EMPLOYMENT TRIBUNALS

Claimant: Mrs Sheila Hardy

Respondent: The British Horse Society

FINAL HEARING

Heard at: Birmingham **On:** 7 to 11, 14 (deliberations), & 15 August 2017

Before: Employment Judge Camp Members: Miss S P Outwin
Miss L S Clark

Appearances
For the claimant: Ms C Urquhart, counsel
For the respondents: Mr R Hignett, counsel

RESERVED REASONS

Introduction

1. These are the reasons, reserved pursuant to rule 62(2), for the unanimous decision given orally on 15 August 2017 and recorded in paragraphs 2 and 3 of a written Judgment signed on 16 August 2017 and sent to the parties on 18 August 2017.

2. The claimant, Mrs Sheila Hardy, was employed – latterly as Senior Executive, Safety – by the respondent, The British Horse Society, from 3 January 1993 until her summary dismissal, effective on 2 August 2016. Following a period of early conciliation, she presented her claim form on 29 November 2016. The only complaints she is pursuing that remained at the end of the liability section of the hearing were complaints of unfair and wrongful dismissal.

Issues & law

3. During the hearing, the Employment Judge provided the parties with a document setting out the law and issues as he understood them to be. Neither party's counsel highlighted any significant perceived errors in that document and we [the tribunal] used it as the basis of our decision-making. The body of that document is set out immediately below.

4. In relation to unfair dismissal, there are two main issues we have to decide.

    - What was the principal reason for dismissal and was it a reason relating to the claimant's conduct?
    - Was the dismissal fair or unfair in all the circumstances, in accordance with equity and the substantial merits of the case, pursuant to section 98(4) of the Employment Rights Act 1996 ("ERA")?

Deciding those two main issues has involved us looking at the following subsidiary issues:

4.1 did the respondent genuinely believe the claimant guilty of the misconduct alleged?

4.2 did the respondent have reasonable grounds on which to sustain that belief?

4.3 had the respondent carried out as much investigation into the matter as was reasonable in the circumstances at the final stage at which it formed that belief?

4.4 did the respondent, in deciding that dismissal was the appropriate sanction and in relation to all other matters, including the procedure followed and including what happened in and in relation to the claimant's appeal against dismissal, act as a reasonable employer might have done, i.e. within the so-called 'band of reasonable responses'?

5. The claimant indicated that she would be seeking compensation only and it was agreed at the start of the hearing that if we took the view that the claimant was unfairly dismissed, we would decide the following issues at the same time as deciding liability for unfair dismissal:

5.1 if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed? [the Polkey issue – see Polkey v AE Dayton Services Ltd [1987] UKHL 8; see also paragraph 54 of the EAT's decision in Software 2000 Ltd v Andrews [2007] ICR 825];

5.2 would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

5.3 did the claimant, by blameworthy or culpable actions, cause or contribute to her dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

5.4 if the respondent unreasonably failed to comply with ACAS Code of Practice 1 in relation to the claimant's dismissal, would it be just and equitable in all the circumstances to increase any compensatory award and if so, by what percentage, up to a maximum of 25 percent, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992?

6. The relevant law appears substantially in the issues as set out above. Our starting point is the wording of ERA section 98 itself. We also have in mind the well-known 'Burchell test', originally expounded in British Home Stores Limited v Burchell [1978] IRLR 379. We note that the burden of proving 'general reasonableness' under ERA section 98(4) is not on the employer as it was when Burchell was decided; the burden of proving a potentially fair reason under subsection (1) is [on the employer], but the burden is neutral under subsection (4).

7. In relation to ERA section 98(4), we consider the whole of the well-known passage from the judgment of the EAT in Iceland Frozen Foods v Jones [1982] IRLR 439 at

paragraph 24, which includes a reference to the "*band of reasonable responses*" test. That test, which we shall also call the "*band of reasonableness*" test, applies in all circumstances, to both procedural and substantive questions: see Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588.

8. Hand in hand with the fact that the band of reasonableness test applies is the fact that we may not substitute our view of what should have been done for that of the reasonable employer. We have to guard against slipping "*into the substitution mindset*" (London Ambulance Service NHS Trust v Small [2009] IRLR 563 at paragraph 43) and remind ourselves that only if the respondent acted as no reasonable employer could have done is the dismissal unfair. Nevertheless (see Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677): the 'band of reasonable responses' test is not infinitely wide; it is important not to overlook ERA section 98(4)(b); Parliament did not intend the tribunal's consideration simply to be a matter of procedural box-ticking.

9. This is a 'gross misconduct' case and in Arriva Trains v Conant [2011] UKEAT 0043_11_2212 (22 December 2011), the EAT provided a helpful summary of the law to be applied by employment tribunals in such cases in paragraphs 23 to 32 of their judgment, paragraphs that should be deemed to be incorporated into this document.

10. In relation to the issue of fairness under ERA section 98(4), we also take into account the ACAS Code of Practice on Disciplinary and Grievance procedures. We note that compliance or non-compliance with the Code is not determinative of that issue.

11. So far as concerns remedy, in addition to the cases mentioned above, in relation to ERA sections 122(2) and 123(6) we note Nelson v BBC (No 2) [1980] ICR 110, CA and paragraphs 27 to 30 of the decision of the EAT in Langston v Department for Business Enterprise and Regulatory Reform UKEAT/0534/09, [2010] All ER (D) 36 (Sep).

12. The only issue we have to decide in relation to the wrongful dismissal complaint is: was the claimant guilty of a repudiatory breach of her contract of employment, i.e. of what is normally labelled 'gross misconduct'? There is no particular magic in those words. They are just a convenient shorthand for [something like]: conduct of the employee so serious it constitutes a fundamental or repudiatory breach of the contract of employment. A fundamental or repudiatory breach is one going to the root of the contract; one (to use the language of some of the older cases) evincing an intention on the part of the contract-breaker no longer to be bound by the contract's terms.

13. In terms of the relevant law, it suffices to note, for present purposes, that: the question for us is whether the respondent has proved the claimant did in fact do something that fundamentally breached her contract of employment; we are not concerned, as we are in relation to unfair dismissal, with what the respondent believed, reasonably or otherwise, nor with whether the respondent acted within the 'band of reasonable responses'; we are acutely conscious of the different approaches that we need to take to, on the one hand, determining liability for unfair dismissal and, on the other, the wrongful dismissal complaint.

Factual background

14. We refer to the parties' agreed chronology and cast list.

15. On 9 June 2016, the claimant was one of two instructors/trainers at a riding and road safety course given at the Rheidol Riding Centre, near Aberystwyth. The other trainer was a woman called Alison Brown who the claimant knew well and who, we understand, the claimant had worked with many times before. The claimant and Alison Brown were jointly 'the face' of the British Horse Society on this course, albeit that, unlike the claimant, Alison Brown was not the respondent's employee; she was an independent contractor for the purposes of delivering this training.

16. The people who attended this course – there were 17 of them on the day – were trainers and/or assessors of the British Horse Society Riding and Road Safety Test. The course on 9 June was part of their continuing professional development and they had to attend such a course annually to keep their accreditation as trainers and/or assessors.

17. From the claimant's point of view, nothing particularly untoward happened on the day. There were a few hiccups – a problem with a loose horse, the need to walk across several fields to get to the place where a practical session took place in the afternoon, problems with heat and horse flies, and a few other things – but nothing exceptional. At the end of the day, delegates filled out feedback forms which they handed to the claimant and/or Alison Brown before they went home. The feedback forms were largely complimentary, or, at worst, broadly neutral.

18. The following day, however, one of the delegates, Ellen Griffiths, who had attended with two colleagues (all three of them college lecturers based at Coleg Sir Gar in Caernarvonshire), made a complaint. She telephoned a British Horse Society employee, Jan Roach, whose job title was National Manager, Wales. We aren't sure, but we assume she telephoned Jan Roach because she knew her and because Jan Roach was the respondent's representative in Wales. Jan Roach was not employed in the same part of the respondent as the claimant and was not responsible for her. Jan Roach the same day telephoned her boss Alan Hiscox (formerly the second respondent), who at the time was the respondent's National Development Director.

19. What happened next is rather strange in our eyes. Instead of passing the matter on to the claimant's line manager, as we would expect anyone in his position to do (the claimant's line manager at the time being Mr Lee Hackett), Mr Hiscox took it upon himself to launch an investigation into the complaint. He instructed Jan Roach to go to Coleg Sir Gar and in person take a statement from Ellen Griffiths and from her two colleagues, who were also, apparently, dissatisfied with the training course on 9 June. Ellen Griffiths's colleagues are Bryony Cutler and Karen Smith. A joint statement was taken from the three of them on 27 June 2016.

20. In the meantime, on 14 June 2016, Mr Hiscox was appointed the new Director of Safety and would take over from Mr Hackett with effect on 5 July. Mr Hiscox was interviewed for that job on 13 June 2016.

21. On 4 July 2016, Mr Hiscox was given the joint statement of Ellen Griffiths, Bryony Cutler and Karen Smith.

22. We have been unable to get to the bottom of precisely how and when this came about, but, sometime around 22 June 2016, a further complaint was made by someone who had attended the course on 9 June called Di Rees Thomas. Mrs Rees Thomas gave oral evidence before us. She did not complain spontaneously and independently; the first contact in relation to her complaint was from Jan Roach to her. On 22 June, Ms Roach told Mr Hiscox about the complaint and on 15 July 2016 he took a statement from Mrs Rees Thomas himself, driving very considerably out of his way, to Caernarvonshire, to do so.

23. A fifth complainant appeared sometime in early July: Rhianwen Rosser. We don't know for sure whether Ms Rosser came forward spontaneously or whether, like Di Rees Thomas, her complaint was instigated by Jan Roach. What we do know is that a statement was taken from her, at Mr Hiscox's request, by Jan Roach in person, which she provided to Mr Hiscox on 23 July 2016.

24. Ann Macdonald was the respondent's director of HR. Mr Hiscox liaised with her about the complaint and she agreed with him that he should formally be appointed the investigating officer in relation to it, and that it should be treated as a potential misconduct matter.

25. On 20 July 2016 Mrs Macdonald wrote to the claimant. Relevant parts of the letter are as follows:

> *I write to advise you that several complaints have been raised against you and it is the duty of the Society to look into the allegations with an investigation.*
>
> *During the investigation process you will be required to attend a disciplinary investigatory meeting. …*
>
> *The meeting will provide you with an opportunity to explain your version of events and you should bring along any evidence that you feel will help you. …*
>
> *After the investigation and depending on the evidence, the outcome will determine whether formal disciplinary proceedings will commence*.

26. This is a rather strange letter and would be very unsettling for any employee to receive. The main problem with it is that it gives the recipient no idea at all of the nature of the allegations that are made, beyond the fact that they are "*complaints*". Be that as it may, it was never received by the claimant because it was posted to her and there was inadequate postage on it. It was retained by the post office and she didn't go to the post office to pick it up and pay the excess postage over the next few days.

27. On 26 July 2016, out of the blue from her point of view, the claimant received a letter headed "*Invite to Investigatory Meeting*". The only warning she had was a telephone call from the respondent's Saima Mohammed (from HR) to tell her that she had something to send her. The letter included the following:

> *As you have been advised on 20 July 2016 the Society are investigating serious allegations made against you regarding your conduct and behaviour that suggest you have brought the Society into disrepute. …*
>
> *The meeting is being held to investigate the following:*

- *Several serious allegations have been raised against you since the BHS R&RS* [riding and road safety] *training Rheidol RC in Aberystwyth on 9 June 2016. Due to the extreme seriousness of the allegations it is the duty of the society to take this with the u*[t]*most seriousness it deserves. This will be discussed further within the investigatory meeting. …*

The meeting will provide you with an opportunity to explain your version of events and you should bring along any evidence that you feel will help support you. …

… As the investigation is private and confidential, I would ask [you] *not to discuss this investigation further within the Company…*

28. The investigatory meeting was duly held on 28 July 2016, chaired by Mr Hiscox as the investigator. We refer to the respondent's notes of that meeting, which the claimant accepts are broadly accurate.

29. It is common ground that that meeting was the first time the specific allegations being made against the claimant were outlined to her, to the extent that they were ever outlined at all. This was done orally. The three allegations were that on 9 June 2016: "*you were aggressive, patronising and condescending"*; "*your manner was unprofessional and improper*"; "*you also attacked the BHS Education Department with heavy criticism*".

30. Immediately following the meeting, Mr Hiscox prepared a "*Disciplinary Investigation Report*". The relevant part of the conclusion section of the report, which contains some rather confusing typographical errors, is: "*We would advise, this goes to Disciplinary and should be investigated further.*"

31. A copy of the report was provided to Mrs Macdonald, who was the decision maker in relation to dismissal, and to Mrs Terry, who was the decision maker in relation to the appeal. It was not provided to the claimant until after the disciplinary and appeal process had been finally concluded.

32. Mrs Macdonald decided that the matter should go to a disciplinary hearing. The claimant was given a written invitation to a disciplinary hearing in the afternoon of 28 July 2016, which was a Thursday. The disciplinary hearing was to take place at 11am on Monday 1 August 2016, so, effectively, the claimant was given just over one working day's notice. The three allegations remained the same: being "*aggressive, patronising and condescending*"; having an "*unprofessional and improper manner*"; attacking "*the BHS education department with 'heavy criticism'*".

33. Together with the invitation letter, the claimant was provided with notes from the investigatory meeting of 28 June and redacted versions of the statements which had been taken by Mr Hiscox and Ms Roach from the five complainants, misleadingly referred to as "*Statement*[s] *from three individuals*". The main detail that had been redacted from the statements was who they were from. She was also provided with some of the feedback forms from 9 June and a copy of a statement she herself had prepared for the investigatory meeting.

34. The disciplinary meeting took place on 1 August 2016 from around 11 am to just after 1 pm. The meeting was chaired by Alison Macdonald. We refer to the notes of the meeting.

35. There are two versions of the notes: the respondent's version and an annotated version of the respondent's version, containing corrections the claimant believed should be made. None of the changes the claimant wanted made are particularly significant in the context of our decision. Before the meeting, the claimant provided a further statement from herself, which was about her achievements in the job rather than about the events of 9 June 2016. She also produced two references or testimonials from individuals who knew her well and a statement from someone who had been on the course on 9 June called Wendy Davies.

36. Following the meeting on 1 August 2016, Mrs Macdonald prepared a document setting out her disciplinary findings and explaining her conclusion, which was that the claimant should be summarily dismissed. It seems the document was prepared purely for her own, and possibly for the respondent's, future reference. The document is dated 2 August 2016 and no one relevant, other than Mrs Macdonald herself, seems to have seen it until after these tribunal proceedings were started. It is the best evidence we have of what was going through Mrs Macdonald's head when she made her decision, in particular of what things she took into account and what things she possibly didn't take into account. It is, in fact, the only contemporaneous evidence we have about such matters. The dismissal letter, also dated 2 August 2016, contains next to nothing by way of explanation or reasoning for the decision. The relevant part of it states:

> *Having reviewed all the points presented, it has been concluded that: it is probable that 5 individuals have no motivation to gain by reporting such behaviours. It is also imaginable that they felt pressured to complete satisfactory feedback sheets with their names, but felt compelled to inform the Society of their evidence on the day in question. There has been no evidence produced by you to support your claims that the statements are untrue other than your denial. Behaviour of this nature brings the society into disrepute.*
>
> *The decision reached after careful consideration is the sanction of a* ***Dismissal under Gross Misconduct*** *with immediate effect.*

37. On 4 August 2016, the claimant's solicitor wrote to the respondent appealing against the decision to dismiss her and complaining about various other things which formed the subject matter of the now-withdrawn discrimination claim. By a letter of 12 August 2016 the claimant was invited to a disciplinary appeal hearing. This ultimately took place on 23 August 2016. It was heard by Mrs Julia Terry, who was and is a human resources consultant.

38. Since her involvement in this appeal, Mrs Terry has done quite a lot of work with the respondent, but this appeal was her first significant dealings with them. She dealt with the appeal as a re-hearing rather than merely reviewing Mrs Macdonald's decision. In fact, she did not even, as part of her appeal, consider the minutes of the disciplinary hearing that had taken place before Mrs Macdonald.

39. By the time of the appeal hearing, the claimant had provided to the respondent and Mrs Terry further testimonials about her, and statements from six other people, in addition to Mrs Davies, who had been present at the training course on 9 June 2016.

40. By letters of 19 and 22 August 2016, the claimant's solicitors asked for the appeal hearing to be postponed from 23 August 2016. Those letters apparently did not find their way to Mrs Terry and the appeal hearing went ahead as planned on 23 August 2016.

41. There are two sets of notes from the appeal meeting: those prepared by Saima Mohammed from HR and those taken on the claimant's behalf by her lay representative. No allegedly material differences between the two sets of notes have been highlighted to us. Reading those two sets of notes for ourselves, we do not think the differences affect our decision to any extent.

42. The only person who gave oral evidence at the disciplinary and appeal meetings was the claimant herself.

43. Following the appeal meeting on 23 August 2016, Mrs Terry decided to do some investigations of her own. She telephoned the five individuals who had complained to ask them to explain why they hadn't made any great criticisms of the claimant or Alison Brown in their feedback forms. She also asked Mr Hiscox something to the effect of whether the claimant had any power over delegates on this course such that she might be able to take revenge against them if she knew their identity. Mr Hiscox apparently told her that the delegates could have been, or could become, assessors and earn money from doing assessing; and that assessment opportunities were managed by the claimant and a colleague of hers called Di Parkinson. The reason for asking Mr Hiscox this was because the claimant continued to complain about the fact that the statements were anonymised.

44. Mrs Terry did not tell the claimant in advance that she was going to do any further investigations and did not tell the claimant what additional information she had gleaned from the investigations before making her decision.

45. Mrs Terry did not actually herself make the decision in relation to the claimant's appeal. She (reasonably) took the view that as someone who was not employed by the respondent, it was not her place to do so. Instead, she made a recommendation, which was: "…*the allegations against Sheila Hardy* [be] *upheld and her appeal denied*". That recommendation was contained in a report she prepared dated 15 September 2016. A copy of that report was ultimately supplied to the claimant after the appeal was rejected, in or around late September / early October 2016.

46. The claimant was notified of the respondent's decision in relation to the appeal by a letter of 21 September 2016. The letter came from Lynn Petersen the respondent's Chief Executive. The relevant parts of the letter state: "…*after reviewing the report I have made the decision to accept the recommendation … to uphold the sanction of dismissal on the grounds of Gross Misconduct and your appeal has been denied*".

Decision on the issues

47. During our decision-making process, we did not ask ourselves, "what would we have done"; and we kept asking ourselves – and answering "no" to – the question, "are we holding the respondent to too high a standard?" We are acutely conscious that the 'band of reasonable responses test' presents a low hurdle for the respondent to get over. Each of us is familiar with the fairly common type of unfair dismissal case where the respondent did not do as we would have done procedurally or substantively, where the decision seems severe to us, but where the dismissal is nevertheless fair under ERA section 98(4). Part of respondent's counsel's submissions was to the effect that this was just such a case. Unanimously, without hesitation, we disagree.

48. We have been rightly reminded by respondent's counsel that we have to consider the disciplinary process as a whole. For example, if we are considering the reasonableness of the respondent's investigation, we shouldn't just look at the investigation conducted by Mr Hiscox but should look at all of the investigations that were done during the course of the disciplinary process. This will include the questioning of the claimant herself during the disciplinary appeal hearings and the investigations which were done by Mrs Terry after the appeal hearing. Similarly, in considering whether the respondent had reasonable grounds for its belief in the claimant's guilt, we shouldn't just consider the evidence obtained by the respondent's investigations but the evidence the claimant herself gave and provided to the respondent.

49. This principle cuts both ways. We are looking at the reasonableness of the dismissal process taken as a whole. A particular aspect of the process followed by the respondent may be outside the band of reasonable responses without this necessarily making the dismissal unfair when the process as a whole is looked at. However, in a similar way, there may be a particular aspect of the respondent's process which, if it were the only defect in it, would not in itself take the respondent outside the band of reasonable responses or make the process as a whole unfair. However, there may be three or four such defects which, taken together, mean that the process as a whole is outside the band of reasonable responses and which make the dismissal unfair. For example, we might say that a reasonable employer could fail to take either of two particular steps during the disciplinary process, but that no reasonable employer would fail to take both.

50. We also don't think it is helpful in this case to seek to put all of the criticisms that we make into particular 'boxes' in terms of specific parts of the Burchell test. Most of the criticisms that we have fall into at least two categories. For example, the defect may be a procedural failing and a failure reasonably to investigate, producing insufficient grounds for a reasonable belief in guilt.

51. We shall nevertheless start with the reason for dismissal, i.e. with whether the reason for the decision-makers' decisions was a genuine belief in guilt of misconduct.

52. In her written closing submissions, claimant's counsel referred repeatedly to the respondent not having a genuine belief in various things. In her oral submissions, she made clear what she actually meant was that there wasn't reasonable belief in guilt and that the claimant accepts the respondent dismissed her because both Mr Hiscox

and Mrs Terry (and presumably Lynn Petersen) genuinely believed she was guilty of gross misconduct.

53. The first of the limbs of the Burchell test that therefore needs to be adjudicated on by us is: did the respondent have reasonable grounds to sustain its belief in guilt? That is a question which, in the particular circumstances of this case, begs another, very pertinent, question, namely: guilt of what?

54. A striking feature of this case is that, even by the end of trial, we were not entirely sure – and neither was the claimant – what it was the claimant was alleged to have done wrong that the respondent dismissed her for.

55. The claimant went into the investigatory meeting on 28 July 2016 knowing only that serious allegations had been made against her and that those allegations related to the training course on 9 June 2016. Because there was a reference in the letter inviting her to that meeting to section 4.8 of the disciplinary procedure, she could also work out that what was alleged against her was something to do with conduct rather than capability; if it were to do with capability, a different part of the disciplinary procedure would be engaged.

56. All she came out of the investigatory meeting knowing was that there were three vague charges made against her, as set out above. She had also been asked questions about various things and could, perhaps, infer something from what she had been asked. The respondent's defence to the allegation that it was unfair not to explain more fully and clearly to the claimant in advance of the disciplinary what the specific allegations against her were seems to be that she ought to have been able to work out what they were from the questions that she was being asked during the investigatory meeting. In our view, that simply is not good enough. It might be good enough in a case where there were one or two specific allegations which readily fitted into the broad categories of allegations which had been set out by the respondent. For example, if there was a charge of rudeness and it was put to the claimant that she had said three specific things that were rude, then she would have no difficulty in putting two and two together. (Even in such a case we would be asking why the respondent didn't actually formulate the charges precisely when this could easily have been done). But it was most definitely not good enough in the present case.

57. In the present case, the claimant was asked about a number of things which did not obviously fall within the ambit of any of the three 'charges' levied against her. In particular: she was asked questions about making disparaging remarks about a former senior employee of the respondent within its Education Department called Margaret Linington-Payne; she was asked questions about what seems to have been an allegation that the training session was, in general terms, badly organised and badly conducted – a capability rather than a conduct issue; she was asked questions about the way Alison Brown allegedly behaved during a practical session in the afternoon which could be characterised as unprofessional behaviour on the part of Alison Brown; other questions relating to Alison Brown and how the afternoon session was conducted were asked, containing allegations coming under the umbrella of failure to comply with good health and safety practice, or something of that kind.

58. The situation was not greatly improved in advance of the disciplinary hearing by providing the claimant with redacted versions of the witness statements. All of the things we have just mentioned which don't readily fit within the broad allegations of the claimant being aggressive, patronising and condescending and/or her manner being unprofessional and improper and/or her attacking the BHS education department with heavy criticism were allegations made within those witness statements. The claimant was, it seems, supposed by some magic to know that everything mentioned in the witness statements, whether encompassed within any of the three broad allegations or not, was being held against her and formed part of the charges against her.

59. In our view, the respondent acted outside the band of reasonable responses in this respect. The respondent also acted outside the ACAS Code. We refer in particular to paragraph 9 of the Code and the requirement that the employee should be notified and that, "*this notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary hearing*". We don't think the notification provided by the respondent did enable the claimant reasonably to prepare.

60. Specific ways in which what was provided to the claimant in terms of notification was inadequate include:

    60.1 it was never made clear what was being alleged against her in relation to Alison Brown. Was it that she should somehow have prevented Alison Brown from behaving inappropriately? Was it that she should publicly have admonished Alison Brown for her behaviour? And/or that she should have apologised to the delegates for Alison Brown's behaviour? Or was it something else?

    60.2 was it being alleged that the claimant herself had made disparaging remarks about Margaret Linington-Payne, or was it being alleged that she had failed to prevent Alison Brown from making such remarks? If those remarks against Margaret Linington-Payne were being relied on, what exactly is it alleged she said? If an allegation that the claimant had herself made "*a vile attack on Margaret Linington-Payne*" (quotation taken from the statement of Ellen Griffiths, Karen Smith and Bryony Cutler) had been included as a specific charge against the claimant, it is likely that, at some stage, the claimant would have asked specifically what it was she was supposed to have said. This might, in turn, have prompted the respondent itself to think about that issue. The respondent never did think about it. So far as we could tell, the first time anyone asked any of the respondent's witnesses what precisely it was the claimant was supposed to have said about Margaret Linington-Payne that was so "*vile*" was when the Employment Judge asked this of Karen Smith during the hearing. Karen Smith's answer was to the effect that it wasn't what the claimant had said but how she said it, and the fact that she named Margaret Linington-Payne at all, that was "*vile*". She also didn't seem to think that the word "vile" was a particularly strong one.

61. What we have just set out illustrates the very considerable overlap between two issues: what was the misconduct for which the claimant was dismissed; and whether

there were reasonable grounds, obtained following a reasonable investigation, for belief in the claimant's guilt. It is not surprising to us that an inadequate investigation resulted from the respondent's failure to articulate, even to itself, precisely what the specific charges against the claimant were.

62. We have already mentioned Mrs Macdonald's report and explained that, in our view, it is the best evidence – indeed, the only evidence which we think is at all reliable – about her thought process. That report tells us: what alleged misconduct she was taking into account in deciding the claimant had committed gross misconduct; what her reasons were for finding that misconduct proven; and why she felt that the misconduct amounted to gross misconduct for which dismissal was the appropriate sanction. We do not think her recollection 12 months on, given in the course of litigation and having taken advice, is reliable; although we should make clear that we don't accuse either her or any other witness – including the claimant – of deliberately seeking to mislead us. We accept that all witnesses gave their evidence honestly; but given the fallibility of human memory, it doesn't remotely follow that what they told us is actually what happened.

63. It is clear from the disciplinary report and from the minutes of the disciplinary meeting that there was one issue of particular importance to Mrs Macdonald which did not feature to any extent within the respondent's 'charge sheet', nor, indeed, within the witness statements being relied on by the respondent. It was plainly a big part of her reasons for deciding to dismiss the claimant. This is an allegation to the effect that the claimant disclosed to delegates on the course on 9 June confidential operational information relating to the British Horse Society. Mrs Macdonald comments in her report that, "*this is a major risk to the organisation and a breaching confidentiality* [sic]*".* It is fundamentally unfair to an employee to have as a significant part of the reasons for dismissal something that they have never been told is one of the charges of misconduct being made against them.

64. We are in danger of repeating ourselves, but the fact that an employee is asked about something during the course of a disciplinary hearing doesn't make this fundamental breach of natural justice significantly less serious, at least not in the circumstances of this case. In fact, this breach of natural justice was in one way even worse in this case than it might be in many other cases. This is because the specific allegations being relied on against the claimant were not spelled out even in the dismissal letter. The only way anyone could know that an allegation of breach of confidentiality had formed a substantial part of Mrs Macdonald's decision-making would be by obtaining a copy of Mrs Macdonald's report, which she gave to no one.

65. This brings us back to the inadequacy of the respondent's investigations. There was, upon analysis, no investigation whatsoever of the allegation that the claimant breached confidentiality, other than asking a few questions of the claimant herself. The claimant's essential case on this allegation was and is that she didn't tell delegates anything that was not fairly well-known within the British Horse Society; it was information that had been passed on to her and to others by her former line manager; nobody had ever suggested to them that it was confidential. Alison Macdonald had no way of knowing whether or not this was accurate. All she could say was that, from her point of view, from her relatively lofty executive position (and

having, it seems to us, no real knowledge of what was going on, or what might have been going on 'at the coal face'), this kind of information shouldn't be shared. If she had conducted a proper investigation into that allegation it might well have been revealed that the claimant was right – that although the information should have been kept confidential, it was not kept confidential and was well-known, and nobody had told the claimant that it was confidential information that should not be shared.

66. It is also clear from her report that the things mentioned above that weren't obviously part of the three core allegations being made against the claimant were significant parts of Mrs Macdonald's decision-making.

67. Going through Mrs Macdonald's report, other things of concern to us include:

    67.1 from the report, the entire basis of Mrs Macdonald's decision-making seems to have been that if she accepted the allegations made in the witness statements of the complainants were true and accurate then the claimant was guilty of misconduct. In other words she wasn't asking, "Are the three charges against the claimant made out?", but rather, "Did the claimant do the various things and did Alison Brown do the various things which are alleged in the witness statements?";

    67.2 it seems to be taken as read that for the claimant to have allegedly pumped her fist was rude or unprofessional and we really don't understand why that view was taken. To take that view doesn't seem to us to be within the band of reasonable responses;

    67.3 on the second page of the report, in what begins as a discussion of the allegation about the claimant attacking the respondent's education department, the entire focus of the discussion is about the breach of confidentiality allegation. The suggestion from the report is that it's the breach of confidentiality rather than anything else that is potentially damaging to the respondent's reputation because, supposedly, external messages should be communicated via the marketing and communications department;

    67.4 there is some discussion of the allegation that either the claimant or Alison Brown referred to external verifiers as "*interferers*". This is yet another allegation not clearly made when the claimant was being notified as to what this hearing was about. Also, it was not made clear whether it was being alleged that she had referred to them in this way, or, instead, that she was being accused of not having done something to stop Alison Brown from referring to them in this way; or something else.

68. We shall now focus specifically on whether there were reasonable grounds for belief in guilt.

69. It is a cliché, but a valuable one, that a decision maker can't have reasonable grounds for their decision if a reasonable investigation hasn't been conducted. When we look at what happened in terms of investigation, this is a very odd situation. We can readily understand why a complaint went from Ellen Griffiths to Jan Roach and from Jan Roach to her line manager Mr Hiscox, but what we can't understand – and it was something which wasn't really explained, certainly not adequately, by Mr Hiscox when giving evidence – is why Mr Hiscox took it upon himself to investigate that complaint.

At the point it was passed to him, it was absolutely none of his business. He didn't even tell Mr Hackett about it. And if it was anyone's business, it was Mr Hackett's. Mr Hiscox doing this suggests to us an active desire to get involved in something that could potentially have adverse consequences for the claimant. It was not put to him in cross-examination that he 'had it in' for the claimant and we don't find that he did, but the evidence does suggest to us that, perhaps unconsciously, he – and the respondent generally – had what might be called a 'prosecution mindset'.

70. The investigation Mr Hiscox instigated was not a casual one, of the kind one might expect of someone who merely wishes to satisfy himself that there is potentially some substance to a complaint before passing it onto the line manager of the person who is being complained about. He got his subordinate, Jan Roach, to take a reasonably significant amount of time out of her working day to do something that was not part of her job, namely to take statements, in person, from a number of people. He moreover put that investigation in train very shortly after 10 June 2016, a time when the claimant was – other than being a fellow employee of the respondent – nothing to do with him.

71. Putting to one side what we see as a prosecution mindset, there is nothing inherently wrong or unfair about someone other than the claimant's line manager embarking upon a preliminary investigation into a complaint made against the claimant. But if we had to identify where this investigation started to go wrong, it was right at the start and with Mr Hiscox – for whatever reason – deciding that he would do it rather than passing on information to the claimant's then line manager.

72. Moving on in the chronology, the respondent ultimately took statements from five people. The first of the statements that was taken was the joint statement from three people. There is nothing wrong with taking statements from people together, rather than taking statements from each of the three of them individually. But what no reasonable employer would do, and what the respondent did in this case (it seems to us), is to give that statement – taken in one go from three people who work together – the same weight as three statements taken separately from three independent complainants. Any reasonable employer would appreciate that any differences of recollection between three colleagues giving a statement together will inevitably be completely ironed out when they give a joint statement. The respondent and its decision-makers, perversely in our view, seem to have said to themselves, "This is particularly compelling evidence because three people are saying exactly the same thing".

73. We have similar comments to make on the other two statements. Throughout the disciplinary process, the decision-makers, Mrs Macdonald and Mrs Terry, operated on an unspoken assumption that Di Rees Thomas's complaint and that of Rhianwen Rosser were unprompted and had arisen separately and independently from each other and from the statement of the three women who worked together. Had that assumption been correct, we can see why the respondent felt that the evidence against the claimant was so strong: five people – or at least two individuals and one group of three individuals – had spontaneously come forward to complain about the claimant and had made their complaints in very similar terms. However, the

respondent never investigated – and, in particular, the decision-makers never looked into – the question of how the second and third complaints arose.

74. From Di Rees Thomas's oral evidence before us, it appears that she only raised a complaint when prompted by Jan Roach to do so. Further, given the considerable similarities between her statement and that of the three women who worked together at the college, we think Mr Hiscox must have based his questioning of her and (possibly unconsciously) his drafting of her statement on that previous statement. Her evidence was not, then, the independent, unprompted recollection of events that it was treated as being.

75. So far as concerns Rhianwen Rosser's statement, we know nothing of the circumstances in which that was taken. But we think it probable that her complaint, too, was prompted in the same way that Di Rees Thomas's was. (Pausing there, another thing we don't know is why Jan Roach decided to contact Di Rees Thomas and Rhianwen Rosser rather than any other delegate). Further, the similarities between the statement from Rhianwen Rosser and the other statements makes it highly likely that – consciously or otherwise – Jan Roach used the first statement as the basis for her questions and her drafting, just as Mr Hiscox did in relation to Di Rees Thomas's statement.

76. The problem we are identifying here is not so much how the statements were obtained. The problem is that, without investigating the point, both Mrs Macdonald and Mrs Terry treated the contents of those statements as independent, spontaneous recollections of events without any basis for doing so. This goes to the reasonableness both of the grounds for belief in guilt and of the investigation. They made an assumption that they were not entitled to make; the investigations carried out did not entitle them reasonably to make that assumption.

77. In addition, this is a further aspect of the respondent's prosecution mindset. All of the faults we have found with what the respondent did – faults that cumulatively place the respondent outside the band of reasonable responses and make the dismissal unfair – are to the claimant's disadvantage. This is not, then, a respondent that is merely incompetent across the board when it comes to disciplining and dismissing an employee.

78. For example, a reasonable employer looks for exculpatory evidence as well as evidence suggesting guilt. If the three sets of complaints the respondent received had indeed been independent and spontaneous, then the decision not to investigate the matter further at that stage – that is, prior to the disciplinary hearing – would probably have been a reasonable one. Given, however, that they were not independent and spontaneous complaints, the only explanation we have for the decision not to attempt to gather evidence from anyone else is that the respondent was only interested in inculpatory evidence. The contrast between the respondent, in the form of Jan Roach and Mr Hiscox, criss-crossing Wales in their cars to take statements personally from 'witnesses for the prosecution' and the respondent's decision not even to pick up the phone or send an email to Alison Brown or any of the other delegates is striking. We find the respondent had a closed mind from the start.

79. This brings us to two connected things. The first is the question of whether the respondent should have attempted to obtain some evidence from Alison Brown and its reasons for not doing so. The second is the length of time between Jan Roach receiving the first complaint, on 10 June, and the respondent actually doing anything of substance about the complaints in terms of starting a disciplinary process.

80. If the matter was really as serious as the respondent has made out then this delay was inexplicable. When explaining why dismissal and not something less was the appropriate sanction, the gist of Mrs Macdonald's evidence was that the claimant could and might well repeat the conduct for which she was dismissed at any time and the risk of her doing so was too much for the respondent to bear. That is completely at odds with the fact that the respondent was apparently content for both the claimant and Alison Brown to conduct further training sessions through June 2016 and potentially most of July; and with the respondent's apparent decision not to take any action against Alison Brown at all.

81. We can well understand why the respondent would prioritise taking action against the claimant, its employee. But to take no action at all against Alison Brown (and we are quite sure that if action had been taken against Alison Brown, we would have been told about it), who was a contractor and was in that capacity representing the British Horse Society, is very odd if the matter was really as serious as all that. This provides additional support for our conclusion that, for whatever reason, the respondent was corporately focused on 'securing a conviction' rather than, to the reasonable best of its ability, reaching a fair and correct decision in relation to a long-standing employee.

82. In our view, in the particular circumstances, any reasonable employer would at least have attempted to contact Alison Brown and some of the other delegates to see if there was more support for the claimant's side than, at first blush, there appeared to be.

83. There were also procedural faults in this disciplinary process that impinge on the reasonableness of the grounds for belief in guilt because they affect the quality of the evidence. Paragraph 5 of the ACAS Code refers to doing things, "*without unreasonable delay*". In our view, there was unreasonable delay here, in terms of the investigation. Mr Hiscox should not have been doing the investigation in the first place. The fact that he was unable to complete his investigations within a reasonable time because he was on holiday is not relevant.

84. There is, yet again, a contrast between what the respondent did to prepare the 'prosecution case' and what the respondent did in relation to the claimant's defence. The first the claimant knew of any allegations being made against her was 26 July 2016. It was not until the afternoon of 28 July that she received the anonymised statements. Accordingly, the first time she was able to do any investigations of her own was 7 weeks or so after the events of 9 June.

85. There are two problems with this. The first is that the claimant was given just over one working day to obtain any evidence when the respondent had had 7 weeks. The second is that in 7 weeks, people's memories are not going to be very fresh, or at least not half as fresh as they would have been had the ACAS Code been complied with.

86. We turn to the issue of anonymisation. A reasonable employer does not just anonymise a statement without thought. It does rather appear that this is what happened in the present case. The evidence before us in this respect was opaque. We don't really know how the anonymisation came about. It is not even clear to us that it was done at the request of the individuals giving statements. There is certainly no kind of audit trial in the evidence explaining the reasons for anonymisation. Even if there was a request for anonymity (rather than anonymisation having been done by HR off its own bat), any reasonable employer would at least question the request for anonymisation to some extent, for example seeking to allay any unnecessary and unreasonable worries about the potential adverse repercussions of giving an un-anonymised statement.

87. If the respondent were able to demonstrate that anonymisation was requested and that it was a reasonable request to grant – for example, if witnesses were adamant that they wanted it and that they would be withdrawing their statements if they didn't get it, or something like that – then for the respondent to rely on anonymised statements would be within the band of reasonable responses. Unfortunately, however, in accordance with our concerns about the respondent having a prosecution mindset, the decision-makers don't seem to have questioned the need for anonymisation at all. Instead: they put the onus on the claimant to justify removing anonymity; they made an assumption, without any real basis in the evidence they had, that there was a genuine and reasonable fear of reprisal.

88. Anonymisation caused two problems. First, had the claimant known who the statements had come from, she might have been able to come up with a reason why those statements were not as reliable as they appeared to the respondent to be. Secondly, when she was looking to counter allegations made against her, because she didn't know who made those allegations, she couldn't know who to ask for supportive witness statements from and was left with no choice but to obtain such statements from close acquaintances and friends. This second point is particularly unfair when the respondent's decision-makers held against the claimant the fact that the only supportive witness statements she had were from people she knew.

89. We now ask ourselves: to what extent did the appeal process 'cure' the problems we have identified with Mrs Macdonald's decision-making process? Another way of putting this question is to ask ourselves whether the dismissal was fair when all the circumstances, including what happened during and in connection with the appeal, is taken into account notwithstanding those problems. In particular, the respondent points to the fact that by the time of the appeal, it had statements from 12 out of 17 of the people who had attended the course.

90. Our short answer is that the unfairness that arose in relation to the original decision to dismiss was not substantially cured by the appeal.

91. The issue of anonymisation that we have just referred – a relatively minor issue that would probably not be a source of unfairness by itself, but even so – remained.

92. The key problem – the lack of clear, specific charges – and the problems with the investigation that that led to it, and the difficulties that that, in turn, created for the claimant in terms of obtaining appropriate evidence by way of rebuttal also remained;

nothing was done about that problem at all. To an extent, the situation on appeal was even worse than it had been originally because the dismissal letter was so uninformative.

93. We think it is not for a claimant who has been dismissed unfairly to tell the respondent ways in which the respondent has acted unreasonably when appealing against that unfair decision, but if and to the extent it is, the claimant's solicitors did clearly set out in their letter to the respondent of 4 August 2016: the complaint that the allegations the claimant was facing were vague; a demand for, "*the notes of the meeting whereby the decision was made to dismiss*" and "*full written reasons for the decision*". What was requested was, essentially, for the respondent to identify precisely what the claimant has been found guilty of and why she has been found guilty of it.

94. With Mrs Terry's decision-making, we have many of the same problems that we have identified with Mrs Macdonald's. Mrs Terry, like Mrs Macdonald, seems to have treated the three [sets of] complaints as if they were spontaneous and independent of each other. Mrs Terry also seems to have – judging by her report – adopted a similar approach of asking herself not whether the three charges levied against the claimant were made out but whether the contents of the three complaints were accurate. These two problems are two sides of the same coin. Because the respondent had never clearly identified, even for its own purposes, what the precise allegations against the claimant were, its decision-makers did not – and could not – go through the allegations and identify whether or not they had been proved. What both Mrs Macdonald and Mrs Terry did was to jump from findings that the three statements were accurate to a conclusion that the three vague charges levied against the claimant were made out. That was not, in our view, an approach that any reasonable employer could adopt.

95. Regrettably, we also get with Mrs Terry a similar prosecution mindset; a one-sided approach to decision-making. She identified potential weaknesses in the respondent's case and telephoned the respondent's witnesses so as to deal with those weaknesses. She took no similar steps in relation to what she identified as a weakness with the claimant's evidence, namely the fact that the claimant's witnesses did not, in the main, deal with the specific allegations that were apparently being made.

96. One of the allegations of unfairness made by the claimant was that nobody investigated what she and her witnesses had to say. For example, it was suggested that the claimant's case and that of her witnesses could have been put to the respondent's witnesses. The respondent, through counsel, submits that although that might be something the respondent could reasonably have done, it was not outside the band of reasonable responses for the respondent not to do it. In slightly different circumstances, that suggestion would have considerable force. The problem with it in this case is that the respondent chose to do some further investigation. If a respondent is going to do further investigations then, if it is going to act within the band of reasonable responses, it must do those further investigations reasonably even-handedly. Mrs Terry's further investigations were all about bolstering the 'prosecution case'.

97. We do not, by any means, accept all of the criticisms that the claimant makes against the respondent. For example, it has been suggested on the claimant's behalf that in relation both to the original disciplinary hearing and to the appeal, the claimant was unable to get her witnesses to deal with specific allegations because she had been prohibited from discussing details with anyone. We accept that the message that had been given to the claimant prior to the disciplinary hearing about revealing details was rather confusing and contradictory. However, very shortly after she was dismissed, she had solicitors not merely in the background but actually writing letters on her behalf. Had there been any doubt in her mind as to her ability to tell potential witnesses precisely what the allegations in the statements were, she could and would, through solicitors if necessary, have sought clarification from the respondent. The fact that she did not seek clarification suggests to us that she did not think she was prevented from doing anything that she wanted to do, in terms of speaking to potential witnesses.

98. We should, however, add that it was a bit much for the respondent, on the one hand, to fail to specify what allegations were being made and, on the other, to criticise the claimant for producing evidence that did not fully address all the specific allegations that were (it seems) in the decision-makers' minds.

99. Our concerns about the respondent's lack of reasonable grounds for its belief in guilt are fuelled by some aspects of the reports prepared by Mrs Macdonald and Mrs Terry, reports which show what was in their minds when they made their decisions.

    99.1 For example, at the bottom of the second page of Mrs Macdonald's report, she states that because she thought there was a contradiction in the claimant's evidence about when she first heard Margaret Linington-Payne's name mentioned during the investigatory and disciplinary process, she concluded that the claimant must be lying about something completely different, namely whether she made an inappropriate reference to Margaret Linington-Payne on 9 June 2016. When this was put to her in cross-examination, she appeared, initially at least, unable even to understand what might be wrong with her logic in this respect.

    99.2 Both Mrs Macdonald's and Mrs Terry's thinking seems to have been to the effect that because the complainant had no motive to make their complaints up, their complaints must be 100% accurate and true. The possibility of people being honestly mistaken does not seem to have occurred to either of them. Respondent's counsel sought to deal with this point in his closing submissions by saying something to the effect that no one could possibly be mistaken about whether, for example, unpleasant things had been said about the education department and/or Margaret Linington-Payne. Putting to one side the fact that, in our experience, the human capacity for self-deception knows no bounds, we accept that both Mrs Macdonald and Mrs Terry might reasonably have taken the view that witnesses couldn't have been mistaken about certain things, e.g. whether Margaret Linington-Payne was verbally disparaged. If acting as reasonable decision-makers, though, they should have appreciated that for the witnesses to have made mistakes about other things that were very important was well within the realms of possibility, e.g. who it was who had made

disparaging remarks about Margaret Linington-Payne and/or the respondent's education department.

99.3 Another example of something in Mrs Macdonald's report that concerns us is her conclusion, set out at the top of page 4 of her report, that delegates on the course on 9 June were not told and were not aware that they could fill in feedback forms anonymously. She had, on our analysis of the situation, literally no evidence whatsoever for that conclusion. This is a minor issue in the grand scheme of things, and we can well understand why delegates would not hand in feedback forms containing considerable criticisms of the claimant and Alison Brown to the claimant and/or to Alison Brown, but it is a minor issue that is characteristic of an approach of making all findings and assumptions in favour of 'the prosecution' and ignoring anything that might potentially assist the claimant.

99.4 The final example we shall give of something in Mrs Macdonald's report that gives us concern about the basis of her belief in guilt is the statement and the conclusion to the effect that the three statements provided by the claimant were merely "*character references*". It is fair to say that two out of the three were merely character references. It was, however, unreasonable to view Wendy Davies's statement like that. Although Mrs Macdonald, in her evidence before us, suggested that she had taken Wendy Davies's statement into account and had appreciated that it had at least something to say directly of relevance to the allegations of misconduct being made against the claimant, the only point at which it is mentioned in her report is in a statement dismissing it as a mere character reference. We think that at the time, she didn't appreciate that to an extent it contradicted and undermined the statements of the complainants.

100. As for Mrs Terry's report, there are a few things in it of concern. None of them is enormously significant in and of itself, except as an indication of a one-sided approach.

100.1 At the bottom of the first page of Mrs Terry's report, there is a statement that "*the witnesses requested anonymity as they feared reprisal from SH due to the influence she has on trainers and assessors and their inclusion on the BHS register. They also feared being discredited as the equine sector is small and tight knit*". We can find no discernible basis in the evidence she had for that statement.

100.2 In the middle of page 6 of the report, there is a reference to the ACAS guide to conducting workplace investigations and to the fact that "*BHS had consistent statements from 29% of delegates, therefore it is reasonable to accept this evidence*". The impression we have got from this and from other parts of Mrs Terry's evidence is that she was less concerned with fairness *per se* than with whether the respondent had done the minimum necessary to satisfy ACAS guidance. She seems to have thought that fairness is a numbers game and that because a particular percentage of people were saying something, it had to be true.

100.3 She also, in the same part of the report, wrongly states that "*statements disputing the allegations were not submitted until appeal stage*". Mrs Davies's

statement was submitted before the appeal stage. This suggests that she, like Mrs Macdonald, wrongly believed Mrs Davies's statement had nothing to say that was relevant to the particular allegations being made against the claimant.

101. A point about process that is also relevant to the question of the reasonableness of the grounds for the respondent's belief in guilt is that, generally, unless there is a good reason for not doing so, any reasonable employer will tell the accused employee everything the employer intends to rely on when making its decision. For example, if the decision-maker decides to undertake some further investigations into a particular matter after a disciplinary hearing, unless there is a good reason for not doing so, she will let the employee have the material which she gathers in her further investigations before making a decision. The respondent acted unreasonably in this respect.

    101.1 Mr Hiscox's investigatory report was supplied to both Mrs Macdonald and Mrs Terry and was taken into account by them. It was not supplied to the claimant until after the conclusion of her appeal against dismissal.

    101.2 The claimant was completely unaware of Mrs Terry's further investigations and was not given an opportunity to comment on what they apparently revealed. In particular, Mr Hiscox had – possibly mistakenly – told Mrs Terry that assessment opportunities were controlled by the claimant and Di Parkinson. The claimant should have been given an opportunity to comment on that. Had she been given that opportunity, she would no doubt have said that Mr Hiscox was wrong and she might even have been able to prove that he was wrong.

102. Neither of these matters is a particularly big issue in the context of the case overall. Were this the only defect in the disciplinary and appeal process, we would probably end up reducing any compensation by 100 percent pursuant to the Polkey principle. But it is nevertheless in its own right a defect making the dismissal, looked at as a whole, unfair.

103. We turn specifically to procedural issues. These have largely been covered already when dealing with the reasonableness of the respondent's investigation. We have already mentioned the respondent's failure to set out clearly the particular allegations being made against the claimant at any time. We have also referred to the claimant only being given just over one working day's notice of the disciplinary hearing. In the particular circumstances of this case, doing so was outside the band of reasonable responses. The respondent can hardly pretend there was a pressing need to get the disciplinary hearing concluded in circumstances where it had had six weeks or so to do its own investigating. Doing this is illustrative of the respondent approaching this matter by asking what the minimum was it had to do. We don't find that there was conscious bias against the claimant – and, indeed, the allegation that there was conscious bias was not put to the decision-makers in cross-examination – but, as above, there was a prosecution mindset.

104. Turning to the specific allegations of a failure to follow a fair procedure set out in paragraph 35 of the claimant's ET1 particulars of claim:

104.1 we agree that the respondent failed to provide the claimant with sufficient information regarding the allegations made against her and that they did not provide sufficient evidence;

104.2 we also (as above) to an extent agree with the claimant in relation to the anonymisation issue, albeit if this were the only source of unfairness we might well have concluded that the dismissal looked at as a whole was not unfair under ERA section 98(4);

104.3 it is right that the claimant was not afforded the opportunity to put forward her case before the decision was made to commence disciplinary action – if by "*commenced disciplinary action*" what the claimant means is before she was invited to the investigatory meeting. Although there was no good reason not to give the claimant more details of the allegations being made against her before the investigatory meeting, in the particular circumstances of this case we don't think the respondent acted unreasonably in failing to do so;

104.4 in relation to the allegation that the "*respondent's decision to dismiss the claimant was pre-meditated*" we have not found that there was conscious pre-meditation, but we do think the respondent didn't seriously consider the possibility that the claimant might not be guilty of gross misconduct;

104.5 the final point made in paragraph 35 – about carrying out further investigations – is also one we have already dealt with.

105. Finally in relation to procedural fairness, we note that in our view the respondent failed to comply with its own disciplinary procedure. That procedure appears to have been largely modelled on the ACAS Code. The respondent failed to inform the claimant, "*of the alleged misconduct … to enable you to answer the case at a disciplinary hearing*", and also failed adequately to, "*explain the complaint against you and go through the evidence that has been gathered*".

106. We agree, too, with what is stated about the respondent's failure to comply with the guidance supplementing the ACAS Code in paragraphs 41A to C of claimant's counsel's written submissions. It is merely guidance, though.

107. The final limb of the Burchell test is whether, putting all else to one side, dismissal was within the band of reasonable responses.

108. It is in relation to this issue that the temptation to adopt a substitution mindset is most great and most dangerous. On any sensible view, this was a very harsh decision by the respondent; and so it struck us from the outset of this case. In those circumstances, we have consciously sought to resist adopting that mindset and to ask ourselves whether what we might doing is allowing our sympathy for the claimant and distaste at the harshness of the respondent's decision-making to lead us down that dangerous path. The firm view of all of us is nevertheless that this was not merely a harsh decision, but one that was so harsh, no reasonable employer could have made it.

109. The one broad allegation that it seems to us might potentially be gross misconduct, potentially leading a reasonable employer to dismiss, is the allegation that: by her alleged rudeness on the day; by the training session as a whole being badly organised and of poor quality; by tolerating Alison Brown's potentially dangerous antics; and by supposedly disclosing confidential information in a way not endorsed by the respondent's communications department – the respondent's reputation was, or was potentially, brought into disrepute, at least amongst a small group of people; and that that small group of people could well tell others about their negative experience; and that that could in turn have a significant impact on the respondent.

110. The first difficulty with this as a basis for dismissal is that it includes things that don't fall within the three allegations for which the claimant was supposedly dismissed. The second, more fundamental, difficulty is that taking into account the claimant's very long service, clean disciplinary record, the apparent lack of any other complaints (including in relation to other training sessions the claimant conducted in the month of June 2016), the fact that the respondent was apparently quite content for both the claimant and Alison Brown to carry on doing training sessions despite the allegations having been made against them, and the fact that it appears the complainants' very negative view of the training session was that of a minority of the people who attended it (based on the evidence the respondent had by the time of the appeal to Mrs Terry), in our view no reasonable employer would have thought that dismissal was the appropriate sanction.

111. When Mrs Macdonald was asked by the tribunal to explain why a sanction short of dismissal was not appropriate, a major factor for her seemed to be her perception that it wouldn't be possible to monitor the claimant's behaviour on an ongoing basis. This is effectively to blame the claimant for the respondent's own lack of a proper monitoring mechanism. It is not for us to tell the respondent how to run itself, but off the top of our heads we could come up with a number of things the respondent didn't do that could have been done that would significantly have reduced the risk of any repetition; and that would have enabled some monitoring of the claimant's behaviour to take place.

112. We would add that we do not accept the submission that a substantial part of the reason for the claimant's dismissal – something that allegedly made the situation more serious than it would otherwise be – was the perception that she had lied during the disciplinary process, i.e. that by dishonesty she had undermined trust and confidence in the employment relationship. In evidence, this was mentioned only in response to what was probably a leading question in re-examination of Mrs Macdonald. Perhaps more importantly, it is not mentioned as a factor in either Mrs Macdonald's or Mrs Terry's report. We don't think it was a significant part of the respondent's decision-making or it would have appeared in those reports. The closest we get in either report is Mrs Macdonald referring to the claimant's alleged "*lack of remorse*", but that phrase was used in her report in connection with the allegation of divulging confidential operational information (an allegation that, as we have already mentioned a number of times, wasn't on the 'charge sheet' and wasn't investigated at all).

113. In summary in relation to liability for unfair dismissal, although the respondent dismissed the claimant because its decision-makers genuinely believed her guilty of serious misconduct: they lacked reasonable grounds for that belief; the investigation was inadequate; there was significant procedural unfairness; dismissal was outside the band of reasonable responses.

114. We can deal with wrongful dismissal very shortly. The respondent has come nowhere near satisfying us that the claimant, by a course of conduct, committed a repudiatory breach of her contract of employment. We discussed with counsel during submissions what gross misconduct is, and everyone seemed to agree that a helpful way of thinking about it is as the employee-equivalent of an employer's breach of the so-called 'trust and confidence term'. The claimant certainly did not, without reasonable and proper cause, do anything that, objectively judged, individually or cumulatively, was calculated or likely to destroy or seriously to damage the relationship of trust and confidence between her and the respondent.

115. We turn to the remedy issues in relation to unfair dismissal that it was agreed we would deal with alongside liability. The Polkey issue does not arise because this was a substantively unfair dismissal, i.e. no matter what procedural steps the respondent had taken, dismissing the claimant would have been outside the band of reasonable responses and unfair. The first remedy issue that does arise is contribution and fault under ERA sections 122(2) and 123(6).

116. One of the things the respondent relies on in relation to this issue is the claimant's rudeness. The problem with the allegation of rudeness is that rudeness is so subjective. What seems to one person to be someone raising their voice can very easily appear to someone else as shouting; necessary firmness in dealing with a group of people who appear disruptive can easily come across as treating the members of that group like children; and so on. We are not satisfied on the evidence that, objectively assessed, anything the claimant did or said was rudeness that could be characterised as blameworthy or culpable. We are also not satisfied that the claimant inappropriately divulged confidential information in a blameworthy or culpable way.

117. However, we are, on balance, satisfied that the claimant did inappropriately disparage the educational department and Margaret Linington-Payne and/or permitted Alison Brown to do so without check or correction. We also think that what happened in the practical session in the afternoon, in terms of Alison Brown adopting unsafe practices and no or no adequate health and safety assessment being made of the field into which they went – indeed, what seems to have been a general lack of organisation in relation to the afternoon session – and the claimant's failure to address any of these things, are also culpable and blameworthy.

118. It is clear that something out of the ordinary happened on 9 June 2016; this must have been so or a complaint would not have been made. It hasn't been suggested to us – and we think it is inherently unlikely – that Ellen Griffiths was a serial complainant or anything like that. Although the complaints from everyone other than Ellen Griffiths were to an extent prompted, the fact is that complaints were made and were not withdrawn; and we have no reason to believe that they weren't made in good faith. For five people to be complaining about a training session must be a very

unusual situation, making it likely that there was, objectively, quite a lot wrong with that training session.

119. We can't pretend there is any particular science involved in our assessment of the extent to which the basic and compensatory award should be reduced. It ought, we think, to be towards the lower end of the scale in circumstances where we have found that no reasonable employer could ever have dismissed the claimant for that which this respondent dismissed her. Nobody has suggested that the reduction to the basic and to the compensatory awards should be different. We think the appropriate figure for both is 20 percent.

120. Finally, we turn to whether there should be an uplift to compensation pursuant to section 207A of the Trade Union and Labour Relations Act (Consolidation) Act 1992 ("section 207A"). We have already highlighted what we think is a breach of paragraph 9 of the ACAS Code. It is more than a merely technical breach. Moreover, we can see no possible justification for it. In our view it was clearly an unreasonable breach. As to whether it would be just and equitable to increase compensation pursuant to section 207A, the submission is made on the respondent's behalf that the claimant did not at the time claim she didn't understand the charges against her. The answer to that submission is that between being informed what the broad allegations against her were and the disciplinary hearing, she hardly had time to think, let alone identify the respects in which the respondent was falling down in terms of procedure. We also note that she did in essence raise this precise point through her solicitors in their letter of 2 August 2016, immediately after dismissal, and the point was not addressed by the respondent during the appeal.

121. For these reasons, we think it is appropriate to increase compensation pursuant to section 207A. So far as where within the range from 1% to 25% that increase should be, we take into account that this was not a knowing breach – the respondent acted through ignorance rather than malice – and that the respondent did, in outline, follow a reasonable procedure, including a full appeal. The increase should in these circumstances be towards the lower end, but not right at the bottom of the scale given that this was not a mere technical breach of the Code, but one that had substantive effects on fairness as explained above.

122. Taking all the circumstances into account, we consider an uplift under section 207A of 10 percent to any compensatory award to be appropriate.

SENT TO THE PARTIES ON 11 October 2017

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12 October 2017
FOR THE TRIBUNAL OFFICE