Case Number 1301466/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss KL O'Leary	**AND**	Oldfield Residential Care Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** **30 31 January and 22 February 2018 28 March 2018 (in Chambers)**

EMPLOYMENT JUDGE Woffenden

Representation
For the Claimant: In Person
For the Respondent: Mr A Macmillan of Counsel

RESERVED JUDGMENT

1 The claimant was fairly dismissed.

REASONS

1 The claimant was employed from 18 July 2011 to 31 March 2017 when she was summarily dismissed .Her job immediately before dismissal was that of administration manager in one of the care homes owned by the respondent. She presented a claim of unfair dismissal on 1 June 2017.

2 It was necessary to address a number of preliminary matters before the hearing could get under way.

3 On the first day of the hearing the respondent's proposed list of issues required amendment to reflect the claim before me and the legal and factual issues identified in the pleadings.

4 The final list of issues to be determined by the tribunal was:

4.1 What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98 (2) Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for the dismissal.

4.2 Did the respondent hold that belief in the claimant's misconduct on reasonable grounds? The claimant's challenges to the fairness of the dismissal were identified as follows:
4.2.1 She never received the earlier final written warning;
4.2.2 There was an inadequate investigation into the discrepancy in dates and the inaccuracy of minutes of meetings;
4.2.3 Contrary to what was said by the respondent the manager was aware that the drawers were unlocked.

4.3 Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

4.4 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? If so to what extent and should a reduction be made to the basic and/or compensatory award to reflect this. This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

4.5 Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

4.6 Should there be an increase/decrease in any compensatory award because the party has unreasonably failed to comply with the ACAS Code on Disciplinary and Grievance Procedures?

5 There was a discussion about the respondent's witnesses and the relevance of their evidence to the issues in dispute. The claimant did not complain that the appeal against dismissal was unfair in any way. Mr Macmillan decided not to call Mr Badland who heard the claimant's appeal in her absence. He did however put in as evidence the witness statement of the claimant's line manager Amanda Keable although she was not called to give evidence. He also applied for leave to prepare and serve a supplementary witness statement for Sharon Perry (who took the decision to dismiss the claimant) .Her original witness statement was in his words *'embarrassingly short'*. The claimant had prepared a witness statement but not sent it to the respondent. I granted leave to each parties to rely on the witness statements in question for reasons I gave at the time.

6 The claimant then denied having received copies of the respondent's witness statements in any event so I had to give her time to read them before cross-examination could begin.

7 The respondent‘s Grounds of Resistance (paragraph 33) contended that its reason for dismissing the claimant was’ *breaching the homes (sic) data protection and confidentiality policy*.’ I wanted to know what policy was being referred to and when and how the claimant breached it but this proved to be unexpectedly difficult to clarify. Mr Macmillan told me the policy was that relating to data protection .Ms Rotchell (one of the respondent’s witnesses who had given instructions that disciplinary proceedings be initiated against the claimant) said during oral evidence that the respondent’s relevant data protection policy was not contained in either the respondent’s or the claimant’s documents (the contents of the bundle having not been agreed) .The document which was later sent to the tribunal was incomplete and when Mr Macmillan was able to provide a complete version the following day he had only one copy so additional copies had to be made. He sought leave to include in the respondent’s bundle that policy and a data protection policy statement and an induction programme for the claimant signed in 2011 which included a checklist of the documents she received including an employee handbook which he submitted contained the above data protection policy. After discussion he applied only for inclusion of the data protection policy itself (‘the Data Protection Policy’) having confirmed it was the respondent’s case it was enclosed with the disciplinary invite letter sent to the claimant. The claimant opposed that application on the grounds that the policy enclosed with that letter was that contained in the employee handbook provided to her in 2011 and not the same as the one Mr Macmillan wanted to include .I gave leave for both policies to be included.

8 Later during cross examination of Sharon Perry it became apparent that a letter had been sent to the claimant on 4 April 2017 sending to her manuscript notes but the notes themselves had not been disclosed .A further avoidable delay was caused while they were found and the parties read them and discussed whether they should be included in the bundle. They then jointly decided this was unnecessary because they were not materially different from the typed notes in the respondent’s bundle.

9 It was possible in the remaining time to conclude only the respondent’s evidence and the hearing was therefore postponed to 22 February 2018. Evidence and submissions were concluded on that day but there was no time for deliberation so a reserved hearing took place on 28 March 2018.Suffice it to say that it appeared to me all these problems could have been avoided by reasonably competent and timely preparations for the hearing.

10 I had a witness statement and heard evidence from the claimant.

11 For the respondent I had witness statements and heard evidence from Julie Rotchell (the Operation Director of Oldfield Residential Care Ltd); Amelia Husbands (Care Home manager and investigating officer); and Sharon Perry (Care Manager and dismissing officer). I gave such weight to the witness

statement of Amanda Keable as I considered appropriate having not seen her cross-examined or had the opportunity to ask her questions.

12 There a bundle of documents which had one section with the documents on which the claimant relied and another which contained those on which the respondent relied. I had regard only to those documents to which reference was made in witness statements or under cross-examination.

13 From the evidence I saw and heard I made the following findings of fact:

13.1 The respondent owns a number of care homes .The claimant commenced employment with the respondent as a laundry assistant on 18 July 2011 working at one of the respondent's care homes: Norton Grange Nursing Home ('the Home'). On 18 May 2015 she was appointed as an 'Admin Manager'.

13.2 Under the respondent's disciplinary procedure ("the Disciplinary Procedure") the outcome of a disciplinary meeting is confirmed in writing to the employee confirming the right to appeal and the process to follow should they wish to do so. The Disciplinary Procedure gives (non- exhaustive) examples of offences which are normally regarded as gross misconduct. This includes "*breach of confidentiality or misuse of confidential information, including for personal gain*" , '*any other serious act which the company reasonable believes damages the reputation or integrity of the Company*' and the '*serious breach of our policies and rules including mediation procedures and protocols*". The data protection policy contained in the employee handbook described the personal and sensitive personal data which was held on employees by the respondent .It said that the respondent was committed to (among other things) comply with the requirement that '*personal information shall be kept secure and confidential at all times*'. The Data Protection Policy was in reality a lengthy summary of the Data Protection Act 1998 produced for employers by a third party organisation (Croners). Among other matters it said that one of the eight principles to which organisations must abide was that '*data must be securely kept*'. Examples given of personal data included personnel records including payroll records and family and home contact details. Guidance is given on collecting and storing records which includes ensuring that there are technical and security measures in place to prevent unauthorised access accidental loss damage or destruction and that there should be a comprehensive data protection policy in place and staff should be trained in understanding confidentiality.

13.3 In May 2016 Julie Rotchell had been following up on some outstanding issues from an action plan drawn up by some external commissioners following a visit to the Home and a number of missing confidential documents were found in the claimant's unlocked drawer. The claimant was asked to attend an investigation meeting about this on 31 May 2016 .In the notes of that meeting (the accuracy of which the claimant has not disputed) she explained that she

could not lock her drawer because the lock had been drilled out by maintenance and (as her manager was aware) had not been replaced.

13.4 The claimant raised a grievance which was dealt with first but in due course she was invited to attend a disciplinary hearing on 21 July 2016 in a letter dated 14 July 2016 from Karen Lynas (the respondent's finance director). The purpose of the meeting was to "*formally discuss with you the alleged failure to follow the sickness procedure, loss of crucial company documents and leaving confidential information in an unlocked drawer*." Enclosed with that letter was a document described as a 'Policy for Record Keeping'. The claimant confirmed under cross-examination that the enclosed document was the respondent's 'Access to Records' policy and that she had been aware of this document since (at the latest) 2016 and also knew it was important to keep documents as safe as possible. Under it staff were required to ensure that all files or written information of a confidential nature are stored in a secure manner in a locked filing cabinet and are only accessed by staff who have a need and a right to access them and that all files or written information of a confidential nature are not left where they can be read by unauthorised people.

13.5 The claimant attended the disciplinary hearing on 21 July 2016. The meeting was chaired by Karen Lynas and Amelia Husbands took minutes. A typed note of that meeting was prepared. One of the three allegations addressed by Karen Lynas was the leaving confidential information in an unlocked drawer. She told the claimant that it was her responsibility to ensure her drawers remained locked and she could have asked for a lock or set of drawers. The claimant said she did not know where the missing documents were and had nothing to add. She was advised to order a lock or drawers immediately. The outcome was not announced at the hearing nor was any indication given about when an outcome would be provided. At the meeting the claimant had expressed the view that the delay in concluding matters had been a 'massive concern' to her.

13.6 Following the disciplinary hearing Ms Lynas sent the claimant a letter dated 25 July 2016 headed "*Final Written Warning"* (the Final Written Warning') in which Ms Lynas said that the purpose of the disciplinary hearing had been to discuss the following allegations:
"1) Not following the company's sickness policy.
2) Leaving confidential information in an unlocked drawer in the entrance to the home.
3) Important drug competencies paperwork and training certificates which were given to yourself to file and had been lost."
She went on to say "*Following the adjournment, a decision was taken to issue you with a Final Written Warning in line with the Company's Disciplinary Procedure. This warning will remain on your employee file for a period of 12 months. Any continuation of misconduct during this period may result in further disciplinary action, up to and including dismissal*." The claimant was also

informed in that letter of her right to appeal against the decision within 7 calendar days of the date of the letter.

13.7 The Final Written Warning was sent first class by special delivery. The Post Office receipt dated 27 July 2016 showed it was signed for by "*P Ford'* and the postcode as '*CV6 7AZ'*. The heading to the letter bears the claimant's correct address. The claimant and her then partner (who is not P Ford) were abroad on 27 July 2016.The claimant gave evidence that she did not know who P Ford was, she did not receive the Final Written Warning and simply assumed that no further action was going to be taken against her.

13.8 It is common ground that there was no appeal in respect of the Final Written Warning nor is there any evidence that the claimant made any attempt to clarify the outcome of the disciplinary hearing although as 'Admin manager' her duties included sending to staff letters which provided the outcomes of disciplinary processes. The claimant was subsequently provided with a lockable set of drawers which had two sets of keys. She had one set and Amanda Keable had the other set.

13.9 On 27 February 2017 the claimant went on annual leave. Amanda Keable was at that time her line manager. She found the claimant's drawers unlocked and that they contained some documents relating to staff and service users. The claimant does not dispute some if not all of these were confidential in nature (2 staff personnel files containing health records and other personal data and terms and conditions of occupancy relating to a resident). Julie Rotchell (who was visiting the Home at the time) witnessed this. Her duties include the carrying out of the respondent's human resource function and the provision of advice about employees. She concluded that leaving the drawer unlocked meant the documents were insecure for anyone to see. Her witness statement stated this was a breach of the Data Protection Policy. Her oral evidence was that in reaching that conclusion she had looked at the Data Protection Policy in particular the matters set out in paragraph 13.2 above and decided the claimant had not kept data secure. She believed it was the responsibility of all employees to keep records secure and the claimant dealt with personnel records of staff. She had been told by Amanda Keable that the claimant had already received a final written warning which Amanda Keable told her was for the same issue i.e. leaving information in an unlocked drawer and that having checked the claimant's personnel file herself and looked at the Final Written Warning she instructed Amanda Keable to begin a disciplinary process. She accepted that the Final Written Warning related to three issues but felt that leaving confidential information unlocked and losing documents were the most serious. She also accepted that the Final Written Warning had made no reference to any breach of the Data Protection Policy. I did not find her a wholly credible witness. She was not frank about the active part she played in the disciplinary process. I reject her oral evidence that she looked at the Data Protection Policy or the claimant's personnel file before issuing her instruction to Amanda Keable. I conclude that

having been told of the existence of a previous disciplinary sanction against the claimant for leaving confidential information in an unlocked drawer she concluded there had been a recurrence and that was sufficient to warrant a disciplinary investigation. She did not turn her mind at the time to whether or not such conduct was a breach of any particular policy.

13.10 Julie Rotchell asked Amanda Keable to ask Amelia Husbands to carry out a disciplinary investigation. On 28 February 2017 the claimant was suspended from work. By a letter of the same date Amanda Keable wrote to the claimant to confirm she had been suspended "*pending investigations into allegations of failure to comply with company policy*." The policy in question and the alleged failures were not set out. A copy of the respondent's Disciplinary Procedure was enclosed. On 6 March 2017 Amelia Husbands sent a letter to the claimant inviting her to a disciplinary investigation meeting on 7 March 2017 which simply said an allegation had been made against her that could lead to disciplinary action and a thorough investigation was required because of its seriousness. It did not set out the nature of the allegation. It is trite to observe that it is good practice for a letter of invitation to a disciplinary investigation to make it clear what exactly is being investigated.

13.11 Investigation meetings with the claimant took place on 9 and 16 March 2017.They were conducted by Amelia Husbands. She understood the purpose of her investigation was about confidential information being left in a drawer. Amanda Keable had told her the information in question was confidential; she did not look at it for herself. During the disciplinary investigation meeting on 9 March 2017 the claimant was asked if there were keys to the drawers in question and said no there was a latch on the inside which locked the middle and bottom drawers. She described the documents in question as being in a locked drawer and said that the way the drawers were locked was known to her manager. Although she said that Amanda Keable knew she kept paperwork in it the claimant confirmed that Amanda Keable did not know the confidential information was in the drawer.

13.12 A statement was provided by Amanda Keable dated 17 March 2017 which confirmed the claimant had been provided with a new set of drawers with a lock. The claimant had one set of keys and she had put the other set in the safe .A few weeks later the claimant had been unable to find her keys and asked for the other set which were given to her but were never returned.

13.13 Amelia Husbands was told by Amanda Keable after carrying out the investigation meetings that this was 'the second time' and the claimant was subject to the Final Written Warning (though again she did not check this for herself). Although Julie Rotchell's oral evidence was that she played no further part in the events which led to the claimant's dismissal I prefer the evidence of Amelia Husbands that it was Julie Rotchell she told of her decision that there should be a disciplinary hearing .Her oral evidence was that she told Julie

Rotchell that there had been a breach of the Data Protection Policy after having had a 'quick look' at that policy in particular the parts Julie Rotchell had mentioned in her evidence to the tribunal. However the notes of the meeting show she had not referred the claimant to the Data Protection Policy or any parts of it during her investigation meeting. I did not find her oral evidence credible and conclude on the balance of probabilities that Amelia Husbands told Julie Rotchell that she had decided there should be a disciplinary hearing because the claimant was subject to a final written warning which she understood to be for the same thing namely leaving confidential information in an unlocked drawer having been told this by Amanda Keable.

13.14 I also accept Sharon Perry's evidence that it was Julie Rotchell (again contrary to Julie Rotchell's oral evidence that her involvement ended on 27 February 2017) who asked her to conduct the subsequent disciplinary hearing with the claimant. Indeed Julie Rotchell visited Sharon Perry at her home and personally brought her the pack of information (put together by Amanda Husbands) shortly afterwards.

13.15 By a letter dated 20 March 2017 Sharon Perry invited the claimant to attend a disciplinary hearing on 27 March 2017 to discuss with her two allegations; first that she had left confidential information in an unlocked drawer in the entrance to the Home and secondly that she had contacted an outside professional when she was suspended. She was informed that this was being viewed as "*alleged failure to comply with company policy, in line with the Companies Disciplinary Procedure*." and that disciplinary action up to and including dismissal might result. Enclosed with that letter (among other documents) was a copy of the respondent's Data Protection Policy the Disciplinary Procedure, the Final Written Warning and Amanda Keable's statement of 17 March 2017. Sharon Perry did not draft that letter herself but on 18 March 2017 (and having read the pack of information) had asked Karen Lynas to do this for her. A standard template was used though Sharon Perry told Karen Lynas what allegations to include. Her evidence about when these events took place was vague and lacked any cogency. Her explanation for not providing the details of which policy (or its relevant sections) with which the claimant had allegedly failed to comply was that the claimant should have been able to infer this from the fact the Data Protection Policy was the only policy included in the letter. In her oral evidence in reply to questions asked by the tribunal she said she had warned the claimant in the letter about the possibility of dismissal because of the Final Written Warning which was 'for the same thing' by which she went on to explain she meant a breach of data protection . It is trite to observe that if an allegation was said to amount to a breach of policy it would be good practice for the letter of invitation to a disciplinary hearing to identify clearly the policy in question the specific breach alleged and how and when it alleged to have occurred.

13.16 The claimant attended the disciplinary hearing on 27 March 2017 chaired by Sharon Perry. Sharon Perry had conducted 5 or 6 disciplinary hearings before but this was the first occasion on which the hearing resulted in a dismissal. Typed notes were made of the hearing. They indicate the hearing was not lengthy. Sharon Perry did not show the claimant the documents found in the drawer and though she had photocopies of them they were not sent to the claimant .The notes state that she asked the claimant to explain the 'Data Protection Policy' and the claimant 'explained the policy.' In her oral evidence in reply to questions asked by the tribunal about what exactly was said she explained that the minutes were not as in depth as she would have liked but she had referred the claimant to the sections of the Data Protection Policy which stated that '*data must be securely kept*' and the specific examples given of personal data which included personnel records such as payroll records and family and home contact details and asked her about her understanding of data protection and those key points and that the claimant had relayed back to her that she understood that data needed to be kept secure. Sharon Perry did not check whether the claimant had been trained on the Data Protection Policy. The claimant confirmed she had a key to a lockable cupboard and it and Amanda Keable's had been lost or misplaced. When asked how then she had kept information safe and locked away she explained the middle and bottom drawer locked via the latch. She confirmed both that she had had keys which were lost and that anyone could get access to the drawers via the latch. Although she accepted she had attended a disciplinary hearing in 2016 and been disciplined for leaving 'confidential information' she denied having ever seen the Final Written Warning. Sharon Perry said the meeting was concluded .The claimant then said she had never seen the Final Written Warning ;she had a disciplinary hearing, went on annual leave returned to work and nothing more was said. She had assumed that it had been dropped and would have appealed.

13.17 After the hearing but before taking the decision to dismiss the claimant Sharon Perry asked the respondent's administrator for proof of postage of the Final Written Warning. This produced the Post Office receipt at paragraph 13.6 above. Sharon Perry saw someone at the claimant's address had signed for it from which she concluded the Final Written Warning had been delivered to the claimant's address. She did not make any further enquiries of the claimant or inform her of the additional investigation she had undertaken and concluded the claimant had received it.

13.18 Sharon Perry sent the claimant an undated letter by special delivery and first-class which confirmed the outcome of the disciplinary hearing on 27 March 2016. In that letter Sharon Perry set out the two allegations against the claimant (leaving confidential information in an unlocked drawer in the entrance to the Home and contacting an outside professional while suspended).She set out the facts she had found in relation to the first allegation. She said that the claimant had agreed that prior to her holiday she had left confidential documents in her filing cabinet and that she had agreed other people could get access to the

documents by pressing a latch inside the top drawer. Sharon Perry concluded this was not a confidential place to store confidential paperwork. The claimant had confirmed that she had attended a disciplinary hearing for not storing confidential documents in July 2016. The claimant had been asked at the investigation meeting on 7 March if her cabinet had keys and she had replied no and explained at the disciplinary hearing on 27 March 2017 that the keys had been lost and this was inconsistent with the explanation given at the investigation meeting. She could have but did not put the documents in question in Amanda Keable's office before leaving on holiday. Sharon Perry confirmed the decision had been taken to dismiss the claimant "*for Gross Misconduct, with immediate effect, in line with the Company's Disciplinary Procedure*." The second allegation was not found proved and formed no part of Sharon Perry's decision to dismiss. The claimant was informed of her right of appeal.

13.19 In her first witness statement (which was no more than 14 lines in total) Sharon Perry made no reference whatsoever to the reason for her decision to dismiss the claimant or to the existence (let alone the contents) of her letter to the claimant in which she informed the claimant of the decision to dismiss her. In her second witness statement (which came into existence in the circumstances set out in paragraph 5 above) her evidence was that she had decided that leaving confidential information in an unsecured location (which the claimant had admitted) was gross misconduct because the respondent's Disciplinary Policy stated that breach of confidentiality or misuse of confidential information, including for personal gain and any other serious act which the respondent reasonably believed damaged its reputation or integrity was gross misconduct and she was aware the CQC enforced data protection stringently. When the tribunal asked whether she had found there had been a breach of confidentiality or misuse of confidential information she confirmed she had not (though she later said by leaving a drawer containing confidential information unlocked there was the potential for such a breach) and although she felt the respondent's reputation or integrity had indeed been damaged by the claimant's conduct she could not explain how or when. However she also tentatively suggested (and for the first time) the main reason she had concluded the claimant's conduct was gross misconduct was because she had seriously breached the respondent's policies and rules including mediation procedures and protocols. Her letter to the claimant informing her of her summary dismissal did not make any reference to any conclusion that the claimant's conduct had amounted to a breach of the Home's 'data protection policy and confidentiality policy' or provide any reasons for her stated conclusion that the claimant was guilty of gross misconduct.

13.20 Sharon Perry did not consider any alternatives to dismissal. Her explanation for this was because of the Final Written Warning and the potential for the claimant's conduct to have affected the business in the event of a CQC visit.

13.21 The claimant was subsequently informed that the date of the dismissal letter was 30 March 2017. She was sent the manuscript notes on 4 April 2017. She wrote a letter of appeal against the decision to dismiss her in which she said in particular that she had not committed any of the examples of offences which were described as gross misconduct in the Disciplinary Procedure; the documents were in a locked drawer, no unauthorised person had accessed them and no documentation was lost. She was not therefore in breach of any policy. Amanda Keable had known about the drawers and the documents in it. She had found out she had supposedly been issued with the Final Written Warning in July 2016 and had been provided with a copy of the receipt which showed that an item was sent to her address on 26 July 2016 but she was not in the country to receive or sign for any post because she was aboard at this time. However she failed to attend the two appeal hearings which were arranged and eventually on 4 May 2017 her appeal was heard in her absence. Mr Badland reviewed the investigation information and the minutes of the disciplinary hearing on 27 March 2017. He upheld the decision to dismiss based on the evidence he read and wrote to her that same day to inform her that the hearing had taken place in her absence; its purpose had been to investigate the reasons she felt the decision to dismiss her was unfair; the facts of the case had been reviewed and the decision to dismiss was upheld.

13.22 The claimant's oral evidence was that she did not pursue her appeal because even if it was successful she did not want to return to work for the respondent; her witness statement said she did not attend because she was in a low state and struggling every day with stress. However she did not however seek a postponement or abandon the appeal; she was aware of the appeal hearings and simply let the appeal take its course and took no further part. I found the claimant's reasons for not participating in the appeal process were inconsistent and lacked credibility and conclude that she had no compelling reason not to attend.

14 Section 98(1) and (2) of ERA provide that:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal; and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

relates to the conduct of the employee."

It was held in the case of **Abernethy v Mott,Hay and Anderson [1974] IRLR 213 CA** that a reason for dismissal is a set of facts known to the employer or beliefs held by him which cause him to dismiss the employee.

15 Section 98(4) of ERA provides that:

"(4) 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."

16 It was held in the case of **Sainsbury'sSupermarkets Ltd v Hitt [2003]IRLR23 C A** that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason.

17 In conduct cases the tribunal derives considerable assistance from the test set out in the case of **British Home Stores Ltd -v- Burchell [1978] IRLR 379 EAT,** namely: (i) did the employer believe that the employee was guilty of misconduct; (ii) did the employer have reasonable grounds for that belief; (iii) had the employer carried out as much investigation into the matter as was reasonable in all the circumstances. The first question goes to the reason for the dismissal. The burden of showing a potentially fair reason is on the employer. The second and third questions go to the question of reasonableness under Section 98(4) ERA and the burden of proof is neutral.

18 I remind myself that it is not for the tribunal to substitute its view of what was the right course for the employer to adopt. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band, it is unfair **(Iceland Frozen Foods Ltd v Jones 1982 IRLR 439 EAT).** In the case of **Taylor v OCS Group Ltd [2006] EWCA Civ 702** tribunals were reminded they should consider the fairness of the whole of the process. They determine whether, due to the fairness or unfairness of the procedures adopted the thoroughness or lack of it of the process and the open-mindedness or not of the decision –maker the

overall process was fair, notwithstanding any deficiencies at an early stage. The tribunal should consider the procedural issues together with the reason for dismissal .The two impact on each other and the tribunal's task is to decide whether in all the circumstances of the case the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.

19 Under section 122 (2) ERA " Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

20 Section 123(6) of ERA provides that:

"(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

21 I have received and considered the respondent's written and oral submissions and the claimant's oral submissions.

22 The reason for the claimant's dismissal put forward by the respondent was pleaded as ' *breaching the homes (sic) data protection and confidentiality policy'*. I reject it as the respondent's true or genuine reason for the claimant's dismissal. I have to consider what was in the mind of Sharon Perry (who took the decision to dismiss).None of the correspondence or documents before her relating to the disciplinary investigation identified what policy the claimant was alleged to have breached. None of the correspondence she sent to the claimant identified the policy the claimant was alleged to have breached or the nature of the alleged breach. Her explanation for the omission from her letter to the claimant dated 20 March 2017of the details of which policy (or its relevant sections) with which the claimant had allegedly failed to comply was improbable for a manager with previous experience of conducting disciplinary hearings .In my judgment it was an expedient afterthought as was her rationale for her conclusion that the Final Written Warning was 'for the same thing' i.e. a breach of data protection. The Final Written Warning made no reference to any breach of data protection or indeed to any breach of policy at all by the claimant. I did not find her evidence credible about the details of the discussion with the claimant about the Data Protection Policy which was said to have taken place at the disciplinary hearing. It was not contained in either of her witness statements and no such details were given in the typed notes of that hearing which (on that point) were (as Sharon Perry realised) plainly inaccurate .The claimant could not have been asked to and have been able to explain such a lengthy and highly technical document (much of which had no relevance to the specific allegations) in the context of a disciplinary hearing. Furthermore had Sharon Perry genuinely been considering

whether there had been a breach of any policy (in particular a policy of which on her evidence she had sufficient knowledge to be able to point out salient sections to the claimant) she would have explored what training the claimant had had since the requirement for staff training is explicit in the policy. I digress to note there was no evidence before me of any formal training regime for staff .In my judgment Sharon Perry tailored her evidence in an effort to make it consistent with the earlier evidence provided by Julie Rotchell in paragraph 13.9 above. I conclude on the balance of probabilities that during the disciplinary hearing she simply referred the claimant to the fact that a Data Protection Policy existed and established that the claimant both understood and accepted (in general terms) there was a requirement to keep data secure. Neither of her witness statements said that the reason for the claimant's dismissal was for a breach of the Home's data protection and confidentiality policy; indeed in my judgment the contents of the second witness statement (given the circumstances in which it came into existence) should be afforded little weight. There was no reference to that being the reason for dismissal in the undated letter of dismissal which Sharon Perry sent to the claimant. I conclude that the real reason for the claimant's dismissal was Sharon Perry's genuine belief that the claimant had left confidential information in an unsecured drawer during the currency of a final written warning which (in part) related to a similar previous instance. This related to the claimant's conduct and is a potentially fair reason for dismissal under section 98(2) (b) ERA.

23 The claimant had three specific allegations of unfairness .The first was that she had not received the Final Written Warning. When considering the issue of unfairness the issue for me is not whether she did or did not receive it but whether Sharon Perry as dismissing officer had reasonable grounds after a reasonable investigation for believing that she did. Sharon Perry established that in accordance with the respondent's Disciplinary Procedure a letter of outcome had been sent to the claimant at the right address and it had been sent first class by special delivery and there was proof that it had been delivered to that address. There was no history of documents sent to the claimant having gone astray or of the claimant having queried the outcome of a hearing which she knew was disciplinary in nature and which had been a source of concern for her. I cannot say that the investigation carried out was outside the range of reasonable responses and that Sharon Perry did not therefore have reasonable grounds for her conclusion that the claimant had indeed received the Final Written Warning.

24 The second aspect of unfairness concerned the inadequate investigation into a discrepancy in dates but this turned out to be in relation to the second allegation against the claimant which was not a matter for which the claimant was dismissed. The claimant gave new evidence in cross examination about how and when the drawers came to be unlockable and about who lost the keys. Indeed she blamed Amanda Keable for having lost them. This account was not consistent with the contents of the typed notes of the investigation and disciplinary meetings. The manuscript notes of the disciplinary hearing were

signed by her on the day and there was no difference between the contents of the manuscript version and the typed version. The version of events she gave under cross examination did not make its way into her appeal letter which confined itself to the claimant asserting she having clearly explained on each occasion she was asked what had happened to the keys but provided no additional evidence. The manuscript minutes from which the typed notes were made were contemporaneous. They were not verbatim but the claimant's credibility was substantially adversely affected by her evidence under cross – examination and she has failed to persuade me that they were in any material respect inaccurate.

25 The third aspect of unfairness concerned Amanda Keable's awareness that the drawers were unlocked. A manager's knowledge of (and therefore acquiescence in) of a particular state of affairs can amount to mitigating circumstances. However in this case the claimant had confirmed in the investigation meeting on 9 March 2017 that her manager was not aware that confidential information was kept in the drawer. She did not challenge this at the disciplinary hearing and in those circumstances it was not outside the range of reasonable responses for Sharon Perry not to initiate any further investigation. The claimant has not complained of any unfairness on the part of Mr Badland in his conduct of the appeal in her absence. Her witness statement did not address Amanda Keable's state of knowledge. Mr Badland had before him the notes of the investigation meeting and the disciplinary hearing and the grounds of appeal and was faced with a claimant who did not turn up to appeal meetings despite being given the opportunity to do so and who provided no evidence to support her contention that Amanda Keable had known about the drawers and the documents in it. In that situation it was not unreasonable of him to conclude the grounds of appeal put forward by the claimant did not provide a reason to overturn the decision to dismiss.

26 I have considered the fairness of the whole of the process. Although there were aspects of the disciplinary process which could have been done better and a tendency at the beginning of the process for those involved to accept information provided by others I conclude that Sharon Perry was an open minded decision maker and there were no procedural irregularities which were sufficiently serious to render the dismissal unfair.

27 I have also carefully considered whether there was any unfairness to the claimant in that the pleaded reason for dismissal was not the real reason .I have decided that there was none. The claimant knew the specific allegations against her and was given copies of the evidence relied on and had the opportunity to put her case before any decision was made. She also knew that she was at risk of dismissal.

28 In my judgment Sharon Perry had reasonable grounds for concluding that (contrary to the claimant's contention that the drawer was 'locked' because it was

secured by a latch) the drawer was not secure and that the information in it was confidential. However I reject Sharon Perry's evidence that at the time she dismissed the claimant she considered whether the claimant's conduct in leaving confidential information in an insecure location amounted to gross misconduct within any of the examples contained in the Disciplinary Policy. In my judgment she was clutching at straws after the event in trying to explain how the misconduct she had found could come within the examples she cited.

28 Was the decision to dismiss the claimant nonetheless a fair sanction? The respondent is aware of the importance of data protection (as evidenced by the Data Protection Policy which clearly sets out the obligations placed on it by the Data Protection Act 1998 and its Access to Records Policy) and of the importance placed on compliance by the authorities (such as the CQC) that inspect the Home. It operates in a highly regulated environment and has in its possession confidential information about staff and residents some of which is sensitive personal data. Sharon Perry established at the disciplinary hearing the claimant knew that data had to be kept secure. That knowledge was informed by the respondent's Access to Records policy (paragraph 13.4 above). She knew why she (as the Home's admin manager) had been supplied with drawers which were lockable. A repeated instance of misconduct can warrant dismissal when a one off occasion of that misconduct would not. In my judgment what made Sharon Perry decide the claimant's conduct on this occasion was sufficiently serious to warrant termination was that the claimant had already received the Final Written Warning (which was in part for a similar offence) which had made the importance the respondent afforded to the need to keep confidential information secure and the potential consequences of future instances clear to the claimant. Her conduct in this respect had not improved; she had done the same thing again. In those circumstances (although another employer might not have been as harsh as the respondent) it was not outside the range of reasonable responses available to an employer to decide to dismiss the claimant. Having regard to the real reason for dismissal the respondent acted reasonably in treating the real reason for dismissal as a sufficient reason to dismiss. The claim of unfair dismissal therefore fails and is dismissed.

Employment Judge Woffenden
23rd May 2018