EMPLOYMENT TRIBUNALS

Claimant: Mrs Y Frankum

Respondent: Bolton Council

HELD AT: Manchester **ON:** 29, 30 and 31 March 2017

BEFORE: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Miss R Mellor, Counsel

WRITTEN REASONS

Introduction

1. These are the written reasons for the judgment delivered orally at the conclusion of the hearing and sent out in writing on 6 April 2017.

2. By a claim form presented on 18 October 2016 the claimant complained that she had been unfairly dismissed from her post as a Senior Social Worker in June 2016 at the conclusion of disciplinary proceedings in which a number of different allegations had been brought against her. She asserted that there were no reasonable grounds for the conclusion that she was guilty of misconduct and that the sanction was too harsh.

3. By its response form of 20 January 2017 the respondent resisted the complaint on the basis it was a fair dismissal for gross misconduct following a fair disciplinary procedure.

Issues

4. I discussed the issues with the representatives at the outset of the hearing. The claimant did not seek to assert that there was any reason for her dismissal other than a reason relating to her conduct. The sole issue for the Tribunal to determine, therefore, was whether the dismissal was fair or unfair applying the general test of fairness in section 98(4) Employment Rights Act 1996 (see below).

Evidence

5. The parties had agreed a bundle of documents in two lever arch files running to over 700 pages. Any reference to page numbers in these reasons is a reference to that bundle unless otherwise indicated. At the start of the hearing the claimant added some additional workload figures to the bundle at page 83a. The respondent did not object to that addition.

6. I heard from five witnesses in total. Each of them gave evidence pursuant to written witness statement which was treated as evidence in chief. The respondent called Jane Gladstone, a team manager within the Safeguarding Service team who investigated the allegations against the claimant; Adrian Crook, Assistant Director of Health and Adult Social Care who chaired the panel which dismissed the claimant; and Hilary Fairclough, a councillor who chaired the panel of elected members which rejected the appeal against dismissal.

7. The claimant gave evidence herself. She had also served the day before the hearing a witness statement from her union representative, Suzi Boardman. After taking instructions Miss Mellor did not object and Ms Boardman gave evidence in person too.

Relevant Legal Framework

8. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

9. The primary provision is section 98 which, so far as relevant, provides as follows:

> **"(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case".**

10. In a misconduct case the correct approach under section 98(4) was summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. The most important point is that the test to be applied is of the range or band of reasonable responses, a test which originated in **British Home**

Stores v Burchell [1980] ICR 303, a decision of the Employment Appeal Tribunal ("EAT") which was subsequently approved in a number of decisions of the Court of Appeal.

11. The "**Burchell** test" involves consideration of three aspects of the employer's conduct. Firstly, did the employer carry out such investigation (including the disciplinary procedure) as was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief? If the answer to each of those questions is "yes", the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band falls short of encompassing termination of employment.

12. The burden of proof which lay on the employer at the time **Burchell** was decided has since been removed by legislation: there is now no burden on either party to prove or disprove fairness.

13. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice.

14. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.**

15. A Tribunal should also have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 in considering procedural fairness.

16. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

17. In cases where the ability of the employee to continue in her chosen profession may be adversely affected by dismissal, the extent of investigation that a reasonable employer would undertake may be greater than in less serious cases**: A v B [2003] IRLR 405** and **Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457.**

18. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and also whether it acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

Relevant Findings of Fact

19. The purpose of this section of these reasons is to set out the broad chronology of events to put my decision into context.

The Respondent

20. The respondent local authority is a substantial employer. According to its response form it has approximately 3,800 employees. It has access to specialist Human Resources ("HR") advice and to Occupational Health advice.

21. An important part of its role is in social services and it runs a number of safeguarding teams of social workers responsible for front line child protection services. Each social worker is allocated a caseload of children for whom they were responsible. Their duties include visiting children both at home and in other settings. A key part of the role was ensuring that the statutory requirements for the safeguarding of children were met, as well as dealing with care proceedings in the courts. The work was closely regulated, complex, frequently time-critical, and challenging.

22. Social workers could expect to be assessed against the British Association of Social Work Capability Framework (pages 482-489).

23. The fitness to practice of social workers is regulated by the Health & Care Professions Council ("HCPC"). The HCPC published Standards of Conduct, Performance and Ethics (pages 490-505) and Standards of Proficiency (pages 506-525). The HCPC standards emphasised the importance of keeping records up-to-date (page 501):

> **"You must complete all records promptly and as soon as possible after providing care, treatment or other services."**

24. The respondent operated a computerised case record system known as "Liquid Logic". Social workers had to enter their records on Liquid Logic so that the records were available to other members of staff when needed. It was the respondent's policy that entries should be made promptly and in any event within three days. A failure to update Liquid Logic could lead to decisions being made based on inaccurate or incomplete information.

Disciplinary Procedure

25. The respondent's disciplinary procedure appeared at pages 184-200. Clause 4.1 on page 188 introduced a list of examples of gross misconduct in Appendix 1 at page 195. That list included:

> **"Failure to obey instructions given by the Council provided these are in accordance with accepted practices."**

26. Page 188 also carried provisions about the investigatory process. Clause 5.1 said:

> **"Detailed records must be kept of any interviews held and any witnesses interviewed must sign any statements given and recognise that they could be used at a subsequent hearing."**

27. Clause 5.4 suggested that an investigatory interview should be done as soon as reasonably practicable, but in any event normally within ten working days of the investigation commencing.

28. There was provision for suspension in clause 6, and clause 6.2 made clear that the employee must be informed of the nature of the allegations made against her.

Workload Allocation

29. The respondent had a model for allocating caseloads so as to ensure an even distribution of work in safeguarding teams. It operated by allocating a number of points to each individual case. The guidelines appeared at pages 82-83. For children subject to safeguarding issues where there were no care proceedings the case would be worth one point per household of up to three children, and one and a half points for each household with four children or more. Where there were care proceedings, however, the case was worth two points per household of up to five children, and three points for any household with six or more children. If two social workers shared a case the points would be split between them. A normal caseload for a fully competent social worker was assessed as being between 15 and 17 points.

The Claimant

30. The claimant was first employed by the respondent in March 2006 as a Social Worker and promoted to Senior Social Worker in March 2007. She worked in a variety of roles and was appointed to a permanent position in the Safeguarding Team North in April 2014. She was part of a team of 11 social workers covering the north part of Bolton. The team was managed by the Team Manager and her deputy. The claimant was an experienced and well respected Senior Social Worker. She had a good record with no previous disciplinary issues

31. A written statement of the main terms of her employment was issued to her on 12 March 2014 (pages 75-80). Clause 13 of those particulars referred to the respondent's disciplinary procedure. Her job description and the person specification appeared at pages 32-36. The job description said that the main duties included providing a social work service in accordance with statutory requirements, working with Legal Services and the courts, producing reports within agreed timescales, and maintaining appropriate records (page 32).

32. The claimant developed arm and hand problems in July 2014 and on 29 September 2014 went off sick to have an elbow operation. She returned to work on a phased basis on 20 April 2015. She returned to full-time work on 11 May 2015. Occupational Health recommended some adjustments to her workstation but these were not put in place until the end of July. The claimant came back with a reduced workload but returned to a full caseload with effect from 7 September 2015.

33. The claimant had been supervised by Mrs Gladstone before she went on sick leave. On her return she was supervised by Lesley Jones.

October 2015

34. Where care proceedings were underway the social worker had to work closely with the respondent's Legal Department. One of the cases the claimant was dealing with concerned a child "HP". On 8 October 2015 Lynn Priestley, a lawyer in the Legal Department, raised concerns with Lesley Jones about how the claimant had been dealing with the case. Ms Jones rang the claimant that afternoon whilst the claimant was at court but only had a brief discussion on the telephone.

35. The following day there was an incident between the claimant and another colleague, Ms Hart, in which it was alleged the claimant had used inappropriate language.

36. On Friday 16 October 2015 there was an issue about the HP case, where a report from the carer was needed to complete the documentation required. The Legal Department were waiting for it but it did not materialise. The lawyer, Sarah Gatenby, sent an email to Ms Jones at shortly before 4.00pm (page 390). The claimant was asked to explain what happened. In an email just before 4.30pm that day (page 389) she explained the difficulties with that piece of work and said she had been working constantly over the last few weeks from 7.00am or 7.30am until 8.00pm or 8.30pm. She explained that the reason for the late report was out of her hands because the carer had gone to Spain where her mother was seriously ill. She said was not happy with the response to all the work she had completed. Her email was copied to the District Manager, Joanne Bibby. Her response within a few minutes was to express appreciation for the claimant's work and to suggest that there should be a meeting to look at what could be done next.

37. On Monday 19 October 2015 the claimant was at court for a hearing in relation to another child, "HL". The court ordered the immediate removal of the child from his mother. The responsibility for that step fell to the claimant as the social worker allocated to the case. However, after the court hearing the claimant rang Lesley Jones and said she did not think she was the best person to take that step as she was negatively associated with threats made by the mother to the child that he would be taken into care. The claimant did not return to the office to discuss this and instead a colleague had to remove the child in compliance with the court order.

38. On the evening of 19 October 2015 the claimant sent a text to Lesley Jones. The content appeared at page 328. It said the following:

> **"…I won't continue to take the repeated negative comments from you and will no longer put up with the unreasonable pressure, bullying and having my competence and confidence torn apart because the workloads are ridiculously excessive and the expectations unrealistic. Nothing is good enough, I don't think it's about the kids I work with anymore it's about more than that. It's totally unfair and uncalled for. I'm not returning until after the meeting. I feel ground down by it all despite the fact that I've worked so hard. It's not a healthy work environment and I do not intend to leave the issues unchallenged."**

39. The claimant did not attend work on Tuesday 20 October, but a complaint was received by email (page 679) about her behaviour in a matter outside work on Sunday 18 October 2015 ("the Sunday incident"). The Sunday incident had nothing to do with work, but the complainant knew that the claimant was a social worker and alleged that she had behaved inappropriately in the presence of a child. The allegation was denied by the claimant, and although it formed part of the disciplinary proceedings it was ultimately found not proven and played no part in the reason for dismissal, so it is not necessary to deal with it any further in these reasons.

Meeting 21 October 2015

40. These matters resulted in a meeting on Wednesday 21 October 2015. The meeting was conducted by Mrs Gladstone. Lesley Jones and Dawn Longworth of HR were also present. The claimant attended and chose to be accompanied by her union representative, Ms Boardman. No formal notes of the meeting were kept, but the notes kept by Dawn Longworth appeared at pages 100-102. The claimant produced her own notes of this meeting much later on at pages 304-312.

41. At the outset of the meeting Mrs Gladstone said that they wanted to discuss issues relating to performance and conduct. The matters discussed included a failure to visit the children in the HP case, the events of 19 October when the claimant did not carry out the court order in relation to HL, and the Sunday incident. Ms Jones also suggested that there was unopened post in the claimant's post tray going back to May, in response to which the claimant raised caseload issues. Mrs Gladstone said that management knew what the caseloads of each social worker were and that the claimant's caseload was no higher than any other member of the team.

42. Page 101 recorded a discussion about the fact that the claimant had some information in her book which had not been entered onto Liquid Logic. She said that it only looked as though some children had not been visited for months because visits she had done had not yet been entered. The "book" was reference to the claimant's personal records, which were entries in a diary and a notebook with a list of tasks that needed to be entered. It is convenient to refer to these two documents together as her "diary". The claimant was not asked to produce her diary at this meeting.

43. The meeting ended with the claimant confirming she was going on sick leave. An Occupational Health referral was agreed.

44. The meeting was followed up by a letter at page 99 which invited the claimant to a further meeting on 26 October 2015. The letter said that the meeting would be in accordance with the disciplinary procedure and a copy was enclosed.

Suspension 26 October 2015

45. The meeting on 26 October 2015 was a brief meeting at which the claimant was suspended. The notes appeared at page 105 and the letter of suspension at pages 103-104. The letter informed the claimant that it was an allegation of potential gross misconduct. The particular allegations were not specified. The letter asked the claimant to return any items belonging to the council within the next five days. There was no request for the diary to be returned.

46. In the months that followed the claimant remained suspended. She also remained unfit for work but was not on sick leave.

47. On 28 October 2015 the claimant sent a letter at pages 120-121 in which she asked for specific details of the allegations and suggested that Jane Gladstone had been a party to the bullying from managers and the overload of work. Ms Longworth replied on 6 November 2015 (pages 123-124) saying:

> **"Detailed allegations will be confirmed to you in due course once our preliminary investigations have been completed, however in the interim I can confirm that the issues include failure to carry out statutory visits and appropriate recording, failure to meet deadlines, failure to obey management instructions, inappropriate conduct both within and outside of working hours."**

48. Ms Longworth also asked the claimant to substantiate her allegation of bullying against Jane Gladstone or withdraw it. The claimant did neither and that matter was not pursued.

49. Occupational Health reported on the claimant in November 2015. The respondent offered to fund counselling.

Gladstone/Longworth Investigation

50. In the meantime the matter was investigated by Mrs Gladstone and Ms Longworth. They interviewed seven members of staff in December 2015. The notes of the interviews appeared at pages 106-119. Two of the people interviewed were Independent Reviewing Officers (Lynn Priestley and Jackie Spilby). An "IRO" has oversight of a child's care plan and is empowered to act on their behalf in challenging the local authority. The other five witnesses were from the Legal Department. They all provided information about the cases on which they had worked with the claimant.

51. The claimant was updated broadly monthly as to her suspension, but was not given any update as to the progress of the investigation.

52. On 12 February 2016, however, she was invited to an investigatory interview on 26 February 2016. The letter appeared at pages 131-132. It set out 11 allegations. They included failure to maintain accurate and up-to-date records; failure to respond to emails, telephone calls and requests for information; failure to undertake statutory visits and comply with timescales regarding meetings reports and care plans; inappropriate behaviour and language, and a refusal to take a child into care.

53. The letter included the following paragraph:

> **"Please bring your works diary with you to the meeting as we require this to enable us to identify if there have been any visits or there is any other information which has not been entered onto the Liquid Logic [system]. If you wish to redact any information relation to personal matters which are contained in the diary prior to returning it to us, there is no problem with that."**

Interviews of Claimant 26 February, 2 and 4 March 2017

54. The investigation interview began on 26 February 2016. The notes appeared at pages 133-142. Jane Gladstone conducted the meeting supported by Ms Longworth. The claimant was accompanied by Ms Boardman. Minutes were taken by a fifth person. There was a list of questions which were to be asked and the claimant was provided with a copy at the start of the meeting.

55. At the outset the claimant said she had brought her diary but would not hand it over as she might need to refer to it during the meeting. She explained that she had a separate book with details of assessments she had done. Mrs Gladstone said she was not aware of that book.

56. The matters discussed included the allegation of inappropriate behaviour on 9 October 2015 made by Ms Hart, the Sunday incident, and some unprofessional comments alleged to have been made during the meeting on 21 October 2015.

57. Page 137 onwards recorded a discussion about failure to maintain accurate and up-to-date records and to respond to emails and requests for information. Caseload figures had been prepared (pages 82-83a) which showed that the claimant had been on 17 points from September but at no stage on more than that. The claimant accepted that she had not kept Liquid Logic updated but said it was about the complexity of cases, not the number. Specific instances of alleged failures to provide information about particular cases were discussed. The failure to undertake statutory visits and comply with timescales was also discussed by reference to some specific cases. At the end of the meeting the claimant was asked to hand in her book and diary but refused to do it.

58. The meeting resumed with the same five participants on 2 March 2016. The notes appeared at pages 143-149. There was further discussion about missed statutory visits and timescales, the quality of reports, and alleged unprofessional behaviour and language. On page 146 the note recorded the claimant accusing a lawyer from the Legal Department of lying about whether a particular care plan had been done or not.

59. At the end of the meeting Mrs Gladstone asked for the book and diary once again. The claimant refused, and when it was pointed out that it was council property and the information could be photocopied and returned to her, she suggested that the respondent should “get a court order”. The meeting ended without that being resolved.

60. The third investigation interview took place on 4 March 2016. The notes appeared at pages 150-155. There was a discussion of individual cases where it was suggested the claimant had placed children at risk by failing to progress matters properly. The refusal of the claimant to action a court order for removal of the child HL was discussed. The meeting ended with the claimant saying she was passionate about her job and that:

> **“I’ve got all the stuff to go on the system. From September to October when I was suspended. Was a hell of a lot of stuff I did.”**

Instruction to Return Diary 7 March 2016

61. On 7 March 2016 (page 156) Ms Longworth wrote to the claimant instructing her to return the diary and related items. The letter said:

> **"You stated at our meeting on 2 March that we put our request for return of the items in writing, and this letter confirms our formal request for the return of these items. We have offered to have the items photocopied for you, with the copies being returned to you, and have also made the offer of a room to enable you to come in to view the items whenever required. You have declined these offers.**
>
> **Therefore should these items not be returned to us by Friday 18 March, this will be deemed as a failure to follow a reasonable management instruction, and will be appended to the list of allegations detailed in the letter of** [12] **February."**

62. The claimant did not respond to that letter. She did not return the diary to the respondent.

Invitation to Disciplinary Hearing 12 May 2016

63. By a letter of 16 March 2016 at page 157 the claimant was informed that there would be a disciplinary hearing.

64. Details were confirmed in a letter of 12 May 2016 at pages 160-161. The claimant was invited to a disciplinary hearing on 14 June before a disciplinary panel to be chaired by Mr Crook. There were eight allegations:

> **"(1) Failure to return diary/book with confidential information relating to children and families (failure to follow a reasonable management instruction).**
>
> **(2) Failure to report concerns in a timely manner following an incident on Sunday 18 October 2015, thus potentially leaving a child at risk.**
>
> **(3) Failure to maintain accurate, up-to-date records and respond to written and verbal requests.**
>
> **(4) Failure to comply with both departmental and legal timescales/deadlines.**
>
> **(5) Failure to undertake statutory visits.**
>
> **(6) Refusal to take a child into care.**
>
> **(7) As a result of the above, placing children at potential risk.**
>
> **(8) Failure to meet the standards expected of an experienced senior social worker."**

65. Arrangements were made for the documentation on both sides to be exchanged a week before the hearing. The documents prepared by management included a statement from Lesley Jones about the supervisory relationship at pages 162-167, and a management statement of case at pages 168-179. The management case set out the concerns in relation to the claimant for each of the eight allegations. Some extracts from the respondent's social care procedures manual were provided.

66. The claimant also prepared documents for the disciplinary hearing. She prepared what she described as an "interim statement" which appeared at pages 222-285. It was a comprehensive statement of her case. It was accompanied by a response to the evidence provided by management at pages 286-383. This addressed in great detail each of the allegations about the particular cases on which the claimant had been working.

Disciplinary Hearing – Crook Panel – 14 June 2016

67. The disciplinary hearing before the panel chaired by Mr Crook took place on 14 June 2016. The notes appeared at pages 201-217. The claimant was accompanied by Ms Boardman. There was a discussion of the diary issue, the Sunday incident, and the claimant's response to the allegations. The claimant had the opportunity to put questions to management.

68. Ms Jones was called to give evidence about supervisions. She referred to supervision meetings on 20 April, 7 May and 29 May. Copies of those records were produced (pages 84-91). The claimant said the supervision meetings had not happened. She accepted that there had been a meeting on 31 July (pages 92-95) but disputed there had been any supervision meeting on 7 September (page 96).

69. In the discussion about updating Liquid Logic, the claimant explained that in her diary she had drawn a red line through an item when it had been entered on Liquid Logic. Her position was that the entries were up-to-date to 25 September 2015 but entries since then had not yet been put on the system. Management said that entries were missing from Liquid Logic even before 25 September.

Dismissal Letter 20 June 2016

70. No decision was given at the disciplinary hearing but it was confirmed by a letter of 20 June at pages 218-221. The conclusion on each of the eight allegations was as follows.

71. Allegation 1 related to the failure to return the diary. This was found to be gross misconduct.

72. Allegation 2 (the Sunday incident) was found unproven.

73. Allegation 3 concerned the failure to maintain accurate up-to-date records and to respond to written and verbal requests. The panel concluded that a number of the entries which the claimant said had been put on Liquid Logic were not in fact contained on the system. The claimant's paper records did not match Liquid Logic even for entries she said she had made. The panel concluded that the allegation was made out, and given the significant risk posed by out-of-date records and the importance the regulator placed upon keeping up-to-date records, it constituted gross misconduct.

74. Allegation 4 was about a failure to comply with timescales. Four specific cases were given as examples of this. The panel concluded that as a consequence meetings were cancelled, court dates adjourned and there must have been implications for the children affected. This was gross misconduct.

75. Allegation 5 was the failure to undertake statutory visits. The claimant accepted she had not done some statutory visits, although she said that she had been prioritising other matters. The allegation was found to be proven and to amount to gross misconduct.

76. Allegation 6 was the refusal to take a child into care on 19 October 2015. The panel rejected the claimant's case that she had been unable to carry this out due to becoming ill. The panel's view was that going home sick was not a reasonable strategy to employ to overcome her disagreement with the directions of the manager. The allegation was found proven and to be gross misconduct.

77. Allegations 7 and 8 (placing children at potential risk and failing to meet standards) were found proven because of the findings on allegations 3, 4, 5 and 6.

78. The dismissal letter went on as follows:

> **"The panel took account of your additional mitigating factors to those mentioned specifically in relation to the allegations above. In particular you stated that management had failed to prove appropriate support and supervision and that you had not experienced problems with previous line managers. The dates and management notes of supervisions were disputed and scrutinised during the hearing. The 7 May 2015 supervision notes contained your signature and were dated 29 May 2015 which was the next supervision date. Whilst you confirmed that this was your signature you were also adamant, based on your diary entry, that you did not have supervision on 29 May 2015. The panel was not therefore convinced with the accuracy of all the entries you said were within your diary and felt on balance of probability that appropriate support and supervisions had occurred.**
>
> **To conclude, in relation to those allegations described above which the panel considered to be proven and which constitute gross misconduct, the panel's decision is that there is no alternative but to dismiss you with immediate effect."**

79. The letter advised the claimant that the HCPC would be informed of the dismissal. It also gave the claimant the right of appeal.

Appeal

80. The claimant appealed by a letter of 25 June 2016 at pages 477-481. Her letter said that the evidence she provided at the hearing had not been properly considered. She said there had been biased and unprofessional decision making in the hearing. Lesley Jones and Jane Gladstone had fabricated details. She sought to justify her refusal to return the diary, which she asserted was her personal property. She said that if she had handed it over it would simply have helped managers fabricate the case against her. She suggested it was a false claim that Liquid Logic did not record the matters which she had crossed out with a red line in her diary. She disputed the conclusion on failure to meet timescales, and said that she had been instructed by Lesley Jones on three occasions to cancel statutory visits. She emphasised that she had genuinely become too ill to take the child into care on 19 October 2015.

81. By a letter of 23 August 2016 at page 316 the claimant was invited to a hearing before a panel composed of three elected members. Ms Fairclough was the Chair.

82. The hearing took place on 30 September 2016. The notes appeared at pages 460-471. The claimant was again represented by Ms Boardman. Mr Crook attended to explain the decision his panel had made. The documents prepared by management for the appeal included a witness statement from him at page 325-327, a management statement of case at pages 318-324 and copies of text messages sent by the claimant to Lesley Jones in October 2015 at page 328. There were also extensive notes on each of the individual cases with which the claimant had been dealing (pages 329 – 459).

83. Mr Crook gave evidence to the panel and was questioned by the claimant and her representative as well as by the panel. The claimant was also questioned about the issues. At the end Ms Boardman summarised the case. The claimant relied on her 18 years of experience, and said there were mitigating circumstances for missing statutory visits. She queried why the diary had only been requested five months after the investigation began. She said across the whole of Bolton social workers were behind with recording in the system. She had been made a scapegoat for errors by others.

84. The panel deliberated immediately after the meeting and then met again on 12 October 2016 for further deliberations. The deliberations were recorded at pages 472 and 473.

85. By a letter of 13 October 2016 at pages 474-476 the panel rejected the appeal. It found that the disciplinary investigation had been fair and reasonable, and had been conducted over an appropriate timescale given the volume of information. The evidence from the claimant had been properly considered by Mr Crook's panel.

86. The diary was not a personal diary but should have been returned, and there was concern that the claimant might disobey a management instruction to implement a court order again. The appeal panel concluded that the failure to undertake statutory visits and the refusal to take a child into care were gross misconduct which justified dismissal in their own right.

87. The other allegations taken together also amounted to gross misconduct.

88. As for the mitigation, the appeal panel concluded there was no evidence to support the claim of bullying, or any prior reports or complaints of bullying. There had been an appropriate caseload and sufficient adjustments on return from sickness absence by way of a reduced workload and the phased increase in cases. The appeal panel concluded that supervision had been offered at appropriate timescales. Management could have followed up on missed supervisions more robustly, but the onus was on the claimant as a professional to raise concerns about inadequate supervision.

89. Because children's lives had potentially been put at risk by the claimant's actions, dismissal was the only appropriate conclusion.

Submissions

90. At the conclusion of the evidence each party made a submission summarising its case.

Claimant's Submission

91. The claimant had prepared a written document prior to the hearing and that was treated as her written submission. I read it before oral submissions. As for her oral submissions, I assisted her by summarising her case on each element as I saw it so that she had the opportunity to correct me or add in any important matter which I had missed.

92. The claimant did not dispute that the reason for dismissal related to her conduct but part of her case was that a reasonable employer would have treated it as a capability issue. She said there had been a failure to follow a fair procedure. The hearing on 21 October had begun informally but had become a disciplinary matter by the end of the day with insufficient time for such a decision to have been taken properly. She had not had the allegations when suspended and was not updated on the investigation process until February. She should have had written questions in advance for the investigation meetings. She did not get a chance to say what she wanted to at either the discipline or the appeal hearing and the notes were not accurate.

93. As to the diary, she accepted it was a reasonable management instruction to require it to be handed over but said that there were good reasons why she did not return it and her refusal should not have been treated as misconduct. There had been no request made at the time and by the time it was requested she was looking to protect her own position. In any event the diary entries were very brief and the detail behind them was carried in her head and could not have been entered on the system by February 2016.

94. She accepted the records were not up-to-date from 25 September but was going to do it on 8 October had it not been for the incident at court. There were others whose records were far more out-of-date than hers but no action had been taken against them.

95. She accepted that deadlines had been missed but there were good reasons in each case. They related to her workload and the need to prioritise. In relation to statutory visits again there were mitigating circumstances and in one case she had been instructed three times by Lesley Jones not to undertake a statutory but to do another activity instead.

96. On the refusal to remove a child into care, she emphasised that there were medical reasons why she was unable to do this.

97. She submitted that the mitigating circumstances relating to the overload of work and the lack of supervision had not been properly taken into account by either panel and that it was outside the band of reasonable responses to dismiss her. A reasonable employer would have looked at the underlying causes. She ended by emphasising how sad this case was, that she was devoted to the children she looked

after and that the dismissal had had an extremely severe impact on her confidence, personality and medical position.

Respondent's Submission

98. For the respondent Miss Mellor made an oral submission. She briefly reviewed the relevant legal position and suggested that there was no real dispute over the reason for dismissal or the genuine belief that the claimant had committed misconduct. Further, for most of the allegations the claimant did not dispute that they had happened and therefore there were reasonable grounds for that belief. The real issue was whether it was within the band of reasonable responses to characterise those matters as gross misconduct and then decide to dismiss.

99. In relation to the diary the claimant accepted it was a reasonable management instruction and her reasons for not providing it did not add up. Failing to follow a reasonable management instruction was identified as gross misconduct in the disciplinary policy. The delay in making a formal request was irrelevant because the same considerations would have applied in October as they did in February. This alone warranted dismissal.

100. With the refusal to remove a child into care the issue was not with the reasons for the refusal but with how it was done. The claimant refused to come into the office to discuss matters despite being instructed to do that by Ms Jones. She had provided the panel with no medical evidence to support her contention she was too ill to do it. She said in any event she would not have carried out that task even if she had been well enough. This too warranted summary dismissal.

101. In relation to the allegations concerning not keeping records up-to-date, missed timescales and missed statutory visits, the issue was whether the mitigating circumstances of overwork and lack of support were enough to mean that it was outside the band of reasonable responses to dismiss. On workload the respondent was entitled to go by the case allocation figures on page 82. They did not show her getting to a full caseload of 17 points by August; that only came in September. Further, there was no record before the panel of any requests by the claimant for allocation of cases to other people because she was overworked. She was a Senior Social Worker aware of her obligation to make such a request if necessary.

102. As to the supervision and support point, the panel were entitled to accept the evidence of Ms Jones about the supervision sessions and the records produced, and from that material it was clear the claimant had been supported. She had made no complaint about lack of adequate supervision even though on her own case she knew from April onwards that she was not being adequately supervised. The texts thanking Ms Jones for her support were also before the panel. It was therefore reasonable to reject both mitigating circumstances and to regard these matters as gross misconduct.

103. The procedure was also fair. The claimant had the chance to have her say at four meetings before the disciplinary hearing and the appeal hearing. She was accompanied by her trade union representative throughout. She put her case extensively on paper on more than 80 pages for the disciplinary hearing. The notes did not support her contention she was cut off or not allowed to say what she

wanted. The appeal was only a review and it was reasonable in that light not to accept the diary as evidence which was not before the dismissing panel. The fact witness statements had not been signed by the witnesses created no unfairness because the claimant declined the opportunity to question them at the start of the disciplinary hearing. Ms Boardman had accepted that was the case.

104. Finally Mr Crook had said in cross examination that he and his panel had considered alternatives to dismissal and therefore overall the dismissal was fair.

Discussion and Conclusions

Introduction

105. In unfair dismissal cases of this kind the EAT and Court of Appeal have warned Tribunals about the dangers of being carried away by sympathy for the position of the claimant (see, for example, **London Ambulance Service NHS Trust v Small [2009] IRLR 563**). It is an error of law for the Tribunal to substitute its own view for that of the employer in this kind of case. That danger is particularly acute in this case because it was evident just how deep and strongly held were the claimant's concerns for the children that she and her colleagues looked after during her work for the respondent.

Reason for Dismissal

106. It was not disputed that Mr Crook and his colleagues, and on appeal Mrs Fairclough and her colleagues, dismissed the claimant and rejected her appeal respectively because of a reason which was related to her conduct. I was satisfied that at both dismissal and appeal stages there was a genuine belief the claimant was guilty of misconduct.

107. The argument that this should have been a capability case rather than a conduct case will be addressed below.

Fairness - General

108. As the respondent has shown a potentially fair reason the question is whether the dismissal for that reason was fair or unfair applying the broad test of fairness in section 98(4). That requires consideration of the size and resources of the employer but also equity and the substantial merits of the case. The approach most commonly adopted is that described as the **Burchell** test which requires the Tribunal to consider whether the employer's belief that the employee was guilty of misconduct was based on reasonable grounds and following a reasonable investigation (including a fair procedure). If so, the next question is whether the decision to dismiss the claimant was a reasonable one. The Tribunal must consider whether the employer's position on these matters fell within the band of reasonable responses.

109. I considered it convenient to address the question of a fair procedure first because that was common to all the allegations, then to consider in relation to each of the relevant allegations whether there were reasonable grounds and had been a reasonable investigation, and finally to consider the question of sanction and

whether mitigating circumstances meant that the matter should have been treated as a capability issue.

Fair procedure?

110. A number of points were made by the claimant in this case. The first concerned the meeting on 21 October 2015 which was arranged as an informal meeting, but by the end the decision was taken within the space of a couple of hours that the matter should be pursued on a disciplinary basis (as evidenced by the letter at page 99). That decision was indeed made quickly, but in my judgment it was within the band of reasonable responses. It followed consultation with the Assistant Director, Mr Daly, and the circumstances which came to light during that meeting were serious enough to give rise to a possible disciplinary consequence.

111. It was remiss of the respondent not to have kept proper notes of that meeting even though it was an informal meeting. The claimant was entitled to be concerned about the fact that no notes of that discussion were provided to her. However, that was not a material unfairness in my judgment because the claimant was interviewed at length three times in the months that followed in addition to appearing before the disciplinary hearing and the appeal hearing.

112. The suspension meeting on 26 October 2015 was also not handled as well as it should have been. Clause 6.2 of the respondent's own disciplinary procedure requires the employee to know what the allegations are. However, in my judgment that failing did not create any material unfairness. The claimant knew that the meeting followed on from the matters discussed on 21 October and in any event when she protested about the lack of information the essential points in the allegations were given to her in the letter of 6 November at page 123.

113. The claimant also criticised the lack of any updates in the period which passed between her suspension on 26 October and early February when she was interviewed. I was satisfied that the failure to keep her updated on the progress of the investigation by Mrs Gladstone and Ms Longworth did not create any unfairness. When they did come to interview the claimant she had three interviews and plenty of opportunity to have her say. In terms of delay, this was a complex matter involving consideration of a number of different individual cases and there were seven different interviews of various members of staff in December before the investigators were ready to interview the claimant in February. It was within the band of reasonable responses for it to have taken as long as it did.

114. The fact that those witness interviews did not result in signed notes was a breach of the respondent's own policy at page 188, but the claimant did have the opportunity at the start of the disciplinary hearing to require those witnesses to attend to be questioned. Her witness, Suzi Boardman, confirmed that the note at page 201 accurately recorded the position: only Ms Jones was required to attend the hearing in person. The claimant did not suggest that witnesses had not said what was in their unsigned statements. Consequently there was no material unfairness resulting from the lack of any signed notes.

115. I was also satisfied that the choice of the witnesses to be interviewed was dictated by the cases where problems had been identified and was not a "witch hunt"

in relation to the claimant. The scope of the investigation was within the band of reasonable responses.

116. Turning to the investigatory interviews, the claimant maintained that she should have had the written questions in advance. I rejected that. There was no requirement in legislation, the respondent's policies or in the ACAS Code of Practice requiring questions to be provided in advance of an investigatory interview. It was within the band of reasonable responses to give the claimant a copy of those questions at the beginning. In any event the investigation interview was adjourned twice and resumed on two subsequent days. The claimant had her say at length and of course also had the chance to provide written answers to those questions prior to the disciplinary hearing.

117. The disciplinary hearing was itself conducted in a fair manner. The claimant knew what the case was against her and had the majority of the evidence on which it was based in advance of the hearing. She was accompanied by her union representative and made no request for any adjournment, even though some documents had only been provided the day before. The notes were not a verbatim record of the hearing but even so there were passages where clearly the claimant was allowed to speak at some length about the cases in question. Further, her response to the allegations was contained not only in what she said at the hearing but in more than 80 pages of written responses which she submitted in advance and which the panel considered. She had a fair opportunity to have her say on the allegations.

118. The appeal hearing was also conducted in a fair manner. There were documents provided to the claimant in advance. The grounds of appeal set out in her letter of appeal at pages 477-481 were considered, and the appeal was before a panel of elected members with no previous involvement in her case. I was also satisfied that it was reasonable for the panel to refuse to consider her diary as part of that appeal hearing. It was being conducted as a review of the evidence before the disciplinary panel and neither the claimant nor her union representative asked the appeal panel to refer the matter back to the disciplinary panel as envisaged by clause 12.1 in the disciplinary procedure at page 194.

119. I was also satisfied that the claimant's criticisms of Mr Crook for not speaking out in the appeal hearing to confirm that the diary was the same one as at his hearing were misconceived. He had not seen the contents of that diary and it was the contents that were at issue rather than the physical document itself.

120. Overall, therefore, I was satisfied that the procedure was reasonably fair and fell within the band of reasonable responses. There was no breach of the ACAS Code of Practice.

<u>Reasonable Grounds and Reasonable Investigation?</u>

121. I ignored allegation 2 because that was found not to be proven and played no part in the reasons for dismissal. Allegations 7 and 8 were composite allegations based upon the other matters. I considered the five remaining allegations, looking at whether there were reasonable grounds for the view that the claimant was guilty of misconduct, and whether they had been reasonably investigated. In such a serious

matter where ability to practice as a social worker may prove to have been affected the degree of investigation reasonably to be expected is greater than in a trivial matter (see **A v B** summarised in paragraph 17 above).

122. Allegation 1 concerned the reasonable management instruction to return the diary. The claimant accepted in cross examination that the instruction to return those documents was a reasonable management instruction. That instruction was first given in a letter of 12 February 2016 at page 132 and repeated in a formal way in a letter of 7 March at page 156 which left no room for doubt that a failure to comply would be treated as a disciplinary matter. It is a matter of record the claimant did not comply with those instructions. No investigation was necessary. The question was whether there were reasonable grounds for regarding that refusal as culpable.

123. The claimant emphasised that the instruction had not been made in October 2015 but only four months later in February 2016, so that she had two justifications for not complying: (1) by February she needed to protect herself against the disciplinary enquiry then under way; (2) by February the content behind the brief diary entries had gone from her mind and therefore the entries themselves would have been of limited use. In my judgment it was within the band of reasonable responses to reject that case and to find that the claimant was at fault in not returning the diary and her notes in February/March when requested. Even by that stage the information was still needed to ensure that Liquid Logic was as accurate as it could be.

124. It is true that management should have asked for this information back in October, particularly once it was clear the claimant was being suspended and would not be able to update Liquid Logic herself. Equally, in my judgment, the claimant can be criticised for not having told management in October 2015 that there was still material to be entered on Liquid Logic. It would, after all, have been in the interests of the children in question to have Liquid Logic kept up-to-date and made accurate. Management could reasonably think that the passage of time between October 2015 and February 2016 was not in itself a good reason for the claimant to disobey the instruction. She could have protected her own interests by keeping a copy of those entries or by accepting management's offer to have access to the originals on request.

125. As for the content, even if the details had faded from her recollection the material in question still contained entries which were not on Liquid Logic, such as records of particular visits to children in question.

126. Overall it was within the band of reasonable responses to treat this direct disobedience of a reasonable management instruction as gross misconduct, particularly given that a failure to obey a management instruction is one of the examples of gross misconduct in Appendix 1 to the disciplinary procedure which appeared on page 195.

127. Allegation 3 concerned the failure to keep records up-to-date and accurate and to respond for requests for information. The claimant's case broadly was that there were occasions when records were not kept up-to-date, particularly from 25 September when on her case the pressure of work became unmanageable given the three new cases allocated to her in early September. She also relied on the events

of 8 October when she had planned to return to the office to update Liquid Logic but was prevented from doing so by the issues which arose in the HP case. The respondent's policy was that Liquid Logic should be updated within three working days. The HCPC standards required it to be updated promptly and as soon as possible. The claimant failed to comply with either of those requirements.

128. In my judgment it was within the band of reasonable responses to conclude that there were issues with the accuracy of the entries prior to 25 September 2015. Examples were given in the dismissal letter at page 219.

129. It was convenient at this point to consider the reasonableness of the decision of management to rely on Liquid Logic in relation to the timelines rather than what was in the claimant's records. The claimant's case was when she put a line in red through something in her diary it meant she had entered it on Liquid Logic, but (a) there were some red line entries in her diary that did not have a corresponding entry on Liquid Logic and (b) some entries did not match the claimant's diary.

130. In my judgment it was reasonable of management to prefer their own records on Liquid Logic to what the claimant said was recorded in her diary, and not solely because management were denied access to those documents. The claimant's case that entries must have been deleted from Liquid Logic was not plausible. Firstly, the evidence from managers was that deletion of records was not possible once they had been finalised and that there would be an audit trail were, in exceptional circumstances, such records to be deleted. Secondly, it was at least equally likely that the claimant had made a mistake herself in the entries.

131. Further, I was satisfied that it was reasonable of Mr Crook at the disciplinary stage not to obtain a copy of the diary records from the claimant. She had been given plenty of opportunity to put them forward and if she had wanted to rely on them at the disciplinary hearing copies should have been supplied in advance as part of her defence in accordance with the procedure explained to her in the disciplinary invitation letter. In any event the notes of the disciplinary hearing at page 216 showed that the claimant had refused to allow access to those documents.

132. Accordingly there was a reasonable investigation of allegation 3 and the respondent's records were justifiably found to be out of date. There were reasonable grounds for the conclusion that this was misconduct. The real issue was whether the mitigating circumstances of workloads and alleged lack of support were matters which meant that this should not have resulted in dismissal, and I will return to those matters shortly.

133. Allegation 4 concerned failure to meet timescales and deadlines. In the disciplinary process the claimant engaged with the position on specific cases. Some of her explanations were reasonably rejected by the disciplinary panel, either because they were not consistent with Liquid Logic or because they were not in line with the evidence before the panel from her managers or from members of the Legal Department. Equally, however, the panel did accept some of her explanations on some of the cases in question. In my judgment, based on the timelines and the supporting documents which in total ran to more than 200 pages there were reasonable grounds for the conclusion that the claimant had failed to meet timescales and deadlines. Further, that allegation was reasonably investigated.

Once again the real issue was whether sufficient weight was given to the mitigating circumstances of workload and lack of support or supervision.

134. Allegation 5 concerned a failure to comply with the statutory visits required by the relevant legislative framework. Again the claimant accepted that she did not comply with that framework. The matter was discussed in the disciplinary hearing. The claimant maintained that in the JA case she had been told three times by Ms Jones to cancel a statutory visit in order to do some work required by a court timetable. However, although that was made clear in my hearing it was not pursued as clearly by the claimant at the disciplinary stage. The notes of the disciplinary hearing did not record that at page 210. The claimant made a brief reference to this in her written document at page 301 and also in the notes of her interview on 2 March at page 143, but not in terms that the cancellation of visits meant that it was inevitable that statutory timescale would be omitted. Further, when Lesley Jones gave evidence to the disciplinary hearing she was not questioned by the claimant or by her representative on this, and the witness statement of Ms Jones did not accord with the claimant's case on this point. Putting these matters together I was satisfied there were reasonable grounds for the conclusion the claimant had failed to comply with the requirement for statutory visits in some of the cases which were before the disciplinary panel. I will return below to the argument that this should have been seen as attributable to an excessive workload and lack of support.

135. Allegation 6 related to the refusal to remove into care the child HL. This matter caused the claimant great distress because of her concerns for the wellbeing of the child. She accepted that she did not remove the child into care on 19 October. Her explanation was that for her to have done so would have been contrary to the interests of the child and that it was agreed with the guardian at court that some one else should remove him. The stress of this made her unwell so she was not able to continue with her work and had to go to the doctor. The claimant's case was that she made that clear to Lesley Jones.

136. The evidence before the panel from Ms Jones was rather different in its effect. Ms Jones said that she was dismayed when the claimant said she was not the best person to take the child into care. She also said that when she spoke to the guardian the guardian could not recall that it was agreed at court that the claimant should not do it. That was later confirmed by the guardian in an email at page 439 which was before the panel. Perhaps most importantly Ms Jones said the claimant refused to return to the office to discuss the best way to handle the situation, and on her case there were no texts from the claimant until the text later that day at page 328 where the claimant accused Lesley Jones of having bullied her. Further, the information before the panel showed that approximately a month before the court order for removal the claimant was saying that she dreaded that happening and therefore there were reasonable grounds to conclude that there was time to make alternative arrangements in case an order for removal was made. As to the medical position, the claimant had not produced to the panel any medical evidence that she was too unwell even to discuss the matter properly with Ms Jones by returning to the office, and in those circumstances the panel was acting reasonably in concluding that this was another instance of the claimant disobeying a reasonable management instruction.

Appeal Decision on Allegations 1, 3, 4, 5 and 6

137. The appeal decision on these allegations was not entirely the same as the decision taken by Mr Crook's panel. The appeal panel decided that there was gross misconduct in isolation in relation to allegations 5 (statutory visits) and 6 (refusal to take a child into care) since children had potentially been placed at risk (allegation 7). The appeal panel was particularly concerned by the prospect the claimant might refuse to comply with a management instruction again. In relation to the other matters it decided that there was no gross misconduct for any matter in isolation, but the cumulative effect amounted to gross misconduct. Those conclusions at the appeal stage were also, in my judgment, within the band of reasonable responses.

Mitigating Factors

138. That left what was perhaps the key issue in this case: whether the disciplinary and appeal panels fell outside the band of reasonable responses in failing to give sufficient weight to the two main mitigating factors which the claimant relied upon, being workload and an alleged lack of supervision and support. The claimant's case was that if a reasonable degree of consideration had been given to these matters, any failings would have been treated as a capability issue to be addressed by reducing workload and making proper arrangements for support going forward.

139. As to the question of workload, the respondent operated a points system which was an effort to quantify the amount of work resulting from different kinds of case in the system for a social worker. Systems of that kind are inherently approximations: each case is different, and a case which might appear to be a relatively simple one can in fact result in more work than anticipated or more complexity than anticipated. Nevertheless, an employer has to have some way of measuring caseloads, even if simply counting case numbers, or a more sophisticated system where different kinds of cases are allocated different points by way of weighting.

140. In my judgment the points system evidenced by page 82 was a reasonable way of measuring workload, particularly where managers could rely on supervision arrangements to identify overwork, or on the social workers themselves (particularly senior social workers) seeking help if what looked like a reasonable caseload turned out to be unmanageable.

141. I was satisfied that there was either a slip of the tongue or a typographical error reflected on page 137 in the investigatory meeting where it was asserted that the claimant had a caseload of 17 points by August. The records at pages 82 and 83a showed that she had 14 points during August, and her workload only went up to what would be regarded as a full workload (15 to 17 points) in September when three new cases were allocated.

142. More broadly, in my judgment the disciplinary and appeal panels were within the band of reasonable responses in concluding that the claimant had a reasonably manageable caseload for the following reasons.

143. Firstly, the caseload allocated was in line with the allocation model, or at worst it went one point over it to 18 points when one of the cases which was a child

protection matter became care proceedings after it had been allocated to the claimant. Secondly, there was no record of the claimant seeking help. As an experienced and senior social worker it was reasonable of management to expect her to come to ask for help if she considered that her workload had become unmanageable. The first record of this was contained in an email on 16 October at page 389, which even then could reasonably be interpreted as referring only to the particular case in question. Thirdly, upon her return to work from her elbow problems in April 2015 the claimant had a reduced workload by way of a phased return and it was not until September that she returned to a full workload which could reasonably be expected of someone with her qualifications and experience. Fourthly, although there were some references to the pressure of work in the supervision records, they were problematic because the claimant disputed that most of them had taken place at all. In any event it would not be a great surprise that work of this kind creates pressure on the social worker given the nature of the work and the extremely serious decisions that have to be taken.

144. Overall, therefore, I was satisfied it was within the band of reasonable responses to reject the claimant's argument that she had been so overworked that the issues should not be treated as misconduct.

145. As to the allegation of a lack of supervision and support, the claimant disputed that there had been any supervision save for the meetings on 7 May and 31 July. She maintained that she was aware from the outset she was not being adequately supervised by Lesley Jones after her return to work in Spring 2015. In my judgment it was within the band of reasonable responses to reject that argument too.

146. Firstly, there was evidence to counter it from Lesley Jones. She said that she had been supervising the claimant. She produced notes, even if some of them were unsigned, and she corroborated the dates of supervisory meetings from her diaries. Management were therefore left, at the disciplinary and appeal stages, with a situation where it was the word of the employee against the word of the manager. It was within the band of reasonable responses to prefer the manager's account.

147. Secondly, there was no record of any complaint by the claimant to Jane Gladstone that she was not being supervised properly.

148. Thirdly, in texts sent on 9 and 16 October the claimant thanked Lesley Jones for her support. There was no reference in those text messages to unreasonable pressure or an excessive workload until the text sent late on 19 October, which was the day the claimant refused to remove HP as required by the court order.

149. Fourthly, the suggestion of an action plan made (albeit briefly) at the end of the meeting on 21 October 2015 was not acceptable to the claimant, as Ms Boardman confirmed in her evidence.

150. It is convenient here to deal with one other point made by the claimant in her written submission, namely that her bullying allegation against Lesley Jones had not been properly addressed. The allegation was made in a text to Lesley Jones on 19 October at page 328. It was then raised again in passing in a letter of 28 October from the claimant at page 120 where she referred to bullying by managers, but only as a reason for not contacting Jane Gladstone whilst suspended. I was satisfied

there was no formal complaint ever made by the claimant about bullying by Lesley Jones by way of a grievance or otherwise and therefore the respondent acted reasonably in not treating it as a mitigating factor.

Sanction

151. Putting those matters together, was the decision to dismiss the claimant was within the band of reasonable responses? For reasons set out above it was within the band of reasonable responses to find that the workload and alleged lack of support and supervision were not mitigating factors that meant this was a capability issue rather than misconduct. The suggestion that others had records even more out of date than the claimant's records was not substantiated in the disciplinary process (or in my hearing) and without specific instances the disciplinary and appeal panels acted reasonably in rejecting it.

152. Dismissal was not necessarily the only reasonable sanction in this kind of case. It might have been equally reasonable to have given the claimant the benefit of the doubt on the questions of overwork and support. However, the question for me was not whether another course of action would have been reasonable, but whether the course of action which this employer took was outside the band of reasonable responses. I was satisfied that Mr Crook's panel did look at alternatives to dismissal and was aware how serious a step dismissal would be, particularly for an employee with so long and unblemished a record. Yet the claimant had known what was expected of her and had the experience to seek assistance if needed. A warning would not have told her anything she did not already know. It was also reasonable to consider that the efficacy of a warning would be undermined by her refusal to comply with reasonable management instructions in any event.

153. Accordingly in my judgment it was within the band of reasonable responses to dismiss the claimant following the conclusion that she was guilty of gross misconduct. The unfair dismissal complaint failed.

Employment Judge Franey

4 May 2017

REASONS SENT TO THE PARTIES ON

10 May 2017

FOR THE TRIBUNAL OFFICE