing on 30 July 2021 the parties agreed to a list of issues. At the start of this hearing the Claimant withdrew claims for unauthorised deductions from wages and unpaid holiday pay. The remaining claims relate to:
 - (1) Unfair dismissal; and
 - (2) Breach of contract.
4. The list of issues appears at Annex 1 to these Reasons.

Procedure, documents, and evidence heard

Procedure

5. It was originally intended that this hearing would take place entirely face-to-face. However, due to an administrative error, Cloud Video Platform joining instructions were sent to the parties. The Respondent's side all appeared in the Tribunal, whereas the Claimant's side all appeared remotely. At the start of the hearing the parties agreed to the hearing being converted into a hybrid hearing.
6. At the start of the hearing I checked whether any reasonable adjustments were required. Those in attendance confirmed that none were required.

Documents

7. I was provided with an agreed Hearing Bundle comprising 428 pages.
8. Witness statements were provided separately from Sarah Tanner (the Claimant's manager), Jo-Ann Reilly (the dismissing officer), Barbara Billings née Cabey (the appeal officer), and the Claimant.

Evidence

9. At the hearing I heard evidence under oath or affirmation from each of the witnesses. Each of the witnesses adopted their witness statements and added to them in response to questions.

Closing submissions

10. Both parties made helpful oral closing submissions.

Findings of fact

The Claimant's personal and health issues

11. The Claimant experiences multiple disabilities which impact on her health and daily life. Her disabilities include urticaria, asthma, depression, and work-related stress.
12. By the time of her dismissal the Claimant had experienced depression for about 10 years. She was prescribed paroxetine to treat her depression. Around June or July 2019 the Claimant's prescription was set at 10mg. In November 2019 her prescription was increased to 20mg. Paroxetine had side effects for the Claimant of drowsiness and problems sleeping, and the increase in dosage caused her cognitive difficulties.
13. The Claimant's son has some degree of learning difficulties. The Claimant assists him with various aspects of his life.

The employment of the Claimant by the Respondent

14. The Claimant was employed by the Respondent for 23 years. She had an unblemished disciplinary record before the events of this case.
15. The Claimant was employed by the Respondent to work in a Jobcentre. As part of her job role she had access to the Respondent's computer systems which contain details of the claims made by Universal Credit claimants. Every day when the Claimant accessed the Respondent's computer system she had to confirm that she accepted the Respondent's Acceptable Use Policy.
16. The Claimant worked full time until June 2019, when she reduced her hours due to her health conditions. She originally worked full time from 09:00 to 17:00 Monday to Friday, and then changed to part time working, 3 days per week from 09:00 to 17:00.

The Respondent's Acceptable Use Policy

17. The Respondent's "*Acceptable Use Policy*" regulates access to its electronic systems. It includes the following:

"Only access Citizen data where there is a valid business need that is appropriate to your job role – this means that you must not, under any circumstances, access, or attempt to access, your own DWP records or the records of friends, family members or ex partners on any Departmental computer, paper file or benefit system, irrespective of your motivation. You must not access the records of other customers, including celebrities, without authorisation and a legitimate business reason."

The misconduct

18. On 2 December 2019 the Claimant's son made a claim for Universal Credit.
19. On 3 and 4 December 2019 the Claimant was at work. She used the

Respondent's computer system to access her son's Universal Credit account. The purpose of accessing the account on 3 December 2019 was to check the claim was up and running correctly. The purpose of accessing the account on 4 December 2019 was to check who her son's Universal Credit appointment was booked with.

20. On 9 December 2019 the Claimant's son attended the Jobcentre for an initial evidence appointment. None of the Claimant's colleagues wanted to see the Claimant's son, because of him being her son. This caused the Claimant's son distress, which he conveyed to the Claimant. The Claimant was not working that day. She told him to speak to a manager. He was eventually seen by a member of staff.
21. On 10 December 2019 the Claimant's son checked his "journal" and saw that an appointment had been made for him on 14 December 2019. This appointment was booked with the Claimant. In this regard, I accept the Claimant's evidence. Although Ms Reilly said that an appointment was not booked for that date, and when she was making a decision on the Claimant's dismissal she did not believe that an appointment had been made on that date, the Claimant's son's statement as part of the appeal against dismissal corroborated the Claimant's account in this regard, and I accept it.
22. On 10 and 12 December 2019 the Claimant again accessed her son's Universal Credit account to check on his appointment details. She did this because she was concerned about the appointment being booked to her. She knew that this was a conflict of interest.
23. On 17 December 2019 the Claimant again accessed her son's Universal Credit account. The purpose of accessing the account was to check whether the appointment details had been changed, because none of her colleagues wanted to conduct his appointment, knowing that he was the Claimant's son.
24. The Claimant did not subjectively believe that what she was doing in logging onto her son's Universal Credit account was wrong. She did not carry out any malicious or fraudulent activity, a fact which the Respondent's disciplinary and appeal officers accepted. She did not access any confidential information, a fact of which the Respondent's disciplinary and appeal officers were aware. The system that she accessed did not contain highly sensitive information such as bank account details, which were kept on a separate system known as the Labour Market System ("**LMS**"), a further fact of which the Respondent's disciplinary and appeal officers were aware. She had permission from her son to access his information. Indeed, she was specifically asked by her son to do this. Although the disciplinary officer was not made aware of this explicitly, the appeal officer was aware of this as she was in possession of a statement from the Claimant's son making this clear. Despite having this permission and holding the beliefs she did, the Claimant's actions were in clear breach of the Respondent's Acceptable Use Policy.
25. On a date between 2 and 19 December 2019 the Claimant informed Sarah Tanner that she had accessed her son's account. When Mrs Reilly made her decision to dismiss the Claimant she believed that this occurred after all of the

accesses to the account had taken place.

26. On 20 December 2019 the Claimant's workplace Christmas meal took place. The Claimant informed Ms Tanner that she had accessed her son's account. The Claimant additionally said that she thought that the restrictions to accessing claims were limited to systems used in relation to Job Seekers Allowance (meaning LMS). She said that because at the time she believed that was the case. Ms Tanner informed the Claimant that it was not the time or place to have that discussion.
27. On 15 January 2020 by email the Claimant's colleague, Adil Chaudry, informed Ms Tanner that the previous day the Claimant had asked him to access her son's account, and that as he typed in the name, hit search, and loaded up the record the Claimant informed Mr Chaudry that it was her son's claim. Ms Tanner forwarded this to a more senior manager, which began an investigation and disciplinary process. This matter is not said by the Respondent to amount to gross misconduct and the Claimant was subsequently acquitted of misconduct allegations relating to it.
28. From this point until the Claimant's dismissal she remained either at work or on special leave for reasons unrelated to the allegations against her. When she worked during the COVID-19 pandemic this work was conducted from home. She was sent a Departmental computer by the Respondent and continued to work unsupervised, logging on each day to the Respondent's computer systems.

The Respondent's policies relevant to the disciplinary procedure

29. The Respondent has a policy on "*How to: Deal with security incidents and breaches of information security*". This sets out a breach of information security as including "Browsing computer or paper records of friends, colleagues or customers without appropriate authorisation and a legitimate business reason". The policy sets out multiple levels of misconduct. It states in particular that minor misconduct action may be appropriate and proportionate where certain principles apply, including that there is no malicious or suspicious intent, there is no known harm, and there has been no reputational damage. There are further such principles, and the policy is unclear about whether all such principles must apply for minor rather than serious misconduct action to be appropriate and proportionate.
30. The policy on "*How to: Deal with security incidents and breaches of information security*" goes on to deal with mitigation. It states:

"Mitigating circumstances are the events or factors beyond an individual's wilful control that have some bearing on the information security breach. Mitigation should help explain or show that the individual had reason to act or behave in a particular way. Although mitigation can never undo the misconduct and does not negate the fact that a breach has occurred, it may influence the outcome as it can be used to reduce the penalty. See How to assess the level of misconduct and decide a discipline penalty for further advice."

31. The policy on *“How to: Deal with security incidents and breaches of information security”* then sets out an “information security scenario matrix” which explains possible outcomes for different security breaches. Within the criteria of “Browsing and unauthorised access to records” the most serious security breach considered is “An employee has authorisation to access personal data or information as part of their normal duties. They access records without legitimate business reasons and appropriate authorisation and use this information themselves (or on behalf of a third party) for personal gain, or to falsify claims for benefits.” This type of security breach did not occur in the Claimant’s case, and no one alleges that it did. This type of security breach is automatically treated as gross misconduct. The only possible outcome listed is dismissal, except in cases “where an employee was acting under extreme duress – violence or threat of violence.”
32. A different breach is “An employee accesses or browses through multiple customer records or makes multiple accesses to the same record, regardless of whose record it is and including their own record, or those of their family, friends or celebrities without a legitimate business reason or appropriate authorisation. The access, browsing or searches may happen on the same day or over a period of time.” Everyone accepts that this is the relevant type of security breach for the Claimant’s case. This type of security breach is automatically treated as gross misconduct, with the further clarification that “When determining the appropriate level of penalty, the manager will consider the motive of the employee in accessing the records, the amount of records accessed and any resulting impacts”. Two possible outcomes are then provided: dismissal, and final written warning. Dismissal is said to be appropriate where the manager “has good reason to believe the actions to be suspicious or malicious and / or the employee can provide no legitimate reason or reasonable justification for accessing the records”. In contrast, a final written warning is said to be appropriate where “the employee can provide some reasonable explanation as to why they may have accessed the records or some other relevant mitigation”.
33. A third breach is “An employee accesses or browses through customer data and records without legitimate business reasons or appropriate authorisation. This may also include accessing their own record, or those of their family, friends or celebrities on one single occasion.” This is treated as serious misconduct, and dismissal is not a possible outcome. The severity of the warning depends on whether the employee had a legitimate reason or reasonable justification for accessing the record, or alternatively whether the employee had some other relevant mitigation.
34. Inadvertent access to the wrong information is treated as not constituting misconduct.
35. The Respondent has a policy on *“How to: Assess the level of misconduct and decide a discipline penalty”*. This provides in particular as follows:

“12. In deciding whether to apply a penalty and the level of any penalty to a proven act of misconduct, Decision Makers will always consider the motives of the employee concerned and the impact or likely impact of the

misconduct. They must also consider and mitigating factors put forward by the employee. Mitigation refers to something about the case that justifies a lower penalty or outcome than the norm.

13. Mitigation may take many different forms and it is for the individual to put forward mitigating factors together with supporting evidence, if available. Such factors should always be considered before deciding the penalty. Typical examples may be (this list is not exhaustive):

- cases of ill-health or conduct due to medication
- issues related to disability, for example where the condition can influence behaviour
- provocation, for example if the employee felt provoked in some way
- exceptional pressures upon the employee
- serious personal trauma
- the employee may appear to have been acting out of character, particularly where they have an unblemished record
- the employee may have volunteered information about the misconduct and gives an explanation prior to any disciplinary action being started.

[...]

16. Where misconduct has been proven, the Decision Maker should decide on a penalty consistent with the seriousness of the misconduct. Consistency does not necessarily mean that the same penalty must be applied in every instance of the same act of misconduct. Each case must be looked at on its own merits. Any relevant circumstances should be taken into account and the same procedure be applied in addressing similar instances of the same misconduct.”

“Note: The Decision Maker must consult Civil Service HR (CSHR) Casework to discuss an appropriate penalty in all cases where the initial assessment of the level of misconduct is serious or gross. This is to ensure that penalties issued for misconduct are consistent across the department.”

The investigation

36. The investigation in this case was conducted partly before the disciplinary hearing, and partly after the disciplinary hearing. The part before the disciplinary hearing took the form of a request for the Claimant to attend an investigation meeting, a letter asking for her response to questions, and a report prepared by Kim Eveleigh from the Government Internal Audit Agency (“**GIAA**”).
37. As everyone involved in deciding upon the Claimant’s disciplinary case accepted, the Claimant had arranged to attend the investigation meeting on 12

March 2020 and intended to do so. However, on the day that she was planning to attend, her husband was taken seriously ill with suspected COVID-19, and was taken to hospital. As a result, the Claimant was unable to attend the meeting.

38. On 31 March 2020 the GIAA sent to the Claimant a written list of questions. As everyone involved in deciding upon the Claimant's case was aware, the Claimant felt unable to answer those questions because her mind was not in the right place to allow her to do so. This is because of the confluence of physical and mental health factors affecting her and her family in light of her existing depression, her husband's illness, and the illness of other members of her family.
39. On 29 May 2020 the GIAA investigation concluded, finding a case to answer. An audit report was prepared in relation to the Claimant's access of her account. This included in an appendix what was called a "CIS audit trail", which showed the accesses to the Claimant's son's account. The appendices to the audit report were not provided to the Tribunal despite being created and possessed by the Respondent. This is surprising, given that they are said to support the Respondent's version of events that the Claimant's son did not have an appointment booked with the Claimant before the appointment on 19 December 2019. If that is what they showed then the Tribunal would expect that the Respondent would place them in evidence. However, it is for the parties to choose what evidence they rely upon.

The disciplinary hearing, and further investigation

40. On 12 June 2020 the Claimant was invited to a disciplinary hearing with Mrs Reilly, an SEO (one grade higher than Sarah Tanner, and 2 grades higher than the Claimant).
41. On 23 June 2020 Mrs Reilly held a disciplinary meeting with the Claimant and the Claimant's trade union representative, Teresa Power. The meeting was conducted in a professional manner and allowed the Claimant to have her say. Notes were taken of that meeting by a third party who was not asked to give evidence.
42. During the course of the disciplinary hearing the Claimant made full admissions. She explained her mitigating circumstances, including that her husband had been unwell, she had severe depression and her "brain was all over the place". She noted that she had an unblemished record. She explained that she had suffered with depression for 10 years, and that shortly before the misconduct occurred her dosage of antidepressants was increased. She pointed out that she was not thinking straight at the time. She pointed out that she had made her manager Sarah Tanner aware of the misconduct.
43. After the disciplinary hearing, Mrs Reilly conducted further investigations. On 26 June 2020 Mrs Reilly contacted HR for assistance. Subsequently, on the advice of HR, she contacted Occupational Health for further assistance. She was told that the effects of the Claimant's increased dosage of medication on cognition could last for 10 weeks. She was also told that the Claimant would be expected

to contact her GP if the side effects lasted longer than 10 weeks.

44. Mrs Reilly also took further evidence from 3 people: Shamima Choudry on 16 July 2020; Sarah Tanner on 27 July 2020; and Siaka Khan on 3 August 2020. Shamima Choudhury and Siaka Khan gave evidence related to the allegation by Adil Chaudry, which was broadly supportive of the Claimant's version of events. Sarah Tanner gave evidence about information that the Claimant had provided to her, and her own reporting of the alleged misconduct.
45. In addition, as part of Mrs Reilly's enquiries, on 4 August 2020 Ms Tanner informed Mrs Reilly by email that on 14 January 2020 the Claimant had asked her to rebook an appointment that was booked for her son on 15 January 2020. She also informed Mrs Reilly that the appointment was originally booked on 19 December 2019.
46. Mrs Reilly did not give the Claimant the opportunity to comment on any of the evidence provided after the disciplinary hearing took place.

The dismissal decision

47. On 10 August 2020 Mrs Reilly wrote to the Claimant to inform her of her dismissal.
48. As became clear in her evidence, Mrs Reilly's view of the disciplinary procedure was that in cases of breach of the Acceptable Use Policy, dismissal was the starting point, but this could be "mitigated down".
49. In reaching her decision to dismiss, Mrs Reilly accepted as true (because it was true) the Claimant's explanation for why she accessed her son's Universal Credit account on 3 and 4 December 2019.
50. Although the Claimant told Mrs Reilly that this was the case, Mrs Reilly did not accept that the Claimant's son had an appointment booked with her on 14 December 2019. As a result, Mrs Reilly did not accept the explanations for the accesses to the account on 10 and 12 December 2019. Mrs Reilly's view was wrongly but nonetheless genuinely held.
51. Mrs Reilly accepted that the Claimant's accesses to her son's account were not malicious, suspicious, or fraudulent, and that the Claimant did not make a personal gain from the access.
52. In the disciplinary hearing and subsequently Mrs Reilly became confused about when the Claimant's medication was increased. She was given the correct information, that the medication was increased in November 2019. There is no reason that the Claimant would give this information incorrectly: it is fixed in her knowledge as an important matter. Despite this, the notes of the meeting show that Mrs Reilly was confused about when the medication was increased, and the notetaker also appears to have been confused, as the notes suggest that the medication was increased in early 2019. Proper attention was not paid by Mrs Reilly and the notetaker to accurately recording this information. Mrs Reilly knew that the timing of the increase in dosage was important because the

increase affected the Claimant's cognitive abilities, and this would be a strong mitigation point. However, she nonetheless proceeded on an incorrect basis despite having the correct information available to her.

53. In her evidence Mrs Reilly ran into difficulties when she was asked whether she accepted that the Claimant's medication was in fact affecting her cognitive abilities when she accessed her son's account, and after counsel for the Respondent told her that if she could not remember the answer then to say so, she said that she could not remember. The reason that Mrs Reilly had difficulty answering was clear: having now understood the evidence that was always in front of her, she knows that the Claimant's decision-making was affected by the medication she was taking.
54. Due to the OH advice that she received, Mrs Reilly thought that it was important that it was for the Claimant to contact her GP if she had issues with her medication. However, she never asked the Claimant whether the Claimant had in fact done so.
55. Mrs Reilly took the view that this case fell into "the most severe circumstances". This is because there were multiple accesses to the Claimant's son's account without a legitimate business reason.
56. Mrs Reilly accepted that the Claimant's motives for accessing her son's account were benign. She also accepted that the only impact of the Claimant's actions was loss of trust in her which arose simply from the Claimant's actions in breach of the Acceptable Use Policy. Mrs Reilly's view was that this breach of trust would apply in every case of unauthorised access. This would necessarily include unauthorised accesses on a single occasion, which the Respondent's policy does not treat as gross misconduct.
57. In considering her decision Mrs Reilly did not give detailed consideration to consistency with other decisions. Although she claimed in evidence that she did discuss with HR consistency of decision-making with other cases, the contemporaneous notes from HR do not support this having occurred. Mrs Reilly said that she had made her own notes but that they were lost. If consistency had been discussed with HR then HR would have recorded this in their notes, given that this forms a part of what HR would be expected to advise upon. It appears that Mrs Reilly's recollection is mistaken.
58. The Claimant had noted to Mrs Reilly that she had been bullied by her previous line manager. Mrs Reilly concluded that because the Claimant was no longer managed by the same person at the time of the misconduct, this was not relevant to mitigation.
59. When she made her decision, Mrs Reilly was aware that the Claimant had remained employed for 7 months, carrying out her job, after the disciplinary process started.
60. Mrs Reilly's view was that in any case when someone accessed a record more than once, trust between the employer and employee had broken down unless a valid reason for the access (in terms of a legitimate business need) could be

provided. This was a circular test, where no one could ever benefit from the decision that there were valid reasons, because there never would be, as valid reasons for the access would preclude there being misconduct.

The appeal

61. On 24 August 2020 the Claimant filed an appeal against her dismissal. The appeal was allocated to Barbara Billings, a Grade 7 (one grade higher than Mrs Reilly).
62. On 10 September 2020 the Claimant was sent an invitation to an appeal meeting. That meeting invitation was sent on an incorrect basis, as the invitation suggested that the Claimant had been found culpable for the misconduct charge of which she had been acquitted. That was pointed out to Mrs Billings by the Claimant's new trade union representative, Mr Thompson. As a result, on 21 September 2020 the Claimant was sent a new meeting invitation, for the meeting to take place on 25 September 2020.
63. On 25 September 2020 Mrs Billings held the appeal hearing with the Claimant and Mr Thompson. The meeting was conducted in a professional manner and allowed the Claimant to have her say. Notes were taken of that meeting by a third party who was not asked to give evidence.
64. In the appeal hearing Mr Thompson made the following points in particular: only one account was accessed; gross misconduct requires consideration of motive and impact, but the motive was benign and there was no impact; the Claimant informed her line manager of the misconduct, and disciplinary proceedings were not started by the line manager as a result of that; the Claimant had 22 years' of unblemished service; the Claimant was not interviewed in the investigation; Mrs Reilly got the dates of the Claimant's medication wrong, and if the correct dates were used then it would be clear that the Claimant's cognition had been affected by the increase in dosage at the time of the misconduct; the Claimant was placed under pressure by her son; and the correct outcome would have been a final written warning.
65. On 29 September 2020 Mr Thompson sent to Mrs Billings an email setting out details of another similar case where an employee had not been dismissed, and urged her to apply a consistent approach.
66. On 8 October 2020 Mrs Billings drafted an appeal outcome letter. This was only a draft and contained gaps which required completion. It rejected the Claimant's appeal. There was a section saying that she had taken advice from OH on the impact of the Claimant's medication. The advice was not included. This is because at the time she prepared the draft she had not received the advice. Before receiving the advice she had already decided that she was going to reject the Claimant's appeal.
67. Also on 8 October 2020 Mrs Billings contacted HR to discuss the appeal outcome. Part of the purpose of the call was to check that the outcome was consistent with other cases. She did not inform HR of the 29 September 2020 email from Mr Thompson. As such, HR would not have known to look for the

case to which Mr Thompson had referred.

68. On 9 October 2020 Mrs Billings refused the appeal. Mrs Billings took the view that there could be no reasonable justification for the employee's actions where there was no legitimate business need for access. This meant that, despite what was written in the disciplinary policy, an employee could not rely on a reasonable justification to mitigate the sanction that would be applied to them; only extraneous matters could act as some form of mitigation. Further, she took the view that the impact of the access was not relevant because there had been a breach. Although Mrs Billings was aware of this, Mrs Billings did not take into account the impact of the Claimant's son's special needs, and that he was reliant on her.
69. Mrs Billings knew that Mrs Reilly made a mistake about the date of the increase in the Claimant's medication dosage. Mrs Billings knew that the dosage increased in November 2019, and that the Claimant would have been affected by this at the time of the misconduct. In her evidence Mrs Billings hesitatingly tried to suggest that she had been told by OH that the Claimant's actions would not have been affected on 5 occasions by her medication. However, there was no contemporaneous record of this in any notes made by OH, HR, or Mrs Billings at the time, and it does not feature in her witness statement. Mrs Billings' evidence that she has some memory of this is incorrect. Mrs Billings was not told this by OH. If she had been told this then there would have been some record of it, given its importance to the outcome of the appeal.
70. Mrs Billings viewed the Claimant's length of service as being an aggravating factor, something which she expressed in her decision letter and clarified in her evidence.
71. Mrs Billings was aware that the Claimant had confessed her misconduct to her line manager before any disciplinary proceedings took place.

Relevant law

Unfair dismissal rights

72. Section 94 of the Employment Rights Act 1996 ("ERA 1996") provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by their employer.
73. Section 98 of the ERA 1996 sets out potentially fair reasons for dismissal:

“(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—

[...]

(b) relates to the conduct of the employee[...].”

The reason for dismissal

74. In the case of *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401; [2017] IRLR 748 (23 May 2017) Lord Justice Underhill stated that the “reason” for a dismissal is the factor or factors operating on the mind of the decision-maker which causes them to take the decision to dismiss or, as it is sometimes put, what “motivates” them to dismiss.

Conduct as a reason for dismissal

75. In the case of *British Home Stores v Burchell* [1980] I.C.R. 303 (20 July 1978) the Employment Appeal Tribunal set down the test that the Tribunal applies in cases of unfair dismissal by reason of conduct. The burden of proof within the test was later altered by section 6 of the Employment Act 1980. As a result, the test applied by the Tribunal is as follows:

- (1) The employer must show that it believed the employee to be guilty of misconduct.
- (2) The Tribunal must determine whether the employer had in mind reasonable grounds upon which to sustain that belief.
- (3) The Tribunal must determine whether, at the stage at which that belief was formed on those grounds, the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances.

76. This means that the Respondent does not need to have conclusive direct proof of the employee’s misconduct: the Respondent only needs to have a genuine and reasonable belief, reasonably tested. Further, there is no requirement to show that the employee was subjectively aware that their conduct would meet with the Respondent’s disapproval.

77. In the case of *Shrestha v Genesis Housing Association Ltd* [2015] EWCA Civ 94; [2015] IRLR 399 (18 February 2015) Lord Justice Richards noted at ¶ 23:

“To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole.”

78. In considering the case generally, and in the Tribunal’s assessment of whether dismissal was a fair sanction in particular, the Tribunal must not simply

substitute its judgment for that of the employer in this case. Different reasonable employers acting reasonably may come to different conclusions about whether to dismiss. As Mr Justice Phillips noted when giving the judgment of the EAT in Trust Houses Forte Leisure Ltd v Aquilar [1976] IRLR 251 (1 January 1976):

“It has to be recognised that when the management is confronted with a decision whether or not to dismiss an employee in particular circumstances, there may well be cases where more than one view is possible. There may well be cases where reasonable managements might take either of two decisions: to dismiss, or not to dismiss. It does not necessarily mean, if they decide to dismiss, that they have acted ‘unfairly,’ because there are plenty of situations in which more than one view is possible.”

79. It is therefore not for the Tribunal to ask whether a lesser sanction would have been reasonable in this case. The Tribunal asks itself whether dismissal was reasonable. The question is also not whether the Claimant committed misconduct, but whether the Respondent had a reasonable belief that the Claimant had committed misconduct.
80. Further, in Linfood Cash and Carry Ltd v Thomson [1989] I.C.R. 518 (10 May 1989) the EAT noted that it is not for the Tribunal to make its own assessment of the credibility of witnesses on the basis of evidence given before it. The relevant question is whether an employer acting reasonably and fairly in the circumstances could properly have accepted the facts and opinions which it did.

Reasonableness of the investigation

81. In the case of Sainsbury’s Supermarkets Ltd v Hitt [2002] EWCA Civ 1588; [2003] I.C.R. 111 (18 October 2002) Mummery LJ at ¶¶ 29-30 & 34, giving the judgment of the Court of Appeal, stated that it is necessary to apply the objective standards of the reasonable employer to all aspects of the question of whether the employee had been fairly and reasonably dismissed. That includes the reasonableness of the investigation.
82. In the case of A v B [2003] IRLR 405 (14 November 2002) the EAT at ¶ 60 held as follows:

“Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field, as in this case. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances.”

83. In the case of Salford Royal NHS Foundation Trust v Roldan [2010] EWCA Civ 522; [2010] I.C.R. 1457 (13 May 2010) Elias LJ giving the judgment of the Court of Appeal approved of the judgment in A v B insofar as it referred to the need for employers to take seriously their responsibilities to conduct a fair investigation where the employee’s reputation or ability to work in their chosen field could be affected by the disciplinary outcome.

Polkey reductions

84. Awards for unfair dismissal can be reduced if the Tribunal finds that the employer could have dismissed the employee fairly if a fair procedure had been used. In the case of *Hill v Governing Body of Great Tey Primary School* [2013] I.C.R 691 (29 January 2013) Langstaff J at ¶ 24 giving the judgment of the EAT set out the particular features of a *Polkey* deduction as follows:

“First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly, though it did not do so beforehand.”

Wrongful dismissal

85. In *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698 Lord Evershed M.R. held in relation to the test for a wrongful dismissal that:

“the question must be — if summary dismissal is claimed to be justifiable — whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.”

86. Where there has been a breach of contract by an employee, in order to terminate a contract for breach, the employer must make sure that it does not delay unacceptably or act in some other way inconsistent with electing to terminate the contract (see e.g. *Cook v MSHK Ltd* [2009] EWCA Civ 624, [2009] IRLR 838 (9 July 2009)). However, where the employer is faced with potentially repudiatory action by the employee, it does not waive the alleged breach merely by taking the employee through the proper disciplinary procedure (*British Heart Foundation v Roy* UKEAT/0049/15 (16 July 2015, unreported)).

Conclusions on liability

Unfair dismissal

87. The principal reason for dismissal was conduct. Conduct is a potentially fair reason for dismissal.
88. The Respondent’s decision-makers, Mrs Reilly at dismissal and Mrs Billings at appeal, genuinely and honestly believed that the Claimant had committed

misconduct. They had reasonable grounds for that belief because the misconduct was admitted.

89. I turn to the issue of a reasonable investigation. Considerable investigative steps were taken. Stones were not left unturned. All of the relevant information about the existence of the misconduct was gathered. An opportunity was given to provide mitigation. The problem, as I will turn to in due course, was what was then done with the information that the Respondent gathered.
90. I turn briefly to consider whether the sanction of dismissal was consistent with other cases of materially similar misconduct. I have not been provided with specific examples of other cases where a comparison can be drawn. If Mr Thompson's email which raised the issue of consistency had been fleshed out with detail of what another case involved, then this argument may have gone further. However, without details of any specific case being materially similar to the Claimant's case and a different result being reached, I cannot conclude that other sufficiently similar cases were dealt with differently. As such, this cannot have an impact on whether the decision to dismiss was within the band of reasonable responses.
91. I then consider whether dismissal was a fair sanction. This is a point where it is particularly important not to substitute my judgment for that of the Respondent. In assessing this issue, great assistance can be derived from the Respondent's own policies. The policies provide that in circumstances involving this type of misconduct, dismissal is a possible sanction, but so is a final written warning. There are criteria for when each is appropriate. In all cases there will have been a breach of the Acceptable Use Policy, meaning that there was no legitimate business reason for access to data. That determines guilt. In determining sanction under the policy, dismissal is appropriate only in the most severe cases. Further guidance provides that what must be considered when deciding whether to dismiss are whether (i) actions are suspicious or malicious; (ii) there is no legitimate reason or reasonable justification for access; and (iii) there was some other relevant mitigation.
92. Based on the material of which they were aware at the time, neither Mrs Reilly nor Mrs Billings can have believed that this case was one of the most severe cases. The only possible less serious cases involve fewer accesses, although more than 1 access because according to the policy a single access would amount to a lower level of misconduct. "Severe cases", as they knew, mean cases where there has been something to make the situation worse than this. They knew that because they accepted the motive of the Claimant was benign and there was no gain or loss caused to anyone. If they had critically applied their minds to the facts of which they were aware then they would each have known that the pressure placed on the Claimant and (for Mrs Billings) the cognitive effects of the Claimant's change in medication meant that she had a reasonable justification for access, this not meaning the same thing as a legitimate business need, a fact which they ignored but which is unambiguous from the policy. They were both also aware that the Claimant had other relevant mitigation. In this regard, almost all of the mitigation examples provided in the Respondent's policy were present, as both Mrs Reilly and Mrs Billings were aware: cases of ill-health or conduct due to medication; issues of disability;

exceptional pressures upon the employee; acting out of character where there is a long unblemished record; and volunteering information about the misconduct and explaining it before disciplinary action is started. Mrs Reilly and Mrs Billings each had all the knowledge necessary for this to fall into the category where their policy mandated that a final written warning would be given.

93. To explain this another way, Mrs Reilly and Mrs Billings considered the issue of breakdown of trust too early in their decision-making process. They considered whether trust had broken down prior to considering mitigation, finding that the result of the Claimant's actions was a breakdown of trust. From that point there was no rescuing the Claimant's situation with any mitigation. What the decision-makers should have done according to their policy was consider the case in the round, note that there were no negative consequences of the Claimant's misconduct, then consider mitigation, and finally determine whether trust had broken down.
94. The Respondent had a fair structure for their decision-making set out in their policy which a reasonable employer would use in determining whether to dismiss. The failure to follow the policy does not automatically make the decision to dismiss an unfair sanction. However, in the circumstances of this case I take that fair policy as a starting point, and consider all of the overwhelming mitigating factors in this case which were known to Mrs Reilly (and then to Mrs Billings), and conclude that no reasonable employer would impose dismissal as a sanction for the misconduct in this case.
95. As a result, the dismissal was substantively unfair.
96. I then turn to the question of whether the procedure used was fair. Considering the Respondent's investigative and disciplinary process in the round, the disciplinary hearing cured any defects in the investigative process up to that point, because it allowed the Claimant to put her case across. There is nothing that the Claimant said in the disciplinary hearing that needed to have been said earlier. For example, the evidence in the disciplinary hearing could not have prevented disciplinary action taking place.
97. The real issue arises with the disciplinary and appeal processes not allowing the Claimant to comment on investigations which happened after each of the disciplinary hearing and appeal hearing respectively.
98. After the disciplinary hearing took place Mrs Reilly interviewed 3 members of staff. She gave the Claimant no opportunity to comment on the evidence gathered as a result of those interviews. Further, Mrs Reilly sought OH advice, which the Claimant was not able to comment upon. If she had been able to comment upon it then she would have explained that assumptions that Mrs Reilly was making about the Claimant's medication and going back to her GP were fundamentally flawed. Further, Mrs Reilly proceeded on an incorrect factual basis about what had been said at the disciplinary hearing about when the Claimant increased her dosage of medication. If Mrs Reilly had proceeded based on what the Claimant actually said, for example by checking with the Claimant in writing Mrs Reilly's confused version of events, then Mrs Reilly

would not have made that mistake. She would have accepted that the Claimant's cognition was affected at the time of the misconduct. In addition, Mrs Reilly assumed that because the Claimant's former line manager was no longer her line manager this could not affect the Claimant at all. However, if she had checked this issue with the Claimant, then the Claimant would have explained that the former line manager was still bullying her, and so she was still being affected by this. All of these issues led Mrs Reilly into material error which necessarily affected her view of whether the Claimant had a reasonable explanation, or mitigation, available to her.

99. The appeal process could not cure the procedural defects in the disciplinary process, because (as I have already explained) Mrs Billings did not actually understand how the policy on discipline and mitigation worked. Further, Mrs Billings did not check with HR the specific details of the case that the Claimant's representative asked her to check. Although this specific point on consistency does not in and of itself show that the dismissal was unfair, it demonstrates a lack of care and attention to detail in the conduct of the appeal process. Mrs Billings did not apply her mind in a critical way to all of the issues raised by Mr Thompson in the appeal.
100. Assessing the whole procedure in the round, the failure to allow the Claimant to comment on all of the evidence against her without any reason to withhold such evidence was unfair. A different outcome would have been reached had Mrs Reilly allowed a full contradictory process to take place. That was not remedied by Mrs Billings' actions given her misunderstanding of the policy. The procedure was not a fair one.
101. As a result, the dismissal was procedurally unfair.

Wrongful dismissal / notice pay

102. The Claimant had an entitlement to 12 weeks' notice.
103. I considered whether there was affirmation of contract by the Respondent in this case. The decision not to dismiss the Claimant pending the outcome of disciplinary proceedings was not an affirmation of contract. Rather, the lengthy disciplinary proceedings were a mark that the Respondent was approaching matters as they must be encouraged to.
104. The decision not to dismiss the Claimant when she originally confessed to Ms Tanner is a more difficult matter. However, I have concluded that this did not amount to an affirmation of contract. There was the inevitable busy nature of a workplace before Christmas and then the Christmas break to consider. After that, the Claimant was referred to disciplinary action in a relatively short time. The timescales involved suggest there was not an affirmation of contract by the employer.
105. However, I conclude that the conduct in this case was not of sufficient seriousness as to constitute repudiatory breach of contract. The Respondent's own policy makes clear that once all of the factors were taken into account, the only correct outcome was a final written warning. Although the policy labels the

Claimant's misconduct as gross misconduct, this is not in and of itself conclusive from a legal standpoint of whether it was gross misconduct.

106. When in cross-examination the Claimant was taken through the policies which labelled her conduct as gross misconduct, she accepted that her conduct was gross misconduct. However, this is of little use to the Tribunal in assessing whether in law it was gross misconduct, because the Tribunal must apply a test based on legal definitions of what amounts to gross misconduct, rather than simply accepting that the Respondent's policy documents correctly apply the legal label of gross misconduct to the relevant conduct.
107. In this case there was not a breach of the implied term of trust and confidence. The conduct complained of was not such as to show that the Claimant had disregarded the essential conditions of the contract of service. When the facts of the case are looked at in the round, and the mitigation is considered, it is apparent that a fundamental breach did not occur. As a result there was no right on the part of the employer to dismiss without notice.
108. In all the circumstances the Respondent and in particular each of its decision-makers, with the information that they had available at the time of their decisions, did not act reasonably in treating the admitted misconduct as a sufficient reason for dismissing the Claimant, and in particular in treating the Claimant's actions as gross misconduct. When regard was had to the Respondent's policy as a whole, notwithstanding that the policy describes the conduct as gross misconduct, it was not gross misconduct and did not justify dismissal.
109. As a result, the Claimant was wrongfully dismissed.

Employment Judge S Knight

16 January 2024

ANNEX 1: LIST OF ISSUES

Unfair dismissal

1. What was the reason or principal reason for dismissal?
The Respondent relies upon conduct.
2. Was it a fair reason under section 98(2) of the Employment Rights Act 1996 such as to justify the dismissal of the Claimant?
3. Did the Respondent act reasonably or unreasonably in treating this as a sufficient reason for dismissing her, having regard to equity and the substantial merits of the case (section 98(4) ERA)?
4. Was the decision to dismiss within the band of reasonable responses? In particular:
 - (1) Did the Respondent genuinely and honestly believe that the Claimant had committed misconduct?
 - (2) Did the Respondent have reasonable grounds for that belief?
 - (3) Was the Respondent's investigation within the range of what was reasonable in the circumstances?
 - (4) Was dismissal a fair sanction for the misconduct in question?
 - (5) Was the sanction of dismissal consistent with other cases of materially similar misconduct?
5. Did the Respondent follow a fair procedure?
6. If the procedure followed by the Respondent in dismissing the Claimant was unfair, what is the likelihood that the Claimant would have been fairly dismissed in any event, had a fair procedure been followed?
7. If the Claimant's claim for unfair dismissal is upheld what remedy does the Claimant seek?

- (1) If the Claimant seeks reinstatement or reengagement, is it practicable for the Respondent to comply with such an Order?
- (2) What financial compensation is appropriate in all of the circumstances?
- (3) Should any compensation awarded be reduced in terms of *Polkey v AE Dayton Services Ltd* [1987] ICR 142 and, if so, what reduction is appropriate?
- (4) Should any compensation awarded be reduced on the grounds that the Claimant's actions caused or contributed to their dismissal and, if so, what reduction is appropriate?
- (5) Has the Claimant mitigated their loss?

Notice Pay

8. Was the Claimant entitled to receive notice of the termination of her employment? The Claimant had been employed for 23 years and had a statutory notice entitlement of 12 weeks.