Case Number: 3200166/2017

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mrs V Hazeley**

Respondent: **London Borough of Hackney**

Heard at: **East London Hearing Centre**

On: **30 & 31 August & 1 September 2017**

Before: **Employment Judge Foxwell**

Representation

Claimant: Mr W Brown (Solicitor)

Respondent: Mr E Gold (Counsel)

JUDGMENT having been sent to the parties on 5 September and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

1 The Claimant, Mrs Victoria Hazeley, began working for the Respondent, the London Borough of Hackney, on 1 May 2004. Her employment ended on 17 October 2016 when she was dismissed without notice for alleged misconduct. At the date of her dismissal she was a Housing with Care Scheme Manager responsible for older service users in two locations within Hackney, Appleton Court and Morrel Court. The service users at these facilities are vulnerable and have a variety of medical conditions including dementia, schizophrenia and cancer. The Claimant had two team leaders reporting to her, 12 members of staff and up to 12 agency workers.

The hearing

2 The Claimant presented a claim of unfair dismissal to the Tribunal on 26 January 2017 having gone through early conciliation. It has come before me for determination and in doing so I have heard evidence and submissions over two days on 30 and 31 August 2017. I heard from the following witnesses for the Respondent:

Diane Ducie Ms Ducie is employed by the Respondent as a Service Manager. She has a degree in social work. She discovered evidence which it is said led to the Claimant's dismissal. She was responsible for suspending the Claimant pending a disciplinary investigation.

Margaretha Staines Ms Staines is employed by the Respondent as a Service Redesign Project Manager. She also has a degree in social work. She conducted disciplinary investigations into the Claimant in 2015 and 2016.

Carlo Gizzarelli Mr Gizarelli is employed by the Respondent as Deputy Head of Adult Social Care. He is a registered Occupational Therapist. He made the decision to dismiss the Claimant and rejected an associated grievance.

Cynthia Davis Ms Davis is employed by the Respondent as Head of Commissioning. She heard the Claimant's appeals against dismissal and the grievance outcome.

3 The Claimant gave evidence in support of her claim and called no other witnesses; that is quite usual and I certainly draw no inference from the number of witnesses a party calls.

4 With the agreement of the parties I heard the Respondent's evidence first. That is the usual practice where a dismissal is admitted because of the way in which the burden of proof works (see below).

5 In addition to the evidence of the witnesses I considered the documents to which I was taken in an agreed bundle and references to page numbers in these Reasons relate to that bundle.

6 Finally, I received oral submissions from the parties' advocates which I have considered.

The legal framework

7 In any case where an employer dismisses an employee, it is for the employer to establish the reason for dismissal and that it is a potentially fair reason within the categories set out in section 98 of the Employment Rights Act 1996. In this case the Respondent asserts that the reason for the Claimant's dismissal was misconduct and that reason has been conceded by the Claimant. It suffices to state that misconduct is a potentially fair reason for dismissal. Accordingly, the issue of the burden of proof in this case does not arise, at least in that respect.

8 Where a Tribunal is satisfied that misconduct is the reason for dismissal, it is for the Tribunal to decide whether it was in fact fair to dismiss for that reason by applying the test of fairness contained in section 98(4) of the Act which provides as follows:

> *"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

9 There is no burden of proof on either party in respect of this.

10 The test of fairness does not permit the Tribunal to decide what it might have done had it been making the decision to dismiss (*London Ambulance Service NHS Trust v Small [2009] IRLR 563*). On the contrary, what the Tribunal must do is consider the reasonableness of the Respondent's decision and decision-making process. In the context of a conduct dismissal it is well established that the questions a Tribunal must consider are as follows (see *British Homes Stores v Burchell [1978] IRLR 379* as approved by the Court of Appeal in *Weddell & Co Ltd v Tepper [1980] ICR 286*):

10.1 Did the employer genuinely believe that the employee was guilty of the conduct alleged against him?

10.2 Did the employer have reasonable grounds for that belief? Important components of this are the existence of a fair procedure and an adequate investigation.

10.3 If the Tribunal is satisfied of those matters on the evidence before it, the final question is whether the decision to dismiss fell within the band of reasonable responses of an employer (see *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*).

11 Furthermore, when the Tribunal approaches questions such as the adequacy of the procedure or investigation it must also apply the band of reasonable responses test (see *Sainsbury's Supermarkets Limited v Hitt [2003] ICR 111*); it is certainly not a *'one size fits all'* approach to these matters, although the Tribunal will have regard to the ACAS Guidelines on Discipline and Grievances at Work and to any relevant workforce agreement. The focus of the Tribunal's enquiry is, therefore, on the reasonableness of the employer's decision-making process when measured against a range of approaches that could be open to different employers looking at the same facts as they were reasonably believed to be at the time (see *Devis v Atkins [1977] ICR 662*).

12 The "band of reasonable responses" test is well-established in the law of unfair dismissal. The test requires a Tribunal to treat with respect the conclusions of an employer who has concluded on reasonable grounds that misconduct has occurred but the band is not infinitely wide: the test of fairness requires a Tribunal to decide whether in dismissing the employer has acted reasonably or unreasonably *"in accordance with equity and the substantial merits of the case"* (see *Bowater v NW London Hospitals NHS Trust [2011] IRLR 331* and *Newbound v Thames Water Utilities Limited [2015] EWCA Civ 677*). In establishing the parameters of the band of reasonable responses a Tribunal must walk

a narrow line between an assessment of the evidence in accordance with the test of fairness and what has been termed the *"substitution mindset".*

13 A relevant consideration in assessing whether a disciplinary investigation was reasonable in its scope (or even necessary at all) is whether the employee has admitted the relevant misconduct (*RSPB v Croucher [1984] ICR 604*).

14 It is irrelevant to all of these questions whether the Claimant actually did what was alleged against her but, if the Tribunal is satisfied that the dismissal is unfair, what the Claimant did is relevant to the question what might have happened but for the unfairness ("the *Polkey* chance") and the issue of contributory fault as the Tribunal must consider whether any compensation should be reduced because of the Claimant's own blameworthy conduct.

15 I asked Mr Brown at the outset of the hearing what aspects of the procedure and investigation was said to be flawed. He told me that the dismissal was procedurally unfair because the Claimant had not had a trade union representative with her at the suspension meeting on 8 July 2016 and also because the investigator, Ms Staines was biased against the Claimant. He said that this was the reason why the investigation was flawed too. He contended that dismissal lay outside the band of reasonable responses of an employer in any event. I have had regard to this when considering the findings that I must make but I have also looked at all the circumstances in deciding whether this dismissal was fair or not.

Findings of Fact

16 Against that background I turn to my findings of fact which I make on the balance of probabilities.

17 The Claimant's role and responsibilities involved managing staff in the field and at the two facilities I have mentioned. She and her staff had access to sensitive data concerning the service users and data such as telephone numbers and addresses concerning one another. The concepts of *"data"* and *"sensitive data"* are defined in the Data Protection Act 1998 which I shall refer to as the *"DPA".* It suffices to state that sensitive data includes information about a person's physical or mental health or condition.

18 The transmission of information by electronic means is a regular part of life and work. Where that information contains personal and/or sensitive data however it is covered by the DPA which imposes financial and criminal penalties for serious breaches of its provisions. Under Schedule 3 of the Act sensitive data may only be processed with the express consent of the data subject or, where this cannot be obtained, for example because of incapacity, where it is in his/her vital interest. Such data may also be processed where it is necessary for medical purposes. There are other exceptions irrelevant to this case. *"Processing"* for these purposes includes disclosing information or data by transmission, for example by sending it in an email.

19 The DPA has been in force since March 2000 but it is fair to say that people's access to electronic forms of communication outside and separate from the workplace has

increased greatly in recent years with the advent of broadband and smart phones. These allow access to services through which users can send messages and attachments electronically using personal accounts. A problem with such services is that possession of the electronic communication then resides within the servers of the service provider who may be located anywhere in the world. A further problem with electronic communications is that they are easily duplicated and disseminated so, once the information has gone, the sender has no control over where it may end up.

20 Against that background I turn to the events which led to the Claimant's dismissal.

21 On 9 April 2015 the Claimant responded to an email from a trade union representative seeking information to assist a staff member in a disciplinary investigation. The representative requested, amongst other things, a care plan for a service user. This plan contained sensitive data. The Claimant sent this document with others by email that day. Coincidentally, later that day she completed online training on the DPA. She had previously been trained on the DPA in 2011.

22 The Claimant's action was picked up as a potential DPA breach almost immediately by a fellow manager. This resulted in a formal disciplinary investigation during part of which the Claimant was suspended. Ms Staines was instructed to carry out the investigation and her report is dated 20 August 2015 (pages 218 – 225). The basic facts, that is the sending of the email with its attachments, was not in dispute nor was it in dispute that the recipient was a fellow Hackney employee and that the information was sent on its systems. The Claimant's trade union representative argued that what the Claimant had done was no different from what had occurred previously (see page 223) and questioned whether it was a data protection breach at all. Ms Staines nevertheless concluded that there had been a breach of the DPA as sensitive and confidential data had been shared by the Claimant with someone who did not need to know it.

23 The investigation report included some of the Respondent's training materials which referred, amongst other things, to the financial penalty the Respondent might face for mishandling data and how members of staff could be disciplined or dismissed for this (page 233).

24 The Claimant attended a disciplinary hearing before Sarah Binna in October 2015. The charge she faced was one of gross misconduct. Ms Binna found the breach proved and described it as serious. She said that the Claimant had exhibited poor judgment and she imposed a final written warning having regard to the mitigation presented, to remain on the Claimant's file for a period of two years. The Claimant was told in writing that any further breaches of the Respondent's Code of Conduct whilst this warning was live would result in dismissal (pages 300 to 304).

25 The Claimant appealed against this decision unsuccessfully. Her appeal was dismissed on 16 January 2016 (pages 308 to 312). Following this the Claimant had DPA refresher online training in April 2016 and a briefing session and test in May 2016 (page 93). She was issued with a new smart phone by the Respondent in 2016 but did not receive any training on how to use it.

26 The Claimant was given additional duties in the summer of 2016 when some services were brought in-house following the collapse of an external provider. This

increased her workload in what is a pressurised job at the best of times.

27 An incident occurred in late June 2016 which raised concerns about the care provided to a service user by the night team. There is no criticism of the Claimant in this respect but she was required to prepare a statement as part of the subsequent investigation and was under some time pressure to do so. She decided to complete this task at home on one of her days off, Tuesday 12 July 2016. She composed her first draft of the statement in the body of an email late that evening using her personal laptop which she then emailed to two private email accounts in the names *"Victoria Hazeley"* (a Yahoo account) and *"Carl Hazeley"* (a Hotmail account). The Claimant has a son named Carl. She then forwarded this email to her work email account using her personal Blackberry smart phone; copies went to the Yahoo and Hotmail accounts. A copy of this email is at pages 50 to 52; it contains personal data, the names of members of staff and a service user, and some sensitive data, namely health information about the service user.

28 On 13 July 2016 the Claimant sent her report to Ms Ducie who noted that the email train revealed that it (or a version of it) had been sent from the Claimant's personal phone apparently to Carl Hazeley, who Ms Ducie knew to be the Claimant's son. The Claimant had, in fact, attempted unsuccessfully to recall this email. Ms Ducie thought that there had been a data protection breach and sought HR advice. Based on this she emailed the Claimant on 14 July asking why she had attempted to withdraw the email. The Claimant did not reply. Ms Ducie took further advice from HR and a more senior manager, Amma Asimeny-Cann, who decided to send the Claimant home on special leave that day. The Claimant was told that she was required to attend a meeting the following Monday, 18 July 2016 under section 5 of the Respondent's Disciplinary Procedure which concerns temporary transfers and suspension (page 346). The Claimant was told that she could be accompanied at the meeting by a trade union representative or work colleague. I pause to note that there is no statutory right to this nor is it a requirement under the ACAS Code of Practice but it is referred to in the Respondent's disciplinary procedure.

29 The Claimant attended the meeting on 18 July 2016 unaccompanied and I accept her evidence that she had had insufficient time to arrange trade union representation. The meeting was chaired by Ms Ducie and Manjit Dhillon, a Senior HR Business Partner, attended to give HR advice and take notes. The minutes are at pages 75 to 77. The Claimant was told at the outset of the meeting that she was alleged to have breached the DPA by sending the relevant email outside the Respondent's system and to Carl Hazeley who was not an employee of the Respondent. The Claimant said that the Carl Hazeley email address was her own. When asked who Carl was she replied *"what relevance is that to you?*" She knew that Ms Ducie was aware that Carl was her son. The Claimant confirmed that she had been issued with a company smart phone but said that she did not have the VPN pass which enabled access to the Respondent's systems from her home computer. When asked why she had attempted to recall the email she said that her finger had just sent it and she wanted to check on some information (page 78).

30 The Claimant was told that she was suspended on full pay pending investigation. Subsequently Ms Ducie instructed Ms Staines to investigate. Ms Staines had investigated the previous incident. She has received training from the Respondent in carrying out disciplinary investigations. She notified the Claimant of her appointment on 29 July 2016 and invited her to an investigatory meeting on 16 August 2016. The matters to be

investigated were emailing confidential information from a personal mobile phone to one or more personal email addresses and to a named person, which was a reference to Carl.

31 The date of the investigatory meeting was subsequently put back to the 23 August 2016 because the Claimant's trade union representative was unavailable on 16 August. The Respondent's counsel suggested in his questions that the fact this adjournment was requested as late as 15 August 2016 is evidence that the Claimant was being uncooperative and obstructive. I do not draw that inference from this sequence of events. It is common for such meetings to have to be rearranged, sometimes at short notice, because of the unavailability of companions or representatives. There is specific statutory provision for this.

32 The Claimant attended the meeting on 23 August 2016 with her representative but by this time she had lodged a grievance dated 17 August 2016 addressed to the Head of Service, Ilona Sarulakis (pages 117 to 118). Ms Staines was concerned about the ambit and appropriateness of her investigation in light of this and decided not to proceed with the interview that day. She wrote on 23 August 2016 stating that the meeting had been adjourned at the Claimant's request but I find that this was factually incorrect rather it was a common position in view of the submission of the grievance. Ms Staines proposed a rescheduled date of 30 August 2016 but the Claimant said she could not attend then. I accept the Claimant's explanation that this was because of the unavailability of her trade union representative.

33 The Claimant eventually attended an investigatory interview with Ms Staines accompanied by her trade union representative, Emmanuel Sillah, on 6 September and notes of it are at pages 98 to 109. Ms Staines had submitted questions to the Claimant in writing in advance of this meeting and the Claimant had replied in writing apparently. Somewhat surprisingly these documents were not produced in evidence before me. In any event the interview notes show that many of the questions put to the Claimant in the investigatory meeting were answered by Mr Sillah who said, in effect, that the Claimant was stressed and not prepared to give answers. While the Claimant answered some questions, Mr Sillah did most of the talking when it came to the circumstances in which the email of 12 July 2016 was sent. He suggested that there was no breach of data protection and that the Claimant should have been allowed to recall the email and delete it. He referred to the Claimant's length of service and said that she had not acted recklessly or carelessly. The Claimant maintained that the "Carl Hazeley" email address was her own but provided no evidence to back this assertion up as far as I am aware; an obvious example might have been emails addressed to her at this address from recognisable third parties such as banks or utilities.

34 Ms Staines interviewed Ms Ducie and Mr Dhillon as part of her investigation and reviewed the Claimant's training records. She sought advice from the Respondent's Information Management and Security Team and her correspondence with Mac Kelany, a security analyst, is at pages 131 to 132. Mr Kelany said that the Claimant's actions had sent the Respondent's confidential information to a server not owned by the Respondent and that, once it was outside the Respondent's ownership and control, it could no longer guarantee its safety and security. He also said that it was inappropriate to send such information to a third party. He said that the evidence suggested breaches of the 7th and 8th Data Protection Principles contained in Schedule 1 of the DPA. He told Ms Staines that the incident had been coded *"red"* under the Respondent's incident severity level

system which was the second highest.

35 Ms Staines investigation report is dated 7 September 2016 (page 87 and following). She concluded that the evidence showed breaches of paragraphs 3.5 and 3.6 of the Respondent's Code of Conduct concerning the handling of data and the protection of the Respondent's reputation (pages 341 to 342) and that it fell within one of the examples of gross misconduct contained in the Respondent's Disciplinary Procedure, namely acting negligently or recklessly in a way which leads to a serious breach of the DPA (page 355). Ms Staines also referred to the fact of a live final written warning for an earlier DPA breach.

36 Separate to this was the grievance that the Claimant had raised. This related principally to workload issues and her treatment by Ms Ducie and Ms Asimeny-Cann but she also complained of having insufficient time to secure trade union representation for the meeting on 18 July 2016. The Claimant and her trade union representatives argued that the grievance should be dealt with before the disciplinary matters were heard and they also sought an external investigator. Ms Sarulakis did not agree to this; she directed that the grievance be investigated separately from the disciplinary allegations but dealt with by the same decision-maker as they were connected.

37 I note that the Claimant did not complain about Ms Staines' appointment as disciplinary investigator in her grievance.

38 Mr Gizzarelli was appointed to hear and decide the disciplinary and grievance allegations. He wrote to the Claimant confirming his appointment on 8 September 2016 and invited her to attend a disciplinary and grievance meeting on 26 September 2016 (page 127). The letter enclosed Ms Staines' investigatory report and set out charges based on her conclusions. It warned the Claimant of the risk of dismissal and notified her of her right to be accompanied.

39 The Claimant attended the meeting with her trade union representative, Mr Sillah. Minutes are at pages 150 to 155. Shortly before the meeting was due to start Ms Staines, who was there to speak to her report, presented some further evidence which had been obtained from the Respondent's servers. This was another version of the Claimant's original email of 12 July with a header *"From Carl: … To Victoria Hazeley"* (pages 53 to 56). The email had been sent from a Hotmail account in Carl's name to the Claimant's Yahoo account, her work account and to the "Carl" Hotmail account. The version of the statement in this email contains spelling and grammar corrections and some minor stylistic changes. It is preceded by the words, *"small changes below just corrected a couple of spelling mistakes etc"*. Neither the Claimant nor Mr Sillah asked for a postponement of the disciplinary hearing because of this new evidence.

40 As before, Mr Sillah did much of the talking for the Claimant during the hearing before Mr Gizzarelli, although she did answer some questions. Her position remained that the email accounts, including that named "Carl", were hers and that what she had done in sending work from a private email address was common practice which had been accepted and tolerated by senior managers. She said that she had not had any training to the contrary. When asked why she had not simply used her work phone (which provided access to work email) she said that she had not got to grips with it because of pressure of work.

41 Mr Gizzarelli gave his decision in writing by letter dated 17 October 2016 (pages 160 to 165). Although couched in careful terms, it is clear that he did not accept the Claimant's explanation that the Carl email address was her own and concluded that her email had gone to a third party, probably her son Carl, for checking. He described her evidence regarding the use of two external email addresses as *"unnecessarily defensive and unconvincing"*. He also rejected her explanation for seeking to recall the original email, inferring that she had realised that she had revealed evidence of a data protection breach. He referred to the Claimant's data protection training and the Respondent's policies on email. He noted the Claimant's evidence that she had not seen these policies but said that it was her obligation as a manager to have done so. He quoted two provisions of the policies; the first related to the auto-forwarding of Council emails to personal accounts and was, in fact, irrelevant to the facts in issue but the second was a provision prohibiting generally the sending of confidential information by email to addresses outside the Respondent's system. He decided that the Claimant's actions constituted gross misconduct and that summary dismissal was appropriate having regard to the final written warning given in October 2015.

42 I asked Mr Gizzarelli what thought he had given to alternatives to dismissal and what weight he had attached to factors such as length of service and the impact of dismissal on the Claimant given her age, qualifications, experience and position. He said that he had thought about these though not recorded in his letter. He said that he had thought about redeployment in particular but had concluded that this would still leave the Respondent exposed to further possible breaches and more serious consequences. He also confirmed in evidence that an explanation the Claimant has given to me in this hearing for copying email from the Yahoo to the Hotmail account, namely that the latter has a spell-check facility, was not something raised before him.

43 Mr Gizzarelli not only dismissed the Claimant from the Respondent's employment he also dismissed her grievance. Accordingly, the Claimant's employment ended on 17 October 2016.

44 The Claimant exercised the right of appeal referred to in Mr Gizzarelli's dismissal letter. Her grounds of appeal are at pages 171 to 185. As far as dismissal is concerned, she alleged that the sanction was too severe given the circumstances and that the procedure had not been followed correctly. She asserted that she had never been made aware of the email policies on the Respondent's intranet and that she had often sent emails from her Yahoo address without sanction and could not see why the same did not apply to the Hotmail address she had used. She said that she had provided evidence that both private email addresses were hers (this evidence has not been shown or explained to me). She said that the Yahoo and Hotmail systems are secure in any event. She said that she had deleted the emails from her private accounts as soon as her work was finished. As far as the new version of the email produced at the disciplinary hearing was concerned, she said that this was merely a *"note-to-self"* and not evidence of someone else having reviewed and corrected her work. She alleged that her answers at the disciplinary hearing had been misrepresented to arrive at a predetermined outcome. She referred to the circumstances of her earlier warning which she characterised as unfair and alleged that Ms Ducie and Ms Staines were biased against her. She set out grounds for appealing the grievance decision in a separate letter.

45 Ms Davis acknowledged the Claimant's appeal on 25 November 2016 (page 186)

and scheduled an appeal hearing for 15 December which duly took place. The Claimant attended with a different trade union representative, Mr Boyd. Minutes are at pages 188 to 193. Mr Gizzarelli attended to present his conclusions. Ms Staines was not present and this has been a matter of criticism by the Claimant in these proceedings because of the allegation of bias against Ms Staines but I have not been taken to any passage in the appeal minutes which shows that the Claimant requested a postponement to secure her attendance. It is clear to me from the minutes that the Claimant had a full and unfettered opportunity to put the points she wished.

46 Ms Davis told me that she saw her task as reviewing the basis of Mr Gizzarelli's decision rather than conducting a complete rehearing of the disciplinary charges. There was insufficient time to deal with the grievance appeal on 15 December and the meeting was therefore postponed to 9 February 2017 to deal with this aspect. Ms Davis provided her decision in writing on 22 March 2017. She rejected the appeals. She acknowledged that there had been occasions in the past when staff had sent emails through private addresses but said that strenuous efforts had been made recently to limit such practices. She endorsed Mr Gizzarelli's findings on what had most likely happened in this case and she concluded that dismissal was reasonable in the circumstances. That decision concluded the Respondent's internal process.

Analysis and Conclusions

47 The reason for dismissal is conceded to be conduct. This concession is appropriate and consistent with the evidence. There was nothing to suggest that the disciplinary charges were relied on as a pretext for some other reason for dismissal. With that in mind I turned to the test of fairness and the *Burchell* questions in particular.

48 I am satisfied on the evidence that Ms Staines, Mr Gizzarelli and Ms Davis each believed that the Claimant had sent confidential information to a third party, her son Carl, in breach of the DPA and the Respondent's policies. Their conclusion that the Hotmail address based on Mr Hazeley's name was his own was a rational one as was their inference that he had received and reviewed his mother's draft statement in a reply sent in the early hours of 13 July 2016. It was reasonable to reach this conclusion in the absence of any contrary evidence other than the Claimant's bare denials. There was no dispute that the Claimant had used private email accounts and her private telephone when dealing with this matter as this was evident from the documents themselves. I am satisfied on the evidence that the investigator and decision makers genuinely believed this activity to be in breach of the DPA and the Respondent's policies. A security analyst, Mr Kelany, had provided evidence of arguable DPA breaches. I find in those circumstances that the first limb of the *Burchell* tests is satisfied.

49 I find that there was a fair procedure when looked at in the round. I find that the suspension meeting on 18 July 2016 had an investigatory element and it was contrary to the letter and spirit of the Respondent's policy to pursue this aspect when the Claimant was unaccompanied and had raised her inability to secure trade union representation at short notice at the beginning of the meeting. It would have been better practice in my judgment simply to have suspended and explained why rather than to question the Claimant as was done. That said, I do not find that this defect affected the fairness of the dismissal overall; it occurred at the outset of the process and the Claimant had competent trade union representation throughout the remainder.

50 I reject the Claimant's case that it was procedurally unfair to nominate the same investigator, Ms Staines, as before. There is no legal principle to this effect and had there been a genuine concern about Ms Staines' appointment I would have expected this to have been raised at the time. The Respondent's process complied with its Disciplinary Policy and the ACAS Code of Practice in my judgment.

51 I find that there was an adequate investigation. Ms Staines' report appears to me to be thorough. I note, for example, that she went back to Mr Kelany with points raised by the Claimant in interview. Ms Staines also provided documentary evidence of the training the Claimant had received. I did not detect evidence of bias or prejudgment although plainly Ms Staines was required to reach and express conclusion.

52 The duty to investigate rests not only with the investigating officer but also with the disciplinary and appeal officers if circumstances arise which require further investigation but, on the evidence presented, that was not the case here. The Claimant had referred in the disciplinary hearings to what has been termed *"the custom and practice"* of using private email and suggested that this should have been investigated further. Ms Davis acknowledged that this had happened in the past but she and Mr Gizzarelli relied on the recent DPA training they had had which was similar to the Claimant's. Furthermore, using private email was not the totality of the allegation against the Claimant, it included sharing information with an unauthorised person. The training information attached to Ms Staines' report warns against this expressly (pages 313 to 324); the materials referred to the importance of keeping data secure and the possibility of breaking the law and of losing one's job if one did not do so. I do not find that in these circumstances fairness required the Respondent to investigate whether others may have sent emails from private addresses. Such an investigation would necessarily have required an analysis of whether those emails contained personal or sensitive data. I find therefore that in all the circumstances the second limb of the *Burchell* test, namely whether the decision-makers had reasonable grounds for their belief is satisfied.

53 That leaves the band of reasonable responses test. It troubles me that an employee with the Claimant's seniority and length of service and who was also relatively close to retirement has been dismissed. I have therefore paid close regard to the band of reasonable responses, reminding myself on the one hand that I must not substitute my own view for that of the employer but on the other that I am not merely a cipher or rubber stamp to approve any decision, the role of the Tribunal remains to define the parameters of the band of reasonable responses. That said, three factors stand out in Mr Gizzarelli's rationale in my judgment. Firstly, he clearly did not accept the Claimant's explanation of events as credible. Secondly, he perceived her approach to the whole disciplinary issue as defensive. These were conclusions which were open to him on the evidence in my judgment given the way in which the Claimant chose to answer the charges against her at the various meetings. Thirdly, there was the final written warning which clearly Mr Gizzarelli took into account.

54 The Claimant has asked me to disregard this warning on the basis that it was given in bad faith or without any *prima facie* evidence to support it or was simply inappropriate. These may be reasons for looking into an earlier warning when considering the reasonableness of a dismissal as explained by the Court of Appeal in *Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374* but I cannot reach these conclusions on the evidence. It seems to me that the evidence shows that there was a

thorough investigation, the Claimant was represented and she had a right of appeal. In other words, all the procedural and investigatory steps which one might expect were taken. Accordingly, I find that the existence of a final written warning is a factor relevant to the band of reasonable responses.

55 Taking all of these factors into account, I conclude that dismissal was within the band. Nothing which occurred on appeal changed this. Accordingly, despite what I am sure was the devastating effect on the Claimant of this decision, it was nevertheless fair for the purposes of Part X of the Employment Rights Act 1996. I must therefore dismiss the claim.

56 I wish to add the following. It has not been necessary for me to decide the exact truth of how emails passed between the Yahoo and Hotmail addresses before reaching the Respondent's system but what is clear to me is that the Claimant had been working late into the night during her free time because of her dedication and diligence. I strongly suspect that, like many people, she did not pause to think of the implications of sending material by email such is its speed and convenience. It is a significant blow to her to be dismissed for this action in the last years of her working life and from a job which she loved. Her genuine feelings of distress deserve respect despite my conclusion that her dismissal was not unlawful.

Employment Judge Foxwell

13 October 2017