



Case Number: 2301491/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mrs M Webb

and

Respondent
Margetts and Associates
Limited

Held at Ashford on 13th and 14th March 2017

Representation

Claimant:
Respondent:

Mrs L Mankau, counsel
Mr G Sims, counsel

Employment Judge J Pritchard (sitting alone)

RESERVED JUDGMENT

- 1 The Claimant's claim that she was unfairly dismissed is well-founded and accordingly succeeds.
- 2 This case will be listed for a remedy hearing with a half-day time estimate. Without prejudice to any further findings of the Tribunal at the remedy hearing the judgment of the Tribunal is that:
 - (i) there was a 50% chance that the Claimant would have been dismissed in any event and any compensatory award will be reduced accordingly;
 - (ii) the Respondent unreasonably failed to comply with the ACAS Code of Practice and any compensatory award will be increased by 10%;
 - (iii) any basic and compensatory awards will be reduced by 10% by reason of the Claimant's contributory conduct.
- 3 The Respondent breached the Claimant's contract of employment by failing to give the Claimant notice of termination of her employment or by paying her in lieu. Damages will be increased by 10% by reason of the Respondent's failure to comply with the ACAS Code of Practice.
- 4 The Respondent was in breach of its duty to provide the Claimant with a written statement of employment particulars and the Claimant is awarded two weeks' wages.

REASONS

- 1 The Claimant claimed unfair dismissal and breach of contract (notice pay). The Respondent resisted the claims.
- 2 The Tribunal heard evidence from the Respondent's witnesses as follows: Sarah Margetts (shareholder and director of the Respondent company); Adam Margetts (veterinary surgeon at the Respondent's veterinary practice and son of Sarah and Alan Margetts); Elspeth Watt (independent human resources practitioner); and Shahin Ismail (a barrister in private practice). The Tribunal also heard evidence from the Claimant's witnesses: the Claimant (bookkeeper and former employee of the Respondent) and Alan Margetts (former owner of the Respondent's veterinary practice). The Tribunal was provided with a bundle of documents to which the parties variously referred. Following the hearing, the representatives provided the Tribunal with written submissions.
- 3 At the outset of the hearing the Respondent made an application for a postponement on the basis that the hearing should be listed for four days to enable the tribunal to hear the all the evidence, deliberate and deliver judgment on liability and remedy. The application was supported by the Claimant. The Tribunal, having regard to the overriding objective, refused the application: the claim was not overly complex. If successful, the Claimant would be seeking compensation in the region of £20,000. It was not proportionate for the case to be re-listed for four days. A postponement would cause delay and cause the parties to incur further expense. Nevertheless, the Tribunal was mindful of the voluminous documentation and the length of the witness statements. Therefore, the Tribunal determined that at this hearing it would hear evidence in relation to liability and issues relating to Polkey and contribution only. The parties would then be given the opportunity to make written submissions after the hearing. This course of action would allow more time for evidence to be heard. Judgment in relation to those issues would then be reserved. If the Claimant were to succeed in her claims, a further hearing would be held to decide remedy. The parties agreed a timetable for presenting evidence and the Tribunal is grateful for their adherence to it.

Issues

- 4 The representatives for the parties provided the Tribunal with an agreed list of issues as follows:
Unfair Dismissal
- 5 Can the Respondent show a potentially fair reason for the Claimant's dismissal?
 - 5.1 Can the Respondent show the Claimant committed misconduct:

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- 5.1.1 Moving money out of the business without proper authority
- 5.1.2 Moving money between business accounts without proper authority putting business payments at risk
- 5.1.3 Cooperating in a change of practice so that money was banked into an inappropriate business account
- 5.1.4 Disclosure of sensitive personal information?
- 5.2 Can the Respondent show an SOSR, i.e. that the relationship of mutual trust and confidence had broken down?
- 6 Did the Respondent have a genuine belief in the misconduct of the Claimant?
- 7 Did the Respondent have reasonable grounds for a belief in the misconduct of the Claimant given the role of Sarah Margetts in the business?
- 8 Was dismissal or summary dismissal a sanction outside the range of reasonable responses open to the Respondent?
- 9 Did the failure to interview the Claimant and/or Alan Margetts mean that a reasonable investigation was not undertaken?
- 10 Was conduct of the disciplinary process outside the range of reasonable responses open to the Respondent?
 - 10.1 Was the outcome pre-judged?
 - 10.2 Was there any material failure to supply evidence to the Claimant and if so did this have any material effect?
 - 10.3 Was any procedural failure corrected on appeal?
- 11 Was the Respondent at fault for any breakdown in mutual trust and confidence. If so, would an SOSR dismissal have been unfair?
- 12 If a proper process was not followed, would the Claimant have been dismissed in any event at the same or later date, or was there a chance that the Claimant would have been dismissed in any event – *Polkey*?
- 13 Should the basic and compensatory awards be reduced as a result of the Claimant's conduct or on other just and equitable grounds?

Wrongful dismissal

- 14 Should the Claimant have been paid notice pay?

Quantum

- 15 What loss can the Claimant prove is attributable to her dismissal?
- 16 Has the Claimant mitigated her losses?
- 17 What, if any, ongoing loss period should be allowed?

Findings of fact

- 18 The Claimant describes herself as a fully qualified bookkeeper.
- 19 During 2008 or 2009 the Claimant commenced employment for Alan Margetts who owned, or was a partner in, three veterinary practices based in Gillingham, Ashford and Maidstone. The Claimant was based at the Gillingham practice, solely owned by Alan Margetts, but did the books for all three practices working three days each week. Her duties included payroll, Sage accounting, paying bills, preparing VAT returns, and providing data for the accountants.
- 20 Alan Margetts was married to Sarah Margetts. Their son is Adam Margetts.
- 21 In 2009 the veterinary partnership dissolved. This left Alan Margetts the sole owner of the Ashford and Gillingham practices. The Claimant continued to work for Alan Margetts. Sarah Margetts worked for the practices as practice manager dealing with administrative matters.
- 22 In 2011, Alan Margetts caused the Gillingham practice to be incorporated as a limited company, the Respondent in these proceedings. Sarah Margetts was appointed sole director and held a 75% shareholding. Alan Margetts held 25% of the shares. This was known to the Claimant. There was a dispute between the parties, which need not be resolved by the Tribunal in order to reach a decision in this case, as to whether the business was incorporated to realise tax benefits or for retirement planning purposes. Alan Margetts, continued to work in both the Respondent practice and the Ashford practice which he continued to operate as a sole trader. The Tribunal accepts that the Respondent is and was at material times a small employer.
- 23 Following incorporation of the Respondent, the Claimant continued to work for the Respondent's practice in Gillingham and for Alan Margetts' practice in Ashford. With the reduction to two practices, the Claimant's hours were reduced to two days each week. On the days she was at work, the Claimant would continue to work alongside Sarah Margetts who continued carrying out administrative duties.
- 24 Transactions between three bank accounts are relevant to these proceedings: the Respondent's Coutts account ("the Coutts Account") to which the Claimant and Sarah Margetts had access; a Natwest business account ("the Natwest Account"), formerly the Gillingham sole trader account, which had been retained following incorporation to take advantage of its overdraft facility; and Alan Margetts' sole trader account relevant to the Ashford practice ("the Ashford Account"). Funds in the various accounts were used to cross subsidise the businesses overall.
- 25 Alan Margetts did not have sufficient computer skills to make online bank transfers. So that Alan Margetts could understand the practices' computerised accounts, the Claimant kept a double entry record (the "red book").

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- 26 In the Tribunal's view, Sarah Margetts' evidence that the Claimant had the specific role of "looking after the company finances" is wide of the mark. The Claimant was not a financial controller. The Tribunal finds that the Claimant, working two days each week, carried out bookkeeping duties in this small business by recording transactions, paying routine bills and making transfers between and out of the three bank accounts upon instruction. It appears that the Respondent also retains external accountants.
- 27 There was a dispute between the parties about who instructed the Claimant and supervised her work until 2014 following incorporation of the Respondent. The Claimant's evidence, fully corroborated by Alan Margetts, was that Alan Margetts instructed the Claimant who did not have responsibility to make autonomous decisions concerning financial and business matters. Sarah Margetts' evidence was that she instructed the Claimant and that at no point did the Claimant take instructions from Alan Margetts. Because of what followed, the Tribunal does not find it necessary to determine the issue.
- 28 In March 2014 Sarah and Alan Margetts separated. The separation and the divorce proceedings which followed were acrimonious. Communication between the couple thereafter was mainly through solicitors.
- 29 Following the separation, Sarah Margetts ceased to attend work at either the Respondent's practice or that of Alan Margetts (according to Sarah Margetts, she was excluded from the business by Alan Margetts). She did not return until 21 January 2016 as described below. The Respondent practice continued in business with Alan Margetts continuing to work long hours. The Tribunal accepts Alan Margetts' evidence that he continued to run the business in his wife's absence.
- 30 It appears that Alan and Sarah Margetts reached an agreement whereby salary and dividend would continue to be paid to Sarah Margetts as a form of spousal maintenance.
- 31 The Tribunal was referred to several text messages between Sarah Margetts and the Claimant in May, July and September 2014 concerning Alan Margetts' drawings and sundry matters. A text message from Sarah Margetts to the Claimant dated 21 September 2014 reads:

Myra

I have just been on the Gillingham account [the Coutts account]. Do you mind telling me why there has been 35k taken by Alan as drawings during August? It has already been made crystal clear that he is only allowed to draw his 15k per month!!!!

Why was I not informed it was happening. You are aware of the legality of this?

There will be a formal warning issued

Sarah

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32 The Claimant discussed the text with Sarah Margetts over the telephone who told her that she should have told Alan Margetts that he could not have the money. In the event, no warning was issued. There appears to have been little or no contact between the Claimant and Sarah Margetts following this exchange. As Sarah Margetts stated in evidence, her role in the business was “distant” during her absence. The Tribunal concludes that, whatever the position before her absence, Sarah Margetts did not issue instructions or supervise the Claimant during her absence from the business. As Sarah Margetts said in evidence:

“During the two years I had been prevented from running the Respondent Gillingham practice I had no ability to see the Sage Management Accounts and I was unable to even remember what the password was”.

33 The Tribunal finds that it was Alan Margetts who instructed the Claimant during this period, in particular with regard to when drawings and payments should be made and in what amount. This finding is consistent with the Claimant’s own evidence and that of Alan Margetts. Sarah Margetts’ evidence that the Claimant made such decisions of her own volition and with no instructions from Alan Margetts cannot be accepted; Sarah Margetts was not present at the practice and thus her evidence in this regard can only be regarded as speculation. Indeed, it appeared to the Tribunal that Sarah Margetts’ evidence was inconsistent since she also stated in cross examination that the Claimant “allowed herself to be manipulated” by Alan Margetts.

34 Because the Respondent’s bank manager had expressed concern to Sarah Margetts about the way the Coutts Account was being run, and its use of the overdraft in particular, Sarah Margetts removed the Claimant and Alan Margetts from banking authorisation rights in November 2015. Thereafter Sarah Margetts had sole control of the Coutts Account.

35 The Tribunal finds that it was Alan Margetts’ decision that cash and cheque receipts at the Respondent’s practice would henceforth be paid into the Natwest Account.

36 Divorce proceedings were concluded in January 2016: Sarah Margetts assumed control of the Respondent practice and Alan Margetts retained his Ashford practice. Alan Margetts ceased to work for the Respondent; Sarah Margetts took over on 21 January 2016.

37 On the same day, Sarah Margetts suspended the Claimant. Sarah Margetts’ letter to the Claimant, which confirmed her suspension, states, among other things:

I write to inform you that a number of serious issues have come to light which, if proven, could amount to gross misconduct...

During the next few weeks, we will be investigating matters of concern that have arisen with regard to your book keeping at the practice and

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potential failures to be open and transparent about financial affairs. The allegations include your lack of transparency with movements of money out of the business account, without justification or authority and without the necessary authorisation from myself as the Company director. It also appears that monies may have been moved into an account to which the sole director of Margetts & Associates Limited has no access and have caused serious issues with the running of the business.

38 Sarah Margetts instructed Elspeth Watt to carry out an investigation which included interviewing a number of the Respondent's staff (but not the Claimant or Alan Margetts). In summary: Emma Dixon, veterinary nurse, stated that the Claimant and Alan Margetts discussed matters relating to the divorce and business finances for all to hear and that they would call Sarah Margetts "awful names" and sought to turn staff away from her; amongst other things, Pauleen Collins-Kershaw stated that her personal wages had been discussed by the Claimant in front of a work colleague; amongst other things, Hayley Smith stated that the Claimant had made a number of inappropriate and disparaging remarks about Sarah Margetts and referred to her as "that woman".

39 By letter dated 15 February 2016, Elspeth Watt informed the Claimant that there was a case to answer in respect of:

- *The movement of money out of the business bank account without justification or authority, and that you made no attempt to contact Mrs S Margetts to obtain such authority*
- *The transfer of company money without Mrs S Margetts authority as the majority shareholder and sole director of the business from the business account with Coutts to a previous sole trader account which was a personal bank account at NatWest in the name of Alan Margetts to which she had no access, causing serious issues to arise with the running of the business*
- *Giving instructions to the Head Receptionist to use an alternative paying in book in the name of Alan Margetts former 'Sole Trader Account' at the NatWest bank for the receipt of cash and cheques received at the Gillingham practice, thereby depriving the business of £11,595.43 for the month of December 2015.*

....

In addition, during the course of my investigations, I have been advised that there had been incidents where your behaviour had fallen far short of what is expected by the reported disclosure of sensitive personal staff information where it could be overheard by others.

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- 40 The Claimant was invited to attend a disciplinary hearing. In advance of the disciplinary hearing, the Claimant sent to Elspeth Watt a statement prepared by Alan Margetts in which among other things states as follows:

Therefore I was the boss when Myra joined and even after the incorporation I remained in charge only for that to be disputed by my wife when we parted in early 2014. When we parted my wife ceased attending the Gillingham practice save for a couple of visits when I was not present in summer 2014...Because I was there at Gillingham and I was always the boss quite naturally Myra carried on taking instructions from me. Initially Myra and my wife enjoyed excellent relations on a professional and personal level. However it soon became clear that my wife was accusing me – totally without foundation (forensic accountants have been through the books) of misappropriating funds from the M & A (Gillingham) account. Every transaction I have made – with Myra’s help as book-keeper – has an obvious audit trail. Myra first became aware of my wife’s unfounded suspicions initially via a text from my wife to Myra which Myra tried to answer by phoning my wife. This call when Myra tried to re assure my wife that nothing I was doing was in any way underhand only caused my wife to become extremely angry and use foul language, so much so that Myra turned her phone to loud speaker so that her husband Pete could witness the call.

...Myra has worked tirelessly for the good of the firms to produce reports and commentaries on these reports during my divorce to show Sarah and her solicitors that NO financial irregularities had taken place, Myra has never had any direction from Sarah or her solicitors apart from the very angry conversation alluded to above.

In November 2015 my wife took me off the bank mandate for M & A so I had no access to the money I was earning to help run the firm. Myra also lost her mandate. I had to have some money for day to day expenses so I decided to pay cash and cheques into a Nat West account used as part of the Gillingham Ltd business where I did have access. This was completely my idea, and I told everyone who had anything to do with the banking that this was the case. Myra had nothing to do with the banking. I or other staff got the money ready for banking and I would run someone to the bank to deposit said banking. I was also entirely responsible for all inter-practice transfers of funds and transfer of funds into Nat West Gillingham from both practices.

Myra has been totally honest and true and loyal in her service at Margetts & Associates both before and after incorporation....

Myra has done nothing wrong except unwittingly annoy the titular head of the firm she works for...

- 41 Sarah Margetts provided a written statement setting out her concerns: about financial transfers, in particular the movement of large tranches of money from the Coutts Account to the Natwest Account between May 2015 and

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October 2015 without her knowledge or authorisation; the effect on the Coutts Account in which the overdraft was maximised; the unauthorised allocation of a large dividend allocated to Sarah Margetts on the Sage accounts; paying cash and cheques into the Natwest Account after the bank mandate was withdrawn; and inappropriate and unprofessional comments to members of staff. Sarah Margetts concluded with her opinion that Claimant had committed various acts of gross misconduct.

- 42 Alan Margetts provided a further statement in support of the Claimant after she had shown him the statements of other members of staff which had been sent to her. In particular, Alan Margetts stated that he had given instructions for receipts to be paid into the Natwest Account. He also challenged what the staff members had to say. Amongst other things, Alan Margetts stated:

Myra worked totally under my explicit direction she did not do a wrong thing. The firms have run with inter-practice money ever since I took over the sole ownership of the Ashford practice. Myra at my behest did nothing that was unusual to the running of the firms. We, between us, actually did an excellent job of keeping the two firms going – only just – during the ... divorce proceedings.

...

May I say that the way Myra handled these drawings was exactly how she handled them for the whole while we were incorporated? We were husband and wife and that was the way things were done

...

Myra has done nothing wrong she deserves a vote of thanks not censure, disgrace and the sack by a back door process

This statement was also forwarded to Elspeth Watt.

- 43 Elspeth Watt chaired a disciplinary hearing on 2 March 2016. She did not take into account the evidence Alan Margetts' statements because she thought it to be "very emotional" and "could not be relied upon". She also felt that calling Alan Margetts as a witness at the disciplinary hearing would be "counterproductive" and a "rehash of a bitter matrimonial dispute". During cross examination Elspeth Watt told the Tribunal that in her opinion Alan Margetts' views were not impartial. At the disciplinary hearing Elspeth Watt did not delve into the details of the alleged inappropriate transfers and payments which were the subject matter of the allegations; rather, she discussed "the generalities of the transfers".
- 44 Elspeth Watt concluded that the Claimant had appeared to be acting on the instructions of Alan Margetts but that she owed a duty to Sarah Margetts to ensure she was able to draw on salary and dividend payments agreed between the parties' solicitors; and that as a professional bookkeeper she should not have acceded to Alan Margetts' requests without referring to Sarah Margetts and the sole director and principal shareholder. Although she

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- found no evidence of fraud, Elspeth Watt concluded that the Claimant had been guilty of gross misconduct in respect of all three of the specific allegations stated above. With regard to the disclosure of sensitive personal information to other members of staff, Elspeth Watt concluded that the Claimant had been guilty of misconduct not amounting to gross misconduct. Elspeth Watt recommended that the Claimant should be dismissed and prepared a letter of dismissal for Sarah Margetts to send to the Claimant.
- 45 Sarah Margetts accepted Elspeth Watt's recommendation and by letter dated 8 March 2016 informed the Claimant that she was to be "summarily" dismissed with effect from 15 March 2016. It was made clear to the Tribunal that this was not simply a case of Sarah Margetts sanctioning Elspeth Watt's decision but that it was Sarah Margetts' decision to dismiss the Claimant.
- 46 The Claimant subsequently appealed. Sarah Margetts instructed Shahin Ismail, a barrister in private practice, to hear the Claimant's appeal. Shahin Ismail held an appeal hearing on 25 April 2016. In evidence, Shahin Ismail said that the appeal was by way of a review of the original decision (the Tribunal notes that in her witness statement, Shahin Ismail claims that because the Claimant was wide-ranging in what she said at the appeal hearing, the appeal was essentially a rehearing).
- 47 However, Shahin Ismail did not interview the three members of staff who had provided statements. Nor did she interview Alan Margetts. After the disciplinary hearing she asked a number of questions of Sarah Margetts who provided a written replies but did not afford the Claimant the opportunity to comment on those replies.
- 48 In her evidence to the Tribunal, Shahin Ismail stated:
- "I fully understood the invidious position the Claimant was in, as between Mr Margetts who had assumed management responsibility for the business and Mrs Margetts who was the sole Director and majority shareholder and formerly in charge of running the business".*
- 49 Nevertheless, Shahin Ismail concluded that the decision to dismiss should stand. In summary, Shahin Ismail reached the following conclusions:
- 49.1 Sarah Margetts was undoubtedly the Claimant's manager, not Alan Margetts;
- 49.2 the Claimant should have kept Sarah Margetts informed of what she was being asked to do by Alan Margetts;
- 49.3 the Claimant had duties above and beyond following Alan Margetts' instructions rather than the clear instructions of the Claimant's manager and owner of the business (Shahin Ismail appears to be referring to the text messages of 2014 in this regard);
- 49.4 as a bookkeeper the Claimant had the responsibility for ensuring the business accounting system was maintained and that the business income and expenditure was kept within acceptable limits;

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- 49.5 the Claimant should have flagged up to Alan Margetts the risks to the business of his instructions.;
- 49.6 each of the specific movements of money were not at Alan Margetts' instructions as he did not understand computers, Sage accounting or the online banking system;
- 49.7 the Claimant's misconduct harmed the business because the Coutts Account overdraft was likely to be called in and medical supply bills were not being paid;
- 49.8 the Claimant had aligned herself so completely with Alan Margetts that she had been unable to see the harm her actions were causing to the business;
- 49.9 the Claimant had attempted to bring Sarah Margetts' reputation into disrepute which was conduct of itself amounting to gross misconduct and the Claimant was "very keen to carry out Alan's wishes against Sarah";
- 49.10 the Claimant was not responsible for depriving the business of £11,544.43 in December 2015.
- 50 Shahin Ismail also felt that the Claimant's dismissal could have been justified on SOSR grounds on the basis of a clear breakdown in any trust between Sarah Margetts and the Claimant.

Applicable law

Unfair dismissal

- 51 Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position she held. A reason relating to conduct is a potentially fair reason falling within section 98(2).
- 52 Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and substantial merits of the case.
- 53 When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Burchell 1980 ICR 303, as explained in Sheffield Health & Social Care NHS Foundation Trust v Crabtree [2009] UKEAT 0331, the Tribunal must consider a threefold test:
- 53.1 The employer must show that he believed the employee was guilty of misconduct;

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- 53.2 Whether the employer had in his mind reasonable grounds upon which to sustain that belief; and
- 53.3 Whether, at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.
- 54 It is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation. In Sainsburys Supermarkets v Hitt [2003] IRLR 23 the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.
- 55 Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. See: Iceland Frozen Foods v Jones [1982] IRLR 430; Post Office v Foley [2000] IRLR 827.
- 56 Defects in the original disciplinary hearing and pre-dismissal procedures can be remedied on appeal. It is not necessary for the appeal to be by way of a re-hearing rather than a review but the Tribunal must assess the disciplinary process as a whole and where procedural deficiencies occur at an early stage, the Tribunal should examine the subsequent appeal hearing, particularly its procedural fairness and thoroughness, and the open-mindedness of the decision maker; see Taylor v OCS Group Ltd [2006] IRLR 613 CA.
- 57 The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. That Code is intended to provide the standard of reasonable behaviour in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.
- 58 In respect of claims such as unfair dismissal and breach of contract, section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that where an employer or employee has unreasonably failed to comply with the Code of Practice, it may, if it considers it just and equitable in all the circumstances to do so, increase or reduce compensation awards by up to 25% (this does not apply to any Basic Award for Unfair Dismissal).
- 59 The Polkey principle established by the House of Lords is that if a dismissal is found unfair then the fact that the employer would or might have dismissed

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the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Guidance as to the enquiry the Tribunal must undertake was provided in Ms M Whitehead v Robertson Partnership UKEAT 0331/01 as follows:

- 59.1 what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process? Was it conduct? Was it some other substantial reason; that is a loss of trust and confidence in the employee? Was it capability?
- 59.2 depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the reason, would or might the Respondent have reasonable grounds for their belief in such misconduct?
- 59.3 even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?
- 60 In Hill v Governing Body of Great Tey Primary School UKEAT/0237/12/SM the Employment Appeal Tribunal held that a "Polkey deduction" has these particular features. 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. The question as to what a hypothetical fair employer would have done is 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.
- 61 Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly. Section 123(6) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

Breach of contract/Wrongful dismissal

- 62 In Neary v Dean of Westminster [1999] IRLR 288, it was held that conduct amounting to gross misconduct justifying summary dismissal must so undermine the trust and confidence which is inherent in the particular contract

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of employment that the employer should no longer be required to retain the employee in her employment. The Respondent bears the burden of showing that the Claimant committed a repudiatory breach of contract; see: Shaw v B & W Group Limited UKEAT/0583/11.

Failure to provide a written statement of employment particulars

- 63 Section 38 of the Employment Act 2002 provides that if in a case to which the proceedings relate (which includes proceedings relating to unfair dismissal) the Tribunal finds in favour of an employee and, when the proceedings were begun the employer was in breach of his duty under section 1(1) or 4(1) of the Employment Rights Act 1996, the Tribunal must, unless there are exceptional circumstances which would make an award or increase unjust or inequitable, award the employee two weeks' pay (subject to the cap specified in section 227 of the Employment Rights Act 1995). If the Tribunal considers it just and equitable in all the circumstances, the Tribunal may award four weeks' pay (subject to the cap specified in section 227 of the Employment Rights Act 1996).

Conclusion and further findings of fact

- 64 The Tribunal finds on the balance of probabilities that the Respondent has shown a genuine belief that that the Claimant made various bank transactions without proper authority (that of Sarah Margetts) and, making those transactions was the principal reason for the Claimant's dismissal despite Alan Margetts' instructions. That much is clear from the letter of dismissal sent to the Claimant by Sarah Margetts. This is not to say that it was reasonable for the Respondent to assert that the proper authority was Sarah Margetts (see below) but, rather, that such a belief was held. The Tribunal is unable to accept the Claimant's submission that the principal reason for the Claimant's dismissal was because of Claimant's perceived loyalty to Alan Margetts during very acrimonious divorce proceedings although, in the Tribunal's view, that formed the background to the disciplinary proceedings. The Claimant's alleged disclosure of sensitive personal information was not found to amount to gross misconduct and the Tribunal concludes that it was not the principal reason for the Claimant's dismissal.
- 65 Sarah Margetts' evidence was inconsistent. On the one hand, she appeared to accept Elspeth Watt's findings that the Claimant had acted on instructions from Alan Margetts; on the other hand she told the Tribunal that the Claimant had not been instructed by Alan Margetts to make various transfers but acted of her own volition. In cross examination, when asked if it would have made a difference had Alan Margetts authorised the transactions, Sarah Margetts said that it would have made a difference (but she could not say what difference). Shahin Ismail appeared to uphold the dismissal on the basis of the findings of Elspeth Watt but also found that each of the specific movements of money were not at Alan Margetts' instruction. Conduct does not have to be blameworthy to fall within the ambit of section 98(2) of the Employment Rights Act 1996. Despite some evidential inconsistency, on

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balance the Tribunal concludes that the Respondent held a genuine belief that the Claimant's actions related to conduct. That conduct was making various bank transactions despite Alan Margetts instructing her to do so and without Sarah Margetts' authority or approval.

- 66 The Tribunal accepts on the facts that the reason for the Claimant's dismissal could equally be labelled as a dismissal for some other substantial reason such as to justify the dismissal of the Claimant from the position she held.
- 67 The Tribunal has been most concerned in this case with the reasonableness of the Respondent's belief in the Claimant's misconduct and the reasonableness of the investigation.
- 68 The Tribunal finds that the Respondent acted outside the band of reasonableness by finding that the Claimant acted "without proper authority" as alleged. On the contrary, the evidence strongly suggests that Alan Margetts instructed the Claimant after Sarah Margetts became absent from the business in 2014. Sarah Margetts was simply not working in the business and the Respondent's purported reliance on the text messages sent in 2014 to show that she remained the proper authority was most unconvincing (and the evidence strongly suggested that the text messages did not in any event relate directly to the Respondent's business). Alan Margetts was running the business and instructing the Claimant. He was a 25% shareholder of the Respondent company. He had sufficient authority to instruct the Claimant and as a matter of fact he did so.
- 69 The Respondent also acted outside the band of reasonableness in determining that the Claimant should have kept Sarah Margetts informed of the various bank account transactions or that being a bookkeeper she had a professional duty to notify Sarah Margetts and/or refuse Alan Margetts' instructions. Sarah Margetts had access to the Coutts Account and could see what was going on; she had every opportunity to give instructions to the Claimant regarding transfers but did not do so, the last contact having been by way of a text message and the subsequent telephone conversation in 2014. Imposition of such a duty appears to ignore the factual circumstances and context pertaining at the time. Sarah Margetts was absent from the business for a lengthy period. The Claimant was aware that complying with Alan Margetts' instructions would or might have been disapproved of by Sarah Margetts but the Claimant was being instructed by Alan Margetts who was undoubtedly "the boss" during Sarah Margetts' absence. It was Alan Margetts who was running the business who was in any event a 25% shareholder of the company. The Claimant was a part-time bookkeeper working two days each week recording and making transactions upon instruction; she was neither a financial controller nor a financial director. The Claimant found herself employed by a company in which the husband and wife owners were going through what was clearly a most acrimonious separation and divorce. The Tribunal concurs with Shahin Ismail that Claimant was in an invidious position.

- 70 Although not seemingly relied upon to show the principal reason for the dismissal, the Tribunal found little credible evidence to suggest that Sarah Margetts (or Shahin Ismail for that matter) had reasonable grounds to believe that the Claimant made autonomous decisions to make business transfers between the accounts or to run the Coutts Account in overdraft.
- 71 In the Tribunal's view, the decision not to interview Alan Margetts during the disciplinary process was wholly unreasonable and one-sided, especially in circumstances in which Sarah Margetts' evidence was given full weight. The Tribunal is unable to ascertain anything "emotional" about Alan Margetts' statements and Elspeth Watt's answers in cross examination about her reasons for not taking Alan Margetts' evidence into account were unconvincing. Simply accepting the word of Sarah Margetts', the other party in acrimonious divorce proceedings, who been absent from the business for nearly two years, was unreasonable. Consideration of Alan Margetts' evidence was essential if the Respondent was to properly examine the circumstances and the extent, if any, of the Claimant's alleged blameworthiness and reach a balanced view.
- 72 The Tribunal concludes that no reasonable employer, having regard to the facts of this case, would have held a reasonable belief that the Claimant acted without proper authority, nor would such an employer have implied obligations on the Claimant to report transactions to Sarah Margetts or required the Claimant to refuse Alan Margetts' instructions. Nor would any reasonable employer have failed to interview Alan Margetts or, at the very least, had regard to what he had to say in his statements.
- 73 The Tribunal's findings above relate equally to the Respondent's belief in the Claimant's conduct and the alleged breakdown in trust confidence said to justify her dismissal.
- 74 The Tribunal has also been concerned about other aspects of this case which suggest that the outcome was likely to have been pre-judged:
- 74.1 Sarah Margetts' statement provided as part of the investigation makes it clear that she was of the opinion that the Claimant had committed gross misconduct;
- 74.2 Elspeth Watt's letter of 15 February 2016 inviting the Claimant to attend a disciplinary hearing states that: "Depending on the facts established at the hearing, the outcome could result in either of the following:
- A final written warning
 - Your dismissal"

A finding that the Claimant had not committed any of the acts of alleged misconduct did not appear to be in contemplation.

- 75 The Tribunal has considered whether the Shahin Ismail's appeal process was capable of remedying this otherwise unfair dismissal. The Tribunal concludes that it was not. The unfair dismissal, on the facts of this case, was no mere procedural defect capable of being remedied.
- 76 Without more, the Tribunal concludes that the Claimant was unfairly dismissed.
- 77 In the circumstances, the Tribunal would in any event conclude that dismissal was outside the band of reasonable responses open to a reasonable employer.

Polkey

- 78 The Tribunal is unable to accept the Claimant's submission that there is insufficient certainty as to whether the Claimant would have been dismissed in any event. The judgment in Software 200 Ltd v Andrews [2007] IRLR 568, upon which the Claimant relies, makes it clear that the Tribunal must appreciate that a degree of uncertainty is an inevitable feature of the exercise.
- 79 At the appeal stage, Shahin Ismail found that Claimant had attempted to bring Sarah Margetts' reputation into disrepute which was conduct of itself amounting to gross misconduct. The statements provided by the various members of staff tend to support this finding. This did not appear to comprise an allegation against the Claimant for which she had been dismissed in the first place and adding it at the appeal stage supports the Tribunal's view that the Claimant was unfairly dismissed. Nevertheless, had the Respondent taken action in relation to this allegation, it is the Tribunal's view that the Respondent might well have dismissed the Claimant for conduct or for some other substantial reason; that is a loss of trust and confidence in the Claimant. In the Tribunal's view, such a dismissal would have been fair in the circumstances. In the Tribunal's view, there was a 50% chance that the Respondent would have dismissed the Claimant in any event for this reason. Any compensatory award will be reduced accordingly.
- 80 The Tribunal's finding in this regard is without prejudice to any further conclusion that the Tribunal may reach that the Claimant herself would have ended her employment with the Respondent because Sarah Margetts had assumed control. This aspect will be considered upon the Tribunal hearing evidence at a remedy hearing.

Contribution

- 81 On the facts of the case, the Tribunal is unable to conclude on the balance of probabilities that the Claimant was guilty of culpable or blameworthy conduct save with regard to the allegation that the Claimant was guilty of disclosing sensitive personal information. Although not relied upon to dismiss the Claimant for gross misconduct, in the Tribunal's view this conduct before the dismissal was such that it would be just and equitable to make a reduction to

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any basic award. Similarly, this action on the Claimant's behalf contributed to her dismissal. In the Tribunal's judgment, it would be just and equitable for both basic award and compensatory award to be reduced by 10%.

Wrongful dismissal

- 82 The Respondent has not shown on the balance of probabilities that the Claimant committed a repudiatory breach of contract. In particular, the Respondent's evidence that effecting the various transactions amounted to wrongdoing amounting to gross misconduct was sketchy. To the extent that there was any detrimental impact on the Respondent as a result of the transactions being made, that was because of decisions made by Alan Margetts, not the Claimant. Sarah Margetts gave the Claimant no express instructions that she should not make the transactions. The Claimant was wrongfully dismissed and she is entitled damages.

Uplift

- 83 The Respondent is a small employer. The Claimant's submissions that the Respondent unreasonably failed to comply with paragraph 6 of the ACAS Code of Conduct is not accepted. The Tribunal finds that on balance it was not practicable in this case for different people to have carried out the investigation and the disciplinary hearing. However, the Tribunal finds that there was an unreasonable delay on the Respondent's part, contrary to paragraph 11 of the ACAS Code of Conduct, not least since the earliest transaction relied on by the Respondent had been made nearly two years before the disciplinary proceedings were commenced. In the Tribunal's judgment, an increase of 10% is just and equitable. This will apply to the compensatory award and to damages for wrongful dismissal.

Statement of employment particulars

- 84 It was evident that the Respondent failed to provide the Claimant with a written statement of employment particulars. The Tribunal accordingly awards the Claimant two weeks' pay under section 38 of the Employment Act 2002

Remedy

- 85 It is hoped that the parties will apply their minds to settlement without further costs being expended on either side. In accordance with Rule 3 of the Employment Tribunal Rule of Procedure 2013, the parties are encouraged to use the services of ACAS or other mediation as a way of resolving the question of remedy. If settlement is reached, the parties are required to notify the Tribunal immediately.
- 86 This case will nevertheless be listed for a remedy hearing with a half-day time estimate.

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- 87 The commencement date of the Claimant's employment was not made clear to the Tribunal. The commencement date must be known to the parties who are required to seek agreement as to the correct commencement date and inform the Tribunal accordingly at the remedy hearing. The Claimant should prepare an updated Schedule of Loss for use at the remedy hearing incorporating the Tribunal's findings herein and setting out the Schedule in accordance with the correct order of deductions. The parties should be provide the Tribunal with a List of Issues for determination at the remedy hearing.
- 88 For the avoidance of doubt, at any remedy hearing the Claimant can expect to be awarded costs in respect of any Tribunal fees she has paid.

Employment Judge Pritchard
5 April 2017