Case Number: 2420855/2017

EMPLOYMENT TRIBUNALS

Claimant:	**Joanne Hammond**	
Respondent:	**St. Jude's Care**	
Heard at:	**Southampton Employment Tribunal**	**On: Wednesday, 14th March 2018**
Before:	**Employment Judge Mr. M. Salter**	
Representation:		
Claimant:	Mrs. R. Hodgson of counsel	
Respondent:	Miss C. Lord of counsel	

JUDGMENT

The Claimant's dismissal was unfair and the Claimant was subject to a breach of contract.

The Respondent shall pay the Claimant: £10,384.01

REASONS

References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.

References in round brackets are to the paragraph of these reasons or to provide definitions.

INTRODUCTION

1. These are my reasons for the reserved judgment above. As tribunal judgments and reasons are now published online these reasons will be published on the relevant website.

BACKGROUND

The Claimant's case as formulated in her ET1

2. The Claimant's complaint, as formulated in her Form ET1 [1 Pleadings], presented to the tribunal on 6th October 2017, is in short, she was unfairly dismissed and that her suspension leading up to that dismissal was wrongful and a breach of contract.

The Respondent's Response

3. In its Form ET3 [9 Pleadings] received by the tribunal on the 9th November 2017 the Respondent accepted the Claimant was an employee and that she was dismissed, but denied that that dismissal was unfair, contending it was for a potentially fair reason, namely a reason related to the Claimant's conduct and that that dismissal occurred after a reasonable investigation and was within the band of reasonable responses open to it.

THE FINAL HEARING

General

4. The matter came before me for Final Hearing on the 14th March 2018. The hearing had a one-day time estimate. The Claimant was represented by Mrs R. Hodgson of counsel, the Respondent by Miss. C. Lord of counsel.

List of Issues

5. There was no list of issues provided by the parties, however the issues were discussed and being a misconduct dismissal claim the issues were well known to both counsel, the Claimant confirmed that her claim for breach of contract concerned the Claimant's suspension and was based on the implied duty of trust and confidence.

Particular Points that were Discussed

Timetabling

6. Time being limited it was agreed that I would hear all evidence on liability and remedy.

DOCUMENTS AND EVIDENCE

Witness Evidence

7. I heard evidence from the following witnesses on behalf of the Respondent: Helen Routledge, who is the Respondent's PA/Office Manager and who conducted part of the investigation into the matter that led to the Claimant's dismissal, Sally Andrews a Director of the Respondent, who conducted the disciplinary meeting and Ben

Andrews, a director of the Respondent and Mrs Andrews' son, who conducted the Appeal hearing. I also heard evidence from the Claimant on her own behalf.

8. All witnesses gave evidence by way of written witness statements that were read by the tribunal in advance of them giving oral evidence. All witnesses were cross-examined

Bundle

9. To assist me in determining the application I have before me today a large number of bundles. Firstly there was one for the pleadings (19 pages), then there was a separate file for the Respondent's witness statements (16 pages), then there was a bundle for documents (75 pages) and then a file for mitigation (16 pages). Taking out the witness statements all the remaining pages fitted easily into one ring binder, so I combined them all into one file.

10. My attention was taken to a number of these documents as part of me hearing submissions and, as discussed with the parties at the outset of the hearing, before commencing their submissions, I have not considered any document or part of a document to which my attention was not drawn. I refer to these bundles by reference to the relevant page number and the designation "Pleadings", "Documents" or "Mitigation".

MATERIAL FACTS

General Points

11. From the evidence and submissions, I made the following finding of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by Ms. Routledge, Mrs Andrews, Mr. Andrews and the Claimant in evidence, both in their respective statements and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed. Rather, I have set out my principle findings of

fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

The Respondent

12. The Respondent provides care services to service users in their homes. It facilitates the maintenance of the service user's independence and way of life. It employs about 90 people [9 Pleadings] one of whom was the Claimant.

The Claimant

13. The Claimant was a senior care worker. She was employed from 30th September 2013 until her dismissal on grounds of gross misconduct on 6 June 2017. The Claimant was only paid as and when she worked.

14. At the time of her dismissal the Claimant had 6 points on her driving licence. If she were to receive a further three points for speeding she would not have her licence suspended.

Pool Cars

15. I am told that one of the Respondent's selling points to recruit staff is that it provides its employees with access to pool cars for them to visit the Respondent's service user clients. Cars are allocated to those employees who are working on any given day.

16. The Respondent operates a system whereby the keys for the pool cars are kept in a key safe in the office foyer and cars are allocated using a sheet of paper [28 Documents]. This sheet is kept on the top of the key safe. The key safe makes a distinctive beeping noise when operated.

17. When taking a car the assigned member of staff signs the relevant box on the sheet of paper referred to above. If a car is allocated to an individual employee and they do not take the vehicle they are required to notify the office of this.

18. The area for parking pool and staff cars is slightly away from the Respondent's office and so the practice is for drivers of pool cars to return the pool car to the parking area, collect their own car from that area and then drive to the front of the office in

their own car when they will then deposit the pool car's keys into the key safe before departing the site in their own vehicle.

19. One of the pool cars is a car registration number WJ15 0BL it is known as "Car 3". The Mileage log for Car 3 shows that at the end of Thursday, 23rd March 2017 Car 3's mileage was 20,960, but that when it was collected by the next recorded driver, on the evening of the 24th March, it had a mileage of 20,986. So, during the day of 24th March 2016, someone had driven it for 26 miles.

Friday, 24th March 2017

20. The Claimant does not normally work for the Respondent on Fridays and was not due to work on the 24th March [5 Documents]. When not working on Friday the Claimant takes Mr. W and Ms. C to Sainsburys so they can do their shopping.

21. The Claimant does, however, sometimes undertake "Additional Calls" on Fridays for the Respondent and on the 24th March, owing to staff shortage, the Claimant did [12 Documents].

22. It turns out that the Claimant was allocated Car 3 on this day. There is no record of her notifying the Respondent that she did not require Car 3; equally there is no document showing the claimant signed for the car on that day.

23. The record of the Additional Calls [12] and the Claimant's timesheet for that day [29 Documents] shows the Claimant had a number of Additional Calls throughout the day, starting at 0715 and finishing at 1740, although there is a gap recorded between 10am and 14:50. It is this gap that I am concerned with.

24. At the beginning of the 24th March the Claimant took her car to the first of the Respondent's jobs as this was, I am told, about a minute's drive from her home and she could not see the sense in driving to the Respondent's site to collect a pool car, which, I find, she did not know if she had been allocated or not, merely to then drive back to an address one minute from where she started from [39 Documents]. I consider this an entirely credible and reasonable account and one I accept.

25. The Claimant remained using her car to travel from job to job until around 10am.

26. The Claimant says she finished the Respondent's clients around 10am. This appears to be borne out by the Claimant's time sheet [29 Documents] and the form signed by the relevant service users on the 24th March [12 Documents]. The Claimant was to then take Mr. W and Ms. C. to Sainsburys and so, after finishing with the Respondent's clients, she returned home, changed her top and car to her father's car as this was smaller and was more suited to driving Mr. W and Ms. C. After changing she then travelled to Mr. W and Mrs C's address in Barley Way.

27. Whilst in Barley Way the Claimant met Paul Walker who has known her for a "few years", they exchanged pleasantries and went on their respective ways [52 Documents].

28. The Claimant gave me an account which she has maintained throughout the disciplinary process, that she arrived at Sainsbury's with Mr. W and Mrs C around 10:30. The shopping was paid for at 10:59 by Mr. W [30 Documents]. The Claimant was assisting Mrs C in the toilet when the shopping was paid for.

29. This account appears to be corroborated by a text message the Claimant sent Kerry Ayling, a work colleague of hers, which states:

> "Hi Kerry did you call I'm assistant (sic) someone in the toilet at mo, what did you want to know ?? Thanks Jo H"

This text was sent at the time and corroborates the Claimant's account given in interview that she was with Mrs C around 11am. It further ties in with the Respondent's account, and the phone records, that the Respondent, and in particular Ms. Ayling, was trying to speak to the Claimant around 11am [33 and 34 Documents] and had been calling the Claimant.

<u>29th March 2017</u>

30. On this date the Respondent received a Notice of Intended Prosecution ("the Notice") from Dorset Police informing them that Car 3 was caught on camera at 1041 on the 24th March 2017, traveling at 36 miles per hour in a 30 mile per hour

area on the A354 Weymouth Relief Road, between Veasta Road and Manor Roundabout [32 and 36 Documents]. This is right next to Sainsburys.

31. Despite this document being received on the 29th March, the Claimant remained working for the Respondent.

32. On the 11th April 2017 the Respondent sent the Claimant a note informing the Claimant that according to their records the Claimant was the driver of Car 3 [38 Documents]. I was told that this note was compiled after a conversation with the Claimant. The Claimant still remained at work. It is noteworthy that it was Ms. Routledge who complied this note.

33. On the 20th April 2017, and without speaking to the Claimant, the Respondent returned the form that accompanied the Notice to the Police, identifying the Claimant as the Driver [37 Documents].

34. On 21st April 2017, as part of its investigation, Ellie Dewland, a fellow work colleague of the Claimant's produced a file note [41 Documents]. Ms. Dewland works in the Respondent's office and says she recalls seeing the Claimant's car outside the office and hearing the key safe being opened between 1050 and 11am. Ms. Dewland states the Claimant did not come into the office and this was odd as Ms Ayling had left a telephone message for the Claimant to contact her (Ms. Ayling). Ms. Dewland had cause to remember this as the 24th March was Ms. Ayling's birthday, and a small reception was being held on that day around 1030 [18 Documents].

35. Ms. Dewland's account is at odds with the file note prepared by the Respondent on the 24th April 2017 [47 Documents] the name of the author being redacted, that records Ms Ayling calling the Claimant twice, at 10:50 and 10:59 and receiving a text message back from the Claimant at 11:03 in the terms I have set out above. This record accords with the telephone records on [33 and 34] and the Claimant's own text message record.

<u>25th April 2017</u>

36. The Respondent spoke to the Claimant about the Notice, the Claimant contended that she had not been driving Car 3 on that day and that she would have been at

Sainsbury's at that time. The Claimant was suspended from work [48 Documents]. The suspension was carried out by Jo Stuart-Smith. Ms. Routledge told me she was at this meeting as a notetaker only. I have therefore heard no evidence as to why suspension was considered appropriate at this time and not before. The Claimant's suspension continued until she was dismissed. The effect of the Claimant's suspension is that she was suspended without pay [JH2].

37. I am told that the Claimant has, in the past, received a speeding fine whilst driving one of the Respondent's vehicles and was not subject to disciplinary proceedings. She also tells me that more recently Pat Thomas also has been similarly caught speeding, and again was not suspended or put through a disciplinary process [JH6]. No evidence was called to contradict this.

38. From the material I have before me it would appear that at the time of her suspension the Respondent was only investigating a speeding matter.

39. On the 28th April 2017 Mr. W and Mrs C wrote a letter to the Respondent confirming what the Claimant said, namely that she had taken them to Sainsburys on the 24th March, and that at 10:59 the shopping was being purchase, was what occurred on the 24th March 2017 [50]. They attached a copy of their shopping receipt for that day which confirmed the time.

<u>The Investigation</u>

40. The Respondent conducted an investigation and, as the photograph provided by the Police of the driver showed, the Respondent contends, a person with blonde hair an exercise of identifying those members of staff with blonde hair and their whereabouts was carried out. The results of that exercise are [3 Documents bundle].

41. The Claimant was invited to attend an investigatory meeting [51 Documents] to be held on 4th May 2017. The letter is sent by Lesley Ridgewell the Respondent's Care Manager. There is no mention that there would be any question as to the Claimant's honesty arising in that meeting.

42. On 3rd May 2015 Mr. Walker provided a document entitled "Supporting Evidence" in which he set out his meeting with the Claimant in Barely Way. This document was supplied to the Respondent.

43. This meeting was held on the 4th May 2017 [53 Documents]. It is chaired by Ms. Ridgwell, again with Ms. Routledge attending as note taker. During this meeting, again, the Claimant denied using Car 3. She said she did not use the car as she used her own vehicle that day as the first call she undertook was near to her house. She provided the letter from Mr. W and Ms. C as well as that of Mr. Walker and confirmed she had never left Mr. W or Mrs C alone in Sainsburys before.

44. As a result of this Mrs Routledge determined that the matter required further investigation [HR19]. She was not provided with a clearer photo of the driver by the Police and undertook an exercise of locating the whereabouts of all staff and especially those employees with blonde hair [3]. Despite now sitting in on this meeting and the earlier one Ms. Routledge's memory was not at this point jogged as to what later she recalls hearing whilst in the office on the 24th March 2017 [70 Documents].

45. Ms. Routledge told me that as the investigator she went through the evidence with "a fine tooth comb". No-one, at any stage of the process contacted Mr. W and Mrs C to ask about the Claimant and their visit to Sainsburys. No-one contacted Mr. Walker either. Ms. Routledge told me that Mr. W and Ms. C's evidence "was not part of the process".

46. On the 11th May 2017 the Claimant was emailed by Ms. Ridgewell and is informed that the matter will progress to a disciplinary hearing [59 Documents]. It was, I am told, Ms. Ridgwell's decision to progress the matter. I have not heard from Ms. Ridgewell but am told she had the statements from Mr. W and Ms. C as well as Mr. Walker before her. There is no mention of any allegation of dishonesty in this email.

47. A letter is then sent to the Claimant on 22nd May 2017, again from Ms. Ridgewell [60 Documents], inviting the Claimant to a disciplinary Hearing on 25th May 2017. The letter sets out the time and place of the hearing, the right to be accompanied

and that the potential consequences of the meeting include summary dismissal as the alleged action is one of gross misconduct. The letter states:

> "*The purpose of the hearing is to consider the following allegation and decide whether disciplinary action is warranted:*
>
> ***It is alleged that on 24th March 2017 you were driving company vehicle reg WJ15 0BL and incurred a speeding offence – Notice number 055306111629702***0"

Again, there is no accusation of dishonesty on the Claimant's behalf.

48. Speeding is not identified in the Respondent's Disciplinary Policy as amounting to Gross Misconduct [1 Documents] although this is a non-exhaustive list. However, I heard from Ms. Routledge in evidence, and I accept, that as far as the Respondent is concerned speeding is not gross misconduct.

The Disciplinary Hearing

49. The Disciplinary Hearing was held on 25th May 2017. It was conducted by Mrs Andrews [61 Documents] she has not conducted any disciplinary hearings before.

50. In evidence she agreed that speeding was not gross misconduct and that therefore the letter calling the Claimant to the disciplinary hearing was, itself unclear.

51. In this meeting Mrs. Andrews gives an account that between 1007 and 1050 the claimant was seen in the office by "Kelly" who had been trying to call the Claimant. I presume this is meant to refer to Kerry. However, I have not seen any statement from Kerry/Kelly confirming the point as put by Mrs Andrews. Mrs Andrews also is recorded as saying it was Ellie who was trying to call the Claimant, this is, of course not what Ellie herself says. The Claimant raises the issue of the telephone calls from the office and that she was not driving a pool car.

52. There is no record of the Claimant's honesty being challenged, called into question or discussed in this meeting. I consider this is because it was not. I draw my conclusion from this as the letter of dismissal does not mention honesty at all and neither, as I say, do the minutes, nor the letter calling the Claimant to the meeting.

Mrs Andrews accepted that she did not raise the issue of fraud or falsification with the Claimant and gave evidence that the falsification of records related to timesheets which had not been signed. When challenged as to what documents had been "falsified" as opposed to merely not being filled out, she "could not remember".

53. Mrs Andrews stated she only became aware of the Claimant's argument that she was at Sainsburys with Mr. W and Mrs C, at the meeting. This is despite the material being placed before the investigator from an early stage. Mrs Andrews "assumed" (and I quote her on this) that Mr. W and Mrs C may not remember the visit. She "thought it flimsy" yet conducted no investigation into this whatsoever, yet rejected their evidence as "unreliable".

54. Mrs Andrews considered the material and came to the conclusion that the Claimant had been driving the car. She was dismissed by way of letter dated 6th June 2017 [64 Documents]. The letter of dismissal states:

> *"In conclusion the company is unable to place any other individual matching the description in the car. After careful consideration I can now confirm that we have reasonable belief that you were the driver of the vehicle.*
>
> *The company considers these actions gross misconduct, and after much deliberation from the management team I must inform you that the company has decided to terminate your employment without notice on these grounds"*

55. The letter saying that the decision to dismiss was taken by the management team, in evidence Mrs Andrews confirmed this and said the decision to dismiss was a "joint" one. When asked who it was joint with, she named her son Mr. Ben Andrews.

56. Again, there is no mention of dishonesty in this letter. Yet in her evidence it is the "dishonesty and lying" which Mrs Andrews considered to be gross misconduct, nor the speeding.

<u>The Appeal</u>

57. The Claimant appealed her dismissal [65 Documents]. The grounds of her appeal were that she felt the sanction was severe considering she had no previous warnings and was, in this case, innocent.

58. The Appeal was heard by Mr. Ben Andrews. It was held on the 5th July 2017 [67 Documents] in this meeting Mr. Andrews is recorded as saying: "What is clear is that someone is lying – either the person in the office or the elderly couple witness". Mr. Andrews appeared also to discount the note from Mr. W and Ms. C as it was typed and so he did not know who produced it.

59. In this meeting the HR Representative proffers an explanation that the person in the office can confidently recall it was the claimant that they saw and that perhaps the elderly couple had got it wrong [67 Documents].

60. The minutes do not record that the Claimant's honesty was called into question at all. In evidence it was advanced by Mr. Andrews that the Claimant "deliberately" did not fill in the time sheets and the mileage logs. This was not addressed at all in the meeting. Mr. Andrews says however that this was discussed in the meeting. On the evidence I have before me I reject his assertion: it would be a startling omission in a meeting with a trained HR professional in attendance that matters of dishonesty are left out of the minutes; further the history of the proceedings shows that dishonesty was never raised in any document or meeting beforehand, and the Claimant herself is clear that it was not until the appeal outcome letter that dishonesty became apparent that this was the reason for her dismissal [8 §10.2 Pleadings].

61. Mr. Andrews disagreed with his mother and said he had no part in the decision to dismiss. He did however confirm that other people who did not attend the disciplinary hearing were part of the process to dismiss the claimant: he confirmed it was "the management team's" decision to dismiss.

62. Further investigations were conducted by the Respondent after the meeting adjourned, further statements were taken from Ms. Dewland, a new witness Ms. McCabe and Ms. Routlege the investigator and note taker at the investigatory meeting who until this point, had not recalled the conversation she was now

recorded as having overheard [70 Documents] despite being in meeting previously with the Claimant in which the Claimant's visit to the foyer, or not, was discussed [53 documents] and having been involved in the taking of file notes from other members of staff regarding car allocation [42 Documents].

63. The Claimant was not offered the opportunity to respond to these new statements. Despite conducting a further investigation the Respondent still did not however contact Mr. W or Ms. C or Mr. Walker. Throughout the entire process Kerry had not provided a statement at all.

64. Mr. Andrews in his letter dismissing the claimant's appeal [74 Documents] states: "the only additional evidence you have provided to support your position is the statement from your two elderly private clients and a Sainsbury's receipt which doesn't prove whether you were there or not" [Documents 74]. Mr Andrews did not check this with Mr W or Ms C.

65. For the first time an accusation of the claimant fraudulently trying to mislead the Respondent is mentioned.

THE LAW

66. The law relating to unfair dismissal is well established. By section 94(1) of the Employment Rights Act 1996:

> "An employee has the right not be unfairly dismissed by his employer."

67. By section 95(1)(a):

> "For the purposes of the unfair dismissal provisions, an employee is dismissed by his employer if the contract under which he is employed is terminated by the employer (whether with or without notice)."

68. By section 98(1) and (2): It is for the employer to show the reason (or principal reason) for the dismissal and, in the context of this case, that it related to the conduct of the employee. Conduct is the reason relied upon by the Respondent.

69. In Abernethy Mott, Hay v Anderson [1974] IRLR 213, CA, it was held that the reason for a dismissal is a set of facts known to the employer or beliefs held by him that cause him to dismiss the employee.

70. By section 98(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.

71. The law to be applied to the reasonable band of responses test is well known. It applies equally to the procedural aspects of the dismissal, such as the investigation, as it does to the substantive decision to dismiss – see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA. As far as the investigation is concerned, and the formation of the reasonable belief of the employer about the behaviour, conduct or actions of the employee concerned, then I have in mind, of course, the well-known case of British Homes Stores Ltd v Burchell [1978] ICR 303, EAT. Did the Respondent have a reasonable belief in the Claimant's conduct formed on reasonable grounds after such investigation as was reasonable and appropriate in the circumstances?

72. The tribunal's task is to assess whether the dismissal falls within the band of reasonable responses of an employer. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair. I refer generally to the well-known case law in this area, namely Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, EAT; and Foley v Post Office; HSBC Bank PLC v Madden [2000] IRLR 827, CA.

73. At neither stage am I to substitute my own decision for that of the employer. I should not substitute my own view for that of the employer but should consider whether the employer's handling of the disciplinary process, and the application of dismissal as a sanction for the conduct found, were within the band of reasonable responses open to it. See, e.g., among numerous other authorities: Tayeh v Barchester Healthcare [2013] EWCA Civ 39.

74. Further guidance is to be found in the ACAS Code on Disciplinary and Grievance procedures of 2009; and I am required to take account of any provision of that

Code which appears to it to be relevant to any issue before it. Although the Code of Practice is not legally binding, in itself, Employment Tribunals will adhere closely to the relevant Code when determining whether any disciplinary or dismissal procedure was fair. The ACAS Code of Practice represents a common-sense approach to dealing with disciplinary matters and incorporates principles of natural justice. In operating any disciplinary procedure or process, the employer will be required to: Deal with the issues promptly and consistently; Established the facts before taking action; Make sure the employee was informed clearly of the allegation; Allow the employee to be accompanied and to state their case; Make sure that the disciplinary action is appropriate to the misconduct alleged; Provide the employee with an opportunity to appeal.

75. In Taylor v OCS Group Ltd [2006] ICR 1602, CA, it was held that if an early stage of a disciplinary process is defective and unfair in some way, then it does not matter whether or not an internal appeal is technically a re-hearing or a review, only whether the disciplinary process as a whole is fair.

76. However, this does not mean that any defect of fair treatment that may occur leading up to the initial decision to dismiss is bound to be irrelevant, so long as a fair appeal process has been granted. There will be some cases where the unfairness arising at the first stage is so serious and fundamental, that the end-to-end process remains unfair.

77. After identifying a defect, I will want to examine any subsequent proceeding with particular care. Their purpose in so doing would be to determine whether, due to the fairness or unfairness of the procedure adopted, the thoroughness or lack of it in the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at an earlier stage. I ultimately, always have to decide the fairness of a given dismissal, applying the words of section 98(4) and the statute makes no particular provision in relation to appeals.

78. In Brito Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854, EAT, it was held that a finding of gross misconduct does not necessarily make a dismissal fair. Even in cases of gross misconduct, regard must be had to possible mitigating circumstances such as, in this case, the Claimant's length of unblemished service and that dismissal

would lead to her deportation and destroy her opportunity of building a career in the UK.

79. In Strouthos v London Underground [2004] IRLR 636, CA, it was held that length of service and a clean disciplinary record are factors which can properly be considered in deciding whether the reaction of an employer to an employee's conduct is an appropriate one.

80. In the context of the Claimant's suspension, as referred to the case of Agoreyo v London Borough of Lambeth [2017] EWHC 2019 (QB), such suspension must be justified on the facts of the case. It is not to be considered a routine response to the need for an investigation.

81. The commentary in Harvey on Employment Relations and Employment Law says that one particular problem here has been arguably the over- readiness of certain employers (particularly in the public sector, including the medical area and the education area) to resort to suspension as soon as allegations have been made against an employee, and then to allow that suspension to continue for a long period. See Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402, CA.

82. There is no hard and fast rule as to the level of inquiry that the employer should conduct into the employee's (suspected) misconduct in order to satisfy the Burchell test. It will very much depend on the particular circumstances, including the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee. At one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase.

CONCLUSIONS ON THE ISSUES

General

83. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine.

Findings on the Issues

Reason for the Dismissal

84. On the basis of the legislative provision, the first step for me in any complaint of unfair dismissal, where the fact of dismissal is admitted is to consider whether the terms of s98(1) ERA have been satisfied by the employer that the reason for the dismissal was one of the potentially fair reasons set out within that statutory provision.

85. I remind myself that for the purposes of this part of s98(1) the employer is not required to prove that the factual basis upon which the decision is based is correct, or even that they had reasonable grounds for believing that to be so. That comes later under section 98(4).

86. The burden is on the employer and what they are required to establish is that the reason which existed in their mind at the time they decided to dismiss was some set of facts which falls within one of the categories set out in s98(1). Usually this is not particularly difficulty. Again, it is normally found, and the present case is no exception, that evidence of what the employer said at the time of dismissal, as being their reason for deciding upon that sanction, is the best evidence of the actual reason. In this case the claimant was dismissed because of her driving Car 3 on 24th March 2017. I do not consider that she was dismissed for any lack of honesty as such an explanation only becomes apparent in the letter rejecting her appeal.

87. This body of material was, as such, sufficient to satisfy me that the reason or principal reason the Respondent had for the Claimant's dismissal was her driving Car 3.

Genuine Belief

88. In closing the Claimant accepted that the Respondent "probably did" have a genuine belief in the guilt of the Claimant.

Reasonable Investigation

89. I considered whether the employer had conducted a reasonable investigation. I did this by looking firstly at the nature of the investigation with a view to determining whether it accorded with what a reasonable employer would do, and then to

consider whether such a hypothetical reasonable employer would have felt able to form a genuine belief that the Claimant was guilty of what was presented as being the reasons for her dismissal.

90. The reasonableness of the scope of such an investigation will vary from case to case according to what is probably an infinite variety of circumstance. Section 98(4) does not involve the test of reasonableness in a completely general sense. The determination of whether the dismissal was fair or not is to be carried out "having regard to the reason shown by the employer". That is clearly a reference to what has been found to be the reason under section 98(1); and further under sub-section (b) of section 98(4) it "depends on whether in the circumstances…the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing…"

91. I am not satisfied that the Respondent had a reasonable belief that the Claimant was driving Car 3 on the 24th March or that the belief it has was formed after a reasonable investigation, at the disciplinary hearing or in the appeal. I have arrived at this conclusion as, although the Claimant was offered a full hearing both before dismissal and by way of an appeal, at all stages the Respondent failed to follow obvious and logical lines of enquiry (namely the witnesses who had given evidence in support of the Claimant); had then presumed them to be lying (see Mr. Andrews statement in interview); had ignored evidence it produced itself that corroborated the Claimant's account (Ms. Ayling's note) and failed to take a statement from Ms. Ayling who appears to have been key to understanding the timeline. All of these are steps that a reasonable employer would have taken in conducting a reasonable investigation.

92. Further, the Claimant was not permitted the opportunity to respond to the statements taken after the appeal hearing but before the outcome of the hearing was notified to her.

93. Furthermore, at no point was the claimant's honesty called into question during this process until it was referred to in the letter giving the outcome of her appeal. I find that this was an attempt to bolster an unfair dismissal by creating a serious accusation against the Claimant, when the same had not been raised with her at any stage beforehand by the investigator, disciplining officer or appeal officer.

94. I have considered the various matters above in isolation and then taken a step back and assessed the process as a whole. These failings put the process adopted by this Respondent outside the band of reasonable responses open to a reasonable employer.

Dismissal within the Band of Reasonable Responses

95. Was dismissal within the range of reasonable responses? I remind myself that it is, again, not for me to substitute my own view for that of the reasonable employer. This means that I am obliged to formulate a view on whether or not the conduct complained of was sufficiently serious to justify dismissal, and thus whether the decision to do so was inside or outside the range.

96. I do not consider that it was. Speeding offences are not identified in the Respondent's handbook as an example of gross misconduct and the Claimant gave uncontroverted evidence that both herself and another employee had on separate occasions been caught speeding in the Respondent's vehicles and not been subject to any disciplinary process at all.

97. I looked also for other evidence which indicated how the Respondent considered this speeding offence, for almost a month after the Respondent had received the Notice the Claimant was permitted to remain at work, and nothing had changed from this date until the suspension. The evidence I have therefore is that it was not seen as so serious that immediate action (let alone suspension) was necessary. Indeed, Mrs. Andrews herself confirmed that the driving offence was not gross misconduct.

Suspension: a Breach of Contract?

98. I find that suspending the claimant in these circumstances was a breach of contract's implied duty of trust and confidence. The Respondent has produced no evidence or a witness to support its contention that the suspension was necessary for any reason, or that it had reasonable and proper cause for the suspension: the Claimant had remained at work for almost a month after the Respondent received the Notice; it is clear that speeding is not a gross misconduct matter on the Respondent's own account; I have heard no evidence at all from the manager who suspends the Claimant as to the reasoning why the decision was taken when it was

or that there was any risk to the integrity of the investigation by the Claimant remaining at work, or that at this stage the Respondent had any concerns over the honesty of the Claimant, there is nothing to show me that speeding is so serious as to demonstrate a willingness of the Claimant to have such disregard to the contract of employment that removal of the Claimant from the workplace is warranted.

99. I do not find therefore that the Respondent had reasonable and proper cause for suspension.

100. I do find that suspension was in breach of the implied duty of trust and confidence.

Remedies Points:
Quantum

101. The Claimant only got paid when she worked. I have found that her suspension was in breach of contract. If she had remained at work as opposed to being suspended, she would have earned wages. Those sums would have been taken into account when working out a "weeks' pay" for the Claimant. The question is, however what she would have earned. The Claimant is paid monthly and I have seen in the remedies bundle a series of pay slips. The date of her suspension happens to be the Respondent's pay date: 25th April 2017 [2 Remedies Bundle] and so I can accurately calculate the previous 12 weeks' pay: this appears to be back to the 31st January 2017 and so would encompass all of the April Payslip, all of the March Payslip and ¾ of the February payslip:

February payslip x 0.75 = gross £1,881.53, net £1,477.58;
March and April payslips as set out in bundle.
So Gross: (£1,881.53+£1,902.15+2,262.33)/12 = £503.83 gross per week
Net: (£1,477.58+1557.53+1797.67)/12 = £402.73 net per week

<u>Unfair Dismissal</u>
Basic Award

102. The Claimant had three complete years' service all over the age of 41 so she is to receive the amount of £2,200.50 as a Basic Award as set out in her Schedule of Loss.

103. I have considered Contributory Fault below when assessing the Compensatory Award.

Compensatory Award

104. The order of deductions and uplifts to be applied to the Compensatory Award was set out in Digital Equipment Co v Clement [1998] IRLR 13, and Hope v Jordan Engineering UKEAT 0545/07:

    a) calculate loss suffered; then
    b) deduct monies received; then
    c) apply any Polkey reduction; then
    d) apply s207A uplift/reduction (s124A ERA); then
    e) apply any contributory conduct reduction (s123(6) 1996 Act); then
    f) deduct any redundancy payment in excess of the statutory one (s123(7) 1996 Act); then
    g) apply statutory cap.

Loss Suffered and Monies Received

105. The Respondent contends and I accept that there are a number of jobs in the caring sector in and around Weymouth. That said, the Respondent's case was that the Claimant was dismissed for dishonesty in a job where trust and honesty are crucial. Understandably, therefore the Claimant may find it difficult to obtain alternative employment.

106. It is for the Claimant to prove her loss to me, and I was not impressed by the Claimant's efforts to mitigate her loss. She told me she had telephoned for "a couple of jobs" but nothing more and could not prove these. She has undertaken some work on a self-employed basis and has set off these earnings in her schedule of loss.

107. I am told the Claimant has been prescribed medication from her GP for her anxiety, but there was of evidence this prevented her from working, indeed the Claimant has been able to work.

108. Being fit to work, I would expect the claimant to be able to find equally remunerative employment than she had with the Respondent within 6 months of her termination in light of the number of jobs I have seen available in this sector and in this area.

109. Therefore, 26 weeks at £402.73 a week net is £10,470.98.

110. I agree with the figure in the Claimant's Schedule of Loss of £300 for loss of statutory rights to reflect that it will now take her two-years of employment to obtain the protection against unfair dismissal.

111. Less he Claimant's mitigation of £6,474.00 means a total compensatory award of ((£10,470.98+300)-£6,474.00): £4,296.98.

Polkey

112. In relation to uplifts and reductions, if a dismissal is unfair then the case of Polkey v AE Dayton Services Limited [1988] ICR 142 (HL) enables me to assess the percentage chance that the claimant would have been fairly dismissed if a fair procedure had been followed, and reduce any Compensatory Award accordingly.

113. In Gover v Propertycare Limited [2006] ICR 1073, the Court of Appeal held that the *Polkey* principle does not only apply to cases where the employer has a valid reason for dismissal but has acted unfairly in its mode of reliance on that reason, so that any fair dismissal would have to be for exactly the same reason. Tribunals should consider making a *Polkey* reduction whenever there is evidence to suggest that the employee might have been fairly dismissed, either when the unfair dismissal actually occurred or at some later date. In making an assessment, Tribunals should apply the principles set out in Software 2000 Limited v Andrews [2007] ICR 825.

114. The question, more precisely, which I had to consider, was whether, had the matters which led to my finding that the dismissal was unfair, not been handled unfairly, the Claimant would or might in any event have been fairly dismissed. I remind myself that I found that the Respondent did have a set of facts in its mind that fell within the ambit of the Employment Rights Act 1996's potentially fair reasons for dismissal and that the claimant accepted that the belief was probably genuinely held.

115. How would, or might, matters have unfolded? There is always an element of speculation when I am asked to reconstruct what might have been, but the authorities remind me that I must do my best to come to some view on this, drawing what I can infer from the evidence and information available to me, about what did actually occur. This is a question of prediction and not of me reviewing what I would

have done. I think that if the Respondent had, in fact, contacted the witnesses suggested by the Claimant they is likely they would have found that the Claimant was at Sainsburys at the time with Mr. W and Ms. C. I consider this likely as the Claimant is playing a high-stakes game giving the name and contact details of three people whom she says provide relevant evidence that exonerates her, if these people would not, in fact do this. Further, had the respondent conducted the analysis of the material it, itself generated, it would have found corroboration in that evidence. In these circumstances the Respondent is likely to have been faced with material that exonerates the Claimant entirely and provides her with an alibi.

116. In such circumstances I do not consider dismissal would have been inevitable and so have no hesitation in declining to apply a time limited type of Polkey reduction (e.g. it would have taken two weeks to obtain this material and then a fair dismissal would have inevitably occurred). Should I therefore apply a percentage reduction to the Claimant's losses, to reflect the possibility that absent the failures a fair dismissal would have occurred. I find I should not. It may have been that the evidence the Claimant put forward did not prove what she thought it would, but that chance of this is, I consider, negligible in light of what I say above about the sheer implausibility of three people making up false evidence for the Claimant and the Claimant putting this forward. Further, the evidence the Respondent chose to ignore is contemporaneous and corroborates the Claimant's accounts of the timings and her location, and was provided at a time when all parties were unaware of the speeding ticket. Furthermore, the Respondent has not provided evidence from which it could tell me what would have happened if they had carried out the investigations (e.g. that in other cases on similar facts, dismissal had occurred), I find this unsurprising in light of the admission that speeding is not gross misconduct.

117. In such circumstances and based on the evidence I have heard that, in any event, a speeding ticket for this respondent does not result in disciplinary proceedings, let alone a dismissal, I do not consider there was any chance of the Claimant being fairly dismissed.

ACAS

118. As this is a case to which the ACAS Code of Practice applies in circumstances where there has been a disregard of that ACAS Code I am required to consider whether

there has been a failing on behalf of the employer and that failure is unreasonable. If I find that there has been an unreasonable failure then I can, if I consider it just and equitable, increase the Claimant's compensatory Award by up to 25%.

119. I consider that there has been an unreasonable failure to follow the ACAS Code of Practice the Code is clear, the Respondent should conduct a fair investigation that looks for evidence point towards the Claimant and away from her, the Respondent did not do this and the failure led to the Claimant not receiving a fair procedure at the hands of the Respondent. This unfairness was pronounced and the result of numerous breaches, it was not either a single breach or, for that matter, a minor failure but a series of important failures: see for instance paragraph 9 regarding notification of the conduct concerned, 18 concerning the requirement that disciplinary action is justified in the circumstances of the case, and 23 compliance with a fair disciplinary process in cases of gross misconduct.

120. Having found breaches of the code, I consider that these are unreasonable ones: the failings are pronounced and obvious and the explanations given for failing to speak to Mr. W and Ms. C are based on unreasonable assumptions and guesses, there was not explanation at all for not contacting Mr. Walker nor for the failure to consider Ms. Ayling's corroborative account of the Claimant's whereabouts.

121. Having considered the failings unreasonable I then had to consider if it was just and equitable to apply an uplift to any award. I find that the failures were not a "one-off" failure, that the Respondent did apply its mind to the issue of the existence of the evidence but chose to ignore it and not make any enquiries over some of it, and so it cannot be said to be an inadvertent failure; there does not appear to have been any mitigation for the failures and the Respondent, whilst a smaller employer, does have access to an HR function.

122. That said, there was compliance with other aspects of the minimal standard required by ACAS, so I do not consider that it is just and equitable for the uplift to be at the upper-end of the bracket permissible.

123. Therefore, I consider that an uplift of 15% is appropriate in these circumstances. 15% of £4,296.98 = £644.55.

124. So the Compensatory award at this stage is £4,941.53.

Contributory Fault

125. The second issue bearing on remedy which I indicated would, if I found that the Claimant was unfairly dismissed, be able also to address in this decision, is what is called contributory conduct.

126. Section 123(6) of the 1996 Act makes provision to the effect that, where the tribunal finds that the dismissal was "to any extent caused or contributed to by any action" of a claimant, it shall reduce the amount of any Compensatory Award by such proportion as I consider "just and equitable having regard to that. Section 122(2) provides that, where the Tribunal considers that any conduct of a claimant before the dismissal was such that it would be "just and equitable" to reduce the amount of any Basic Award to any extent, I shall reduce that award accordingly.

127. As the leading case puts it, conduct may be within the scope of these provisions if I consider it to be "culpable or blameworthy" which may include conduct considered to be "foolish, bloody minded or otherwise unreasonable". It does not need to be conduct that would amount to a breach of contract.

128. By *s122(2) ERA,* where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, the Tribunal shall make such a reduction. By *s123(6) ERA*, 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. Optikinetics Limited v Whooley [1999] ICR 984: it is obligatory to reduce the compensatory award where there is a finding of contributory fault. The reduction may be 100% - W Devis & Sons Limited v Atkins [1977] ICR 662.

129. In Nelson v BBC (No 2) [1980] ICR 110, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

(a) The relevant action must be culpable and blameworthy
(b) It must actually have caused or contributed to the dismissal
(c) It must be just and equitable to reduce the award by the proportion specified.

130. In RSPCA v Crudden [1986] ICR 205 it was held that, in light of the similarity in the provisions of *ss122(2) & s123 (6) ERA 1996,* only in exceptional circumstances would deductions to the compensatory and basic awards differ.

131. The Respondent said that there was indeed conduct of this sort in this case being the Claimant's driving and dishonesty. Whereas, at the stage of determining liability for unfair dismissal I do not substitute my own view for that of the employer, at the remedy stage, of deciding whether there has been contributory conduct, I have to make my own finding. In doing so I draw on all the evidence available at the tribunal hearing, which may differ from the evidence that was available to the employer when it made its decision to dismiss.

132. Turning now to the questions I am required to ask by Nelson: did the Claimant commit culpable or blameworthy acts: I find she did not. I am not satisfied on the balance of probabilities that she was driving Car 3 on the 24th March 2017; I arrive at this conclusion as there is a wealth of material which places the claimant elsewhere (Mr. W and Ms. C and Mr. Walker) and which corroborates her account given repeatedly at the time (the phone records and the record of Ms. Ayling). With this balanced against the material the Respondent has produced to say that she was the driver I cannot say that it was more probable than not that she was driving the car.

133. Turning then to the other aspect of the Respondent's case: that the Claimant falsified documents I find that that she did not. The timesheets I have been shown are completed and reflect the Claimant's movements on the morning. I have heard no evidence which makes me consider the Claimant's account is less than truthful.

134. In all the circumstances, I found that there was not significant conduct by the Claimant, which was culpable or blameworthy. I decline, therefore to make a reduction from either the Basic or Compensatory Awards on grounds of Contributory Fault.

135. Total Compensatory Award: £4,941.53.

Breach of Contract

136. By suspending the Claimant in breach of contract the Respondent denied the Claimant the opportunity to work from the date of her suspension until her dismissal. The Claimant claims seven weeks pay for this. Seven weeks at £402.73 is a net loss of is £2,819.11.

137. In accordance with Schedule A2 of the Trade Union & Labour Relations (Consolidation) Act 1992 the ACAS uplift applies to breach of contract claims as well. As I found above, I do not consider that suspension in the circumstances of this case was necessary and there was no evidence before me of any risk to the Respondent of the claimant remaining at work. As a result I find that the suspension was not in accordance with the ACAS Code (para 8).

138. I consider that it is just and equitable for the uplift to apply to the breach of contract damages for the reasons I have set out above, in particular the Respondent's access to HR advisory services and, also in this situation, the lack of any evidence that suspension was necessary at the time it was carried out.

139. The level of this award will be the same as awarded for the dismissal: 15%: (£2,819.11 x 15% = £422.87

140. A total breach of contract claim, therefore, of £2,819.11 + £422.87 = £3,241.98.

Financial Penalty

141. Pursuant to s12A of the Employment Tribunals Act 1996 I am required to consider in cases where I find there is a breach of the workers' rights to which the claim relates and am of the opinion that the breach has one or more aggravating features I may order the Respondent to make a payment to the Secretary of State. In this case I have found that there has been a breach of the Claimant's employment rights, she was dismissed unfairly and the Respondent acted in breach of contract.

142. I also consider that the wholesale failures of the Respondent's procedure detailed above are sufficient to amount to an aggravating feature: this was not simply a case

of a tribunal taking the view that there was a single failure by the Respondent, in this case the respondent turned a blind eye to obvious potentially exculpatory evidence, failed to investigate material it itself had produced that corroborated the Claimant's case and then, after the appeal, decided the claimant was guilty of matters that had not been put before her beforehand.

143. As a result I consider that my discretion to make a financial penalty has been triggered. It was agreed at the hearing that should I arrive at this decision then submissions would need to be made on whether to exercise my discretion.

144. I direct therefore that within 28 days of the date this order is sent to the parties they shall, unless the matter has resolved, file and serve written submissions, limited to 1,000 words each on whether I should exercise my discretion to make a financial penalty and, if so, at what level.

Conclusions on the Complaints of

145. I therefore give the declaration that the Claimant was unfairly dismissed and that dismissal was in wrongful.

146. I order that the Respondent shall pay to the Claimant a monetary award of £10,384.01 being constituted as detailed below:

a. Basic Award is therefore: £2,200.50.
b. Compensatory Award of: £4,941.53
c. Damages for breach of contract: £3,241.98

_____

Employment Judge

_____

Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....

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FOR THE TRIBUNAL OFFICE