EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104457/18 Held at Inverness on 10 and 11 October and 14 November 2018

Employment Judge: Mr N M Hosie (sitting alone)

Mrs Annette Alston	Claimant Represented by: Mr F H Lefevre – Solicitor
Boots Management Services Limited	Respondent Represented by: Mr K Scott – Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was unfairly dismissed by the respondent and the respondent shall pay her compensation of Nine Thousand, Nine Hundred and Twenty-One Pounds and Fifty Pence (£9,921.50).

REASONS

Introduction

1. Annette Alston, claimed that she was constructively and unfairly dismissed by her employer, the respondent Company, Boots Management Services Ltd ("Boots"). The respondent denied the claim in its entirety.

The Evidence

2. I heard evidence first from the claimant.

3. I then heard evidence on behalf of the respondent from:

- Karen Stuart, Store Manager, who carried out an investigation.
- Alison Winter, Store Manager, who took the decision to issue the claimant with a final written warning.
- Gayle MacLeod, Area Manager, who heard the claimant's appeal against the issuing of the final written warning and a Grievance which the claimant had submitted.

A joint bundle of documentary productions was also lodged by the parties ("P").

4. Once the evidence was completed, the parties' solicitors were directed to make written submissions. I was able to consider these on 14 November 2018.

The Facts

5. Having heard the evidence and considered the documentary productions, I was able to make the following material findings in fact. By and large, the facts were either agreed or not disputed. However, I wish to record that the claimant gave her evidence in measured, consistent and convincing manner and presented as entirely credible and reliable.

6. The claimant commenced her employment with Boots, at their Nairn store as a Trainee Pharmacy Dispenser, on 23 July 2007 (P30-43). At the time of her resignation, on 28 February 2018, she was still employed there, but as Senior

Pharmacy Dispenser. At that time, she was nearing completion of a Pharmaceutical Science NVQ3 Diploma.

Confidentiality

7. Customers' confidentiality is of prime importance to the respondent. The claimant was aware of this, particularly as she was responsible for dispensing medication.

Code of Conduct

8. The respondent has a "Code of Conduct" (P.66/67) which the claimant was aware of (P.64). It contains the following provisions (P.67): -

"***Confidentiality***

- *Employees must not disclose confidential information concerning either the Company and its business, including customers and third parties to any person not authorised to receive it. In particular confidential information must not be used for the personal advantage of employees or for the benefit of competitors of the Company.*

- *An employee's duty not to disclose or abuse confidential information continues even after employment with the Company has ended.*

- *The nature of the information that is confidential will vary depending upon the nature of an employee's duties.*

- *It is the responsibility of managers to ensure that employees know what is and what is not to be regarded as confidential……*

Failure to comply with the requirements of the Code will result in disciplinary action that may include dismissal. Any failure to comply with legal or regulatory requirements may be referred to the police or other relevant authority."

"<u>Code of Conduct & Business Ethics</u>"

9. The respondent also has this Code (P.68-105) which the claimant was also aware of. It contains the following provisions (P.81): -

"***e. We protect the private information and intellectual properties of others***.

WBA is committed to protecting personal and confidential information about our customers and employees that we may collect in the course of doing business. When you handle personal and confidential information, you must do so ethically and in accordance with applicable policies, procedures, laws and regulations (collectively "Rules") that govern the processing of personal information. You are obligated to protect personal and confidential information from inappropriate collection, access, use, maintenance, transfer and disclosure."

<u>Complaint</u>

10. On 7 December 2017, the claimant's Area Manager, Claire Wilson, received, by way of e-mail, a complaint from a customer ("A"). She alleged that the claimant had disclosed confidential information about the medication she had been prescribed to one of her friends ("B"). The complaint was in the following terms (P.148/149): -

"*I live in Nairn in Scotland, a very small town, Boots Chemist in Nairn I have found to always be helpful over the years especially during my pregnancy time, also my daughter when she developed silent reflux, they provided me with an Excellent service.*

Today I have learnt that one of your staff members in the prescription department Annette Alston has breached the stores confidentiality code by disclosing the medication I am currently on (anti-depressants) to one of my friends. I'm visibly upset and distraught by this as I have always been private about this. I would have expected some professionalism and discretion was big part of their job.

I will now be taking my services to the other chemist in Nairn as I feel I can't go to boots without being judged and talked about.

I myself have worked in a Drs surgery and confidentiality is paramount.

I wish my name to remain private as my good friend was good enough to alert me of this."

Investigation

11. The Area Manager, Claire Wilson, contacted Karen Stuart, the Manager of the respondent's store in Forres, to advise her of the complaint and instructed her to carry out an investigation.

12. On 13 December Ms Stuart arrived at the Nairn store along with a colleague, Fiona Wilson, Area Administrator, and asked to speak with the claimant. The claimant had received no notice of this visit.

13. Notes of the "Investigatory Interview" were produced (P.132-147). I was satisfied they were reasonably accurate.

14. At first, the claimant was unaware of who had complained, but eventually was able to speculate correctly who it was. She explained that she had spoken in her home with a friend ("B") and warned B about her friendship with A and A's husband who had been sending B text messages, which the claimant thought was inappropriate. She denied ever discussing A's medication with B. She did admit saying later in their conversation that "*half of Nairn was on anti-depressants*", but denied that she said this with reference to A. She explained it was made in direct response to a comment by B that Nairn residents were *"miserable"*, compared with people in South Africa where B had stayed previously.

15. The following are excerpts from the Minutes (from P. 134): -

"*AA (Claimant): I did not have a conversation with her (B) about it. It was about the couple's (A's) relationship. I never spoke to her about medication. I said I did not want to become involved with them. I swear I have never mentioned "medication". It has made me feel really angry. I never talk about anyone's medication in all years have been here, never would.*

KS (Karen Stuart): Head office received complaint that you discussed "medication" that A is on.

AA: Absolutely not! I said they came into Boots – A and husband but did not mention anything regarding the medication they are on. Is she out to cause me trouble. No reason for this…….....
…….

KS: During one of the conversations A had with Area Manager she quoted "you need to watch who your friends are in this town, half of Nairn on Sertraline". Would you have said to B?

AA: I may have said words to that effect. I was trying to warn her that the crowd she was getting involved with were trouble. But wouldn't have said A was on medication. That one in particular. I just would have said the comment "half of Nairn are on Sertraline, a general conversation" ……

AA: I may have said "half of Nairn are on Sertraline" as a flyaway comment – might have but not sure. Definitely would not have said about anyone's personal medication.

KS: How long do you think A has been a customer?

AA: About 10 years at least, since pregnant, she has been coming.

KS: Why this now?

AA: I think it's to do with this other lady (B). I feel it is about her husband and messages between them. That is why I warned her about this crowd. I think she has taken it personally."

16. Following the meeting, Claire Wilson sent an e-mail to Ms Stuart to summarise the discussion she had with A (P.160). Ms Wilson had conveyed this information to Ms Stuart by telephone prior to her meeting with the claimant.

17. When asked at the Tribunal Hearing why she did not speak to A direct as part of her investigation, Ms Stuart said that that was not something Boots would normally do, as it was *"an internal investigation".*

Suspension

18. The claimant was suspended on 13 December which Ms Stuart confirmed in writing (P.150/151). The following is an excerpt: -

"*Further to our conversation I am writing to confirm that you are currently suspended on full pay with immediate effect pending further investigation into the allegations of breach of patient confidentiality.*

Comments made in the public domain about a customer which may breach confidentiality or which may cause damage, offence or embarrassment.

Conduct that brings the Company's good name into disrepute."

Disciplinary

19. Ms Stuart recommended that the respondent's disciplinary procedure should be engaged. Accordingly, Alison Winter, another experienced Store Manager, wrote to the claimant on 14 December to invite her to attend a Disciplinary Hearing (P.152/153).

20. Despite it having been established that the claimant made the comment in the privacy of her own home, to a friend, the allegations were the same: -

1. *"Comments made in the public domain about a customer which may breach confidentiality, or which may cause damage, offence or embarrassment".*

2. *"Conduct that brings the Company's good name into disrepute".*

21. The claimant was also advised that this was *"potential gross misconduct"* and that she should be aware that: "*a potential outcome of this meeting may be that you receive a final written warning/are dismissed from our employment without notice (summary dismissal).*"

22. Minutes of the Disciplinary Hearing were produced (P.168-190). I was satisfied that they were reasonably accurate.

23. At the start of the Hearing, the claimant gave Ms Winter a hand-written statement (P.106-118).

24. The claimant had not received the "witness statements" referred to in the invite to the Disciplinary Hearing. She was only sent a copy of Ms Wilson's account of her conversations with A and A's complaint which was sent by e-mail on 7 December (P.162-166).

25. The following are excerpts from the Minutes of the Disciplinary Hearing (from P.176): -

"AA – We carried on with other conversations about our children as she was struggling to get visa for her son. She (B) then said she missed SA and she was finding Nairn very difficult as people weren't friendly at school playground or in street. We laughed and joked when she said everyone was miserable as in SA all smiled and hugged, very loving. I laughed and said, in a flippant comment, that's probably because half of Nairn are on antidepressants.

AW - So knowing the role you do did you think it was appropriate to say that.

AA – That was based on peoples moods in Nairn, not anyone in particular…….

I never once quoted A as being on antidepressants. I did not put both in the same sentence. I did not state that A was on sertraline – as I know both she and her husband are on the same meds.

AW – If that's the case why would B say to A and she's quoted what you've said about antidepressants.

AA – Two completely different conversations and she's put them in the same conversation…….Conversation I'm having in my home. I'm not responsible for how B has construed our conversation and passed to A……

AW – You agree you said 1/2 of Nairn on antidepressants

AA – Yes, as a flippant comment – did not break confidentiality. I didn't identify anybody by name as being on antidepressants.

AW – At no point did you say that A was on Sertraline.

AA – Never, not once.

Final Written Warning

26. Ms Winter adjourned the Disciplinary Hearing after approximately an hour to consider the matter and when the meeting was reconvened she advised the claimant that while she had decided not to uphold the first allegation, she had decided to uphold the second – *"Conduct that brings the Company's good name into disrepute"* and issue her with a final written warning. The Minutes record that she said this (P.186-188): - "*I believe you've made a careless comment but not directly breached patient confidentiality. So, the decision I've made is to issue you with a final written warning and that's around flippant comment you made.*"

27. On 21 December Ms Winter wrote to the claimant to confirm her decision (P.192-193). The following is an excerpt: -

"*Although you didn't disclose the name of an individual patient's medication you did, however make an unprofessional comment and in your position as Trainee Pharmacy Advisor I felt this was highly inappropriate and could potentially cause damage, offence or embarrassment. Potentially bringing the Company name into disrepute.*

It was therefore my decision to issue you with a Final Written Warning which will remain live for 12 months. I need to make you aware that I need to see an immediate and sustained improvement in your conduct. Any further occasions of misconduct may result in further disciplinary action, including your dismissal from Boots."

28. When it was put to Ms Winter in cross-examination that a full investigation had not been carried out, as no statements had been taken from either A or B, and the claimant's denial and account of her discussion with B had not been put to them either, she explained that that was not something which the respondent normally does.

29. Ms Winter also said in evidence that, when considering the appropriate sanction, she only had two options namely, a final written warning or

dismissal as that was what was contained in the letter inviting the claimant to the Disciplinary Hearing (P.154).

Appeal

30. On 30 December, the claimant wrote to the respondent to intimate that she wished to appeal against the issuing of the final written warning (P.200/201).

31. The following are excerpts from her letter: -

"*I wish to appeal the outcome on the following grounds:*

1. *The appropriateness of the outcome.*

   I was able to disprove the complaint made against me and have not breached data protection. The "flippant comment" was made during a private conversation in my home as a throwaway remark to a derogatory comment about the residents in Nairn. It was said to put an end to a conversation, to allow the conversation to be changed. The comment was not made in a public domain nor was it made in reference to my employment at my employer Boots. I believe a final written warning is too extreme in these circumstances.

2. *With reference to the immediate and sustained improvement in my conduct I am at odds to understand how I can improve bearing in mind that I "disproved the complaint".*

   My annual performance appraisals have in the past been legendary. I have also been working towards my NVQ3 Pharmacy Technician with little support from Boots. I was recently awarded an honorarium in relation to my contribution to going above and beyond my role as a dispenser in Nairn.

3. *New Evidence.*

   I am fully aware of a similar accusation in Nairn regarding Breach of Data Protection/Confidentiality in which the patient in this situation was identified by a male colleague of a higher ranking.

   I believe the manner in which I have been treated is in total contrast to that which my male colleague was treated. I was investigated, suspended and given a final written warning. Where he was given verbal

conversation via the telephone I believe, by the area manager at the time Mr Jonathan Stuart. I believe that my treatment constitutes direct discrimination."

32. The Appeal Hearing was conducted on 23 January 2018 by Gayle Macleod, one of the respondent's Area Managers. The claimant had trade union representation at the Hearing.

33. Minutes of the Appeal Hearing were produced (P214-227). I was satisfied that they were reasonably accurate. The following are excerpts (from P216):-

"*AA: Comment made in my home. Not related to Boots. Girl from South Africa (B). She said Nairn was difficult place to integrate. Everyone is miserable.*

GM: How is it not relatable?

AA: I was saying that we must need anti depressants. I would say the same thing about kids having cold/flu bug. I don't know how the conversation has gone on after she left my house. Only thing I can think of is because the girl was having a relationship.

DL (trade union representative): I don't think it was properly investigated.

GM: I can assure you that it was investigated. We may never understand why it came to be a customer complaint…..

AA: I wouldn't say anything. We were talking about her husband. If I was going to talk about anyone it was his medication. He's on the same.

KD (notetaker): I didn't know that. I understand the context but what you should not say these types of comments.

DL: It was an innocent comment.

KD: I know that but this past comment we are here to discuss. There was no intent but it was still made.

AA: This final written warning is on file and if another complaint comes in I'll lose my job.

GM: And that's what the appeal process is for. To hear your grounds.

AA: If I was someone who had a lot of complaints but I don't have them against me.

GM: ……..the complaint that has been upheld is the comment that you've admitted to however it was meant.

Move on to point 2 – immediate and sustained improvement. This forms part of the letter is not personal to you.

AA: Not directed specifically at me?

GM: No. Goes in all letters."

34. The claimant's "point 3" was then addressed: the allegation that a previous Store Manager had been treated more leniently for a breach of confidentiality.

35. The claimant provided details of the individuals involved and her understanding of what had occurred. She alleged that the Store Manager in question had talked in public, at a customer's place of work, about medication which the customer's daughter was taking. The customer had complained to the Store Manager's line manager, but the Store Manager was only 'spoken to'. Unlike the claimant, he was not disciplined.

36. A statement was taken from the Store Manager on 22 January by Esther Jardine as Ms MacLeod was on holiday (P.210-212).

Appeal Outcome

37. On 21 February, Ms MacLeod wrote to the claimant to advise her that she had decided not to uphold her Appeal (P.258-260). The following are excerpts from her letter: -

"***Summary of Findings***

I have set out my findings in line with your Appeal points above for ease of reference:

1. *We discussed the importance of patient confidentiality and you agreed that you fully understood how important this was for both the company and the patient and at no point had you breached this, you felt because the comment was made in your own home around residents in Nairn that it was acceptable as it wasn't made in the public domain nor in reference to Boots. I explained that to disclose any information regarding patients is a breach of confidentiality even if the customer is unaware of the situation and it doesn't matter where the conversation takes place. Due to your comment being around medication, the person you were discussing this knew you worked for Boots so she had no reason not to trust that what you were saying was accurate. You also disclosed in the conversation what medication the person's husband was on which was a further breach of confidentiality.*

2. *I explained that this wording is added to all outcome letters (the requirement that there be "immediate and sustained improvement in your conduct"). I do feel you need to reflect on how you would handle the situation differently so you are not put in the same predicament at any point in the future.*

3. *You then went on to inform me of a similar incident involving your store manager at the time back in November 2015 where a complaint was made as a result of him delivering medication to the customers workplace and discussing her daughters medication in front of her work colleagues, you felt you were dealt with much more harshly than he was by his line manager which led you to feel you had been discriminated against. I explained that I was unable to comment on the previous complaint as the matter is confidential. However as a company we take every customer complaint very seriously and each would be fully investigated and any learnings put into place to prevent the same thing happening again.*

Conclusion

Having reviewed all of the information presented to me, I have concluded that although the conversation happened in your own home it is still a breach of confidentiality, you made an unprofessional comment which in your position as Trainee Pharmacy Technician is highly inappropriate and could off (sic) *easily have brought the company is to disrepute* (sic)*. I therefore do not uphold your Appeal.*"

38. When giving evidence, Ms MacLeod said that, as far as the outcome of the Appeal was concerned, she had three options: upholding the Appeal, confirming the final written warning or dismissal, as the claimant had been advised that these were the only two possible disciplinary outcomes. She

said that she did not consider any other sanctions, such as a verbal warning or a written warning.

39. She also said that, in arriving at her decision, she, *"took into account the fact that the claimant had disclosed in the course of the Appeal Hearing that A's husband was on the same medication"* (P.218), as this was *"a further breach of confidentiality"* by the claimant (P.259).

Grievance

40. On 8 January 2018, the claimant raised a formal grievance on the grounds of: "*withholding my salary when off sick*" (P.202).

41. This was considered by Gayle MacLeod immediately after the Appeal Hearing. Minutes were produced which I was satisfied were reasonably accurate (P.228-232).

42. The respondent's "Information on Statutory Sick Pay (SSP) and Company Sick Pay (CSP)" was produced (P.56-62) which included some examples where CSP will be withheld (P.60). In short, the CSP provided that the claimant was entitled to six months' full pay and then six months' half pay.

43. There was also included with the productions a copy of the relevant sections from the respondent's Handbook under the heading "Employees not entitled to SSP" (P.63A/63B). The following are excerpts: -

"

- *If the timing of the sickness absence coincides with an issue of poor performance or suspected misconduct in relation to which you have been suspended from work on disciplinary grounds or notified of an investigation interview or of a formal meeting under the Disciplinary, Performance, Absence or reprofiling process……*

  Your manager will hold a return to work interview with you on your return and will discuss the details of your absence. You will then be informed of whether you will be granted CSP."

44. Ms MacLeod advised the claimant that the CSP was discretionary but any decision to withhold CSP could be reviewed on her return to work (P.228).

45. On 14 February, Ms MacLeod wrote to the claimant to advise her that she had decided not to uphold her grievance (P.254/255). The following are excerpts from her letter: -

"*I explained to you that CSP is a non-contractual discretionary benefit provided to support colleagues during periods of absence relating to illness or injury.*

We then went on to discuss when you thought you would be well enough to return to work. We suggested that this could be a phased return with the option of this being in a different store if this would support you to return in the foreseeable future. You stated that at this point you did not feel you were well enough to return and have since handed in another fit note for a further four weeks……..

Conclusion

Having reviewed all of the information in my investigation your grievance letter dated 8 January and the meeting we had on 23 January 2018, I have concluded that I believe the absences are linked to your investigation and subsequent Disciplinary Hearing. There are some instances when CSP will be withheld, one of these is when the absence coincides with a disciplinary or grievance investigation/hearing. I therefore do not uphold your grievance. As a result of my conclusions I am making the following recommendations.

I believe the process by which you were informed that you were not receiving CSP could have been better. Rather than reply to a text that you sent to your Store Manager asking if you were getting sick pay, your Store Manager could have made contact with you personally to explain this to you and the reason behind it. I have asked the Area manager Claire Wilson to address this.

I appreciate that this may be an unsettling period for you and wanted to remind you that we do have an Employee Assistance Program (EAP) who can support colleagues and their immediate household members. Our EAP is run by Life Works and is free and confidential for you to use should you wish. Life Works is available 24 hours a day, 365 days a year and can be reached on ……"

46. As some 3 weeks had passed since her Appeal Hearing and she had still not been advised of the outcome of her Appeal against the issuing of the final

written warning, on 12 February the claimant sent an e-mail to Alison Winter to enquire (P. 251). She was advised that she should receive the outcome letter, *"within the next few days"* (P.251). She sent a further reminder by e-mail to Gayle MacLeod on 14 February (P.252); and a reminder to Alison Winter on 21 February (P.256). The Appeal outcome letter was sent to her by Gayle MacLeod on 21 February (P. 258-260).

47. On 24 February, the claimant sent an e-mail to Alison Winter which was in the following terms (P.264): -

"*I have been trying to phone you all morning. I left an e-mail with you the other day which you didn't reply to so can I assume that you are not my point of contact?*

I have had no contact from anyone else regarding my return to work/phased returns etc.

I am at G.P. on Tuesday late appointment and she will be asking about late options regarding my return to work. If you are no longer my point of contact then surely I would have had some kind of contact from management."

48. Ms Winter replied by e-mail on Monday 26 February (P. 264). She advised that she was on holiday and that she would call the claimant on her return on Wednesday.

Resignation

49. On 28 February, the claimant wrote to the respondent to intimate her resignation. Her letter was in the following terms (P.268): -

"*Please accept this letter of my resignation with immediate effect.*

I realise that my contractual obligation is four weeks' notice however I feel that my position with the company has been made untenable therefore making it impossible for me to fulfill this notice period.

I have worked for the company for over 12 years and feel that I was not shown any respect or offered very little support when wrongly accused of the alleged allegations relating to myself. The company withheld my salary at this time

and have been even more stressed because of the situation. All of this was detrimental to my general health and wellbeing.

The disciplinary process has taken over two months. I feel very let down by the company. I tried to contact the company about my proposed "phased" return to work and no response from anyone, another reason for my resignation!

Please ensure that any holiday pay is calculated and added to my final pay."

50. The claimant did not have alternative employment to go to when she resigned. However, she was able to secure some temporary work in a Care Home owned by an acquaintance on 5 March for a few weeks.

51. Claire Wilson, Area Manager, responded to the claimant's resignation by letter on 2 March 2018 in which, amongst other things, she invited the claimant to reconsider her decision (P. 270-272). However, the claimant was not prepared to do so.

Claimant's Submissions

52. The claimant's solicitor made written submissions. These are referred to for their terms. As I have made findings in fact based on the evidence which I heard and the documentary productions, I do not propose rehearsing these. I summarise the main aspects.

53. At the investigatory meeting, Karen Stuart suggested A had made a further assertion, namely that the claimant had said to B: "*you need to watch who your friends are in this town. Half of Nairn is on Steretaline*." However, that was untrue as the claimant made no reference to that particular medication either in her complaint (P.148/149), or when she spoke to Claire Wilson (P.160).

54. The claimant's solicitor also submitted that following the investigatory meeting it should have been apparent to Ms Stuart as the discussion between

the claimant and B took place in the claimant's home the alleged breach was not *"in the public domain".* That complaint, therefore, "*could neither competently nor fairly be pursued*".

55. Ms Stuart also accepted, as did the respondent's other witnesses, that there was an obligation to carry out a full investigation. However, she only spoke to the claimant and by telephone to Claire Wilson, who alone had spoken to A, and B was never interviewed either.

56. So far as the Disciplinary Hearing was concerned, the claimant's solicitor drew my attention to Ms Winter's conclusion that: "*I believe you've made a careless comment but not directly breached patient confidentiality. So, decision I've made is to issue you with a final written warning and that's around flippant comment you've made*" (P.186-188).

57. The claimant's solicitor submitted that this created, *"a serious problem for the respondent as the words 'confidentiality' on the one hand and the alternative 'damage offence or embarrassment' on the other, all appear together in the charge made against the claimant where the alleged offence was a comment made 'in the public domain"* (P.150).

58. Following the Disciplinary Hearing, Ms Winter issued a final written warning for the following reason (P.192): "*Although you didn't disclose the name of an individual patient's medication you did, however, make an unprofessional comment and in your position as Trainee Pharmacy Advisor I felt this was highly inappropriate and could potentially cause damage, offence or embarrassment. Potentially bringing the company into disrepute.*"

59. It was submitted, therefore, that:

"*Any idea that the original suspension and Disciplinary letters (P.150 and P.152) are setting down an accusation of two separate offences now disappears when we see that the foregoing finding by Ms Winter runs the two sentences setting down the offence into one by explaining that the making of comments in the public domain 'which may cause damage, offence or*

embarrassment' amount to behaviour which is 'potentially bringing the company name into disrepute'. There we see the second part of the alleged breach as no more than descriptive of the first.

That being the case it became critical for the respondent that before any allegation against the claimant could be established the lesser offence to the extent now found proven by Ms Winter would have to be committed within the public domain. And it was not."

"The potential sanction"

60. The claimant's solicitor also referred me to the fact that from the outset from the suspension letter, to discipline, to her appeal, the claimant had faced the potential penalty of a *"final written warning or dismissal*". He submitted: "*It may seem unusually excessive if comparing the penalty for public disclosure of a patient's confidential information against an in private off-the-cuff jocular observation that half the folk in Nairn were on anti-depressants.*"

61. It was submitted that once it was established the remark complained of was made in private that should have been an end to the matter. As it was:

"*the claimant wholly unnecessarily has had to undergo the procedures raised against her by the respondent resulting in damage to her health, her reputation and her financial situation……*

The respondents accept that this was an off-the-cuff remark. But is Boots mentioned in the sentence? Is A mentioned? Is B said to be a Boots customer? Is any specific medicine mentioned? Was the claimant quoting a factual statistic? The answer is a repeated 'No'. Accordingly how can it be alleged that such a comment could cause damage, offence or embarrassment enough to bring the company into disrepute whether made privately or publicly?

And how could it ever carry with it the potential sanction of a final written warning or dismissal?"

Appeal

62. In her outcome letter (P.258-260), Ms MacLeod acknowledged that the statement was not a breach as it had been made in the claimant's own home and not in the public domain with no reference to Boots. However, *"she remarkably finds this to be a breach of confidentiality".*

63. Surprisingly, she made a similar finding based on the claimant disclosing that A's husband was also on medication at the Appeal Hearing. *"Ms MacLeod had clearly missed the point perhaps not understanding the result arrived at by Ms Winter after the Disciplinary Hearing and certainly failing at the Appeal to see that the need to establish that whatever remarks had been made by the claimant whether to B or any of the three respondent's witnesses none met the standard needed for any finding against the claimant namely that they had occurred within the public domain. However conversely the claimant comes out worse off."*

Grievance Hearing

64. The claimant's solicitor also submitted once the respondent had decided beyond doubt that what had occurred was said in the claimant's home and was a careless remark, not in the public domain, "*At that point it was wholly unreasonable not to meet her entitlement to wages. It matters not that at that point she had not appealed.*" That decision was intimated on 21 December, eight days after the investigation and the day the claimant was signed off with stress.

"Phased Return to work – Resignation"

65. The claimant e-mailed both Ms MacLeod and Ms Winter between 14 and 21 February asking when she could expect to hear the result of the Appeal against the imposition of her final written warning. The claimant's solicitor

referred to this as the *"last formal part of the marathon process which had commenced on 13 December 2017".*

66. Although the Appeal Hearing took place on 23 January she did not hear from Ms MacLeod until 21 February.

67. As she had not received a reply from Ms Winter, she sent a further e-mail on 24 February. Ms Winter's reply was that: "*She had heard nothing from anyone else regarding return to work/phased returns etc.*"

68. It was submitted that it was "*little wonder that the claimant found herself in a position with no alternative but to resign and the reasons for her coming down to that decision in her letter of 28 February* (P.268). *Those reasons illustrate in detail why she had lost all trust and confidence in the respondent.*"

"<u>Respondent's Flawed Process</u>"

69. It was submitted that in the circumstances the respondent's failure to pay CSP whether perverse or not was nonetheless "an unreasonable exercise of discretion".

70. It was also submitted that there was an inadequate investigation. The claimant's solicitor did not submit it was necessary to investigate further with A, given her written complaint (P. 148/149) and Ms Wilson's note (P. 160). However, "*it was essential to the fairness of the investigation that the veracity of the former's complaint was confirmed by B the common denominator to and reporter of the allegation.*" It was not for the claimant to advise Ms Stuart to interview B, but as the investigator she had a duty to establish the truth in the most direct way.

71. Further, "*public domain is the phrase relied on by the respondent throughout the lengthy process in the accusation against the claimant and its*

inappropriateness was pointed out in the ET1 para.7 (P.12)*. Any reasonable employer would have recognised the flaw in the accusation as printed at an early point and terminated the investigation or consequent procedure. Ignorance is no excuse."*

72. It was also submitted that the respondent's employees dealing with complaints which require to be investigated are not permitted to "*use the many alternatives which may be applied by way of sanction.*"

73. It was further submitted: "*The Tribunal is entitled to take into account both what appears in the resignation letter and the ET1 and to conclude that the claimant's disbelief that having been cleared of the alleged confidentiality breach and though not accepted at any time not to have been a breach in the public domain the final written warning also carried quite nonsensically the apparent need for an immediate and sustained improvement.*"

74. Further, the outcome of the Appeal Hearing was inconsistent with the outcome of the comparative case involving the Store Manager. It was submitted that there was a *"sound reason"* for applying the same sanction, namely a verbal warning and allowing the claimant's appeal to that extent. To emphasise his point, the claimant's solicitor said this:

"*But surely there is a clear distinction between what on the one hand her fellow employee (the Store Manager) did within the shop premises relating to a patient of the company and what occurred as a part of a lengthy chat with a visitor over coffee in her own house. One seems to be a blatant breach capable of doing untold damage while the other in privacy makes a casual observation in her house to a friend under risk her friend repeats a false version of what was said to an interested third party.*

Each case of course is judged on its own merits. In the first case if proved even with a clean record a serious penalty must be the likely outcome. In the second case with no previous problems in more than 10 years employment and a complaint where the employer is not interested in whether B agrees that the complaint is valid they impose a final written warning to the claimant at every stage notwithstanding a 'not guilty' finding. It is hard to imagine any other set of circumstances likely to result in a loss of trust and confidence in the employer.

It will be recollected that while this was not put forward as a last straw case per chance the claimant at the end of the evidence in referring to the failure to get return communication from Ms Winter after waiting forever for an appeal result referred to that point in the interminable procedure as the last straw."

"<u>The Legal Position</u>"

75. It was accepted by the respondent's three witnesses that a full investigation ensures that all witness evidence is obtained, and this was ignored in the present case as *"they were unused to doing it that way*".

76. The claimant, an employee of some 11 years "*was subjected to a surprise request during working hours for an immediate investigatory interview on her knowledge of a client complaint that had been received.*" However, the complaint was neither read out nor displayed to the claimant during that meeting. It was only when the claimant became aware of the subject matter of the complaint that she was able to confirm she made the comment in her own home some 11 days previously to B who lived in the same street as her.

77. It was further submitted that the procedure which followed "*had no concern for fairness for the claimant*". This was a *"sudden and harrowing experience"* for the claimant, having been given no notice of the allegation.

78. "*The rejection of the appeal and the justification therefor in Ms MacLeod's decision dated 21 February is perhaps the strongest example of the respondent's fundamental lack of understanding of her function as the person designated to deal with an appeal against the severity of penalty. Again it demonstrates a fundamental breach of their contractual obligations to the claimant.*"

Breach of confidentiality etc. committed in the public domain is understandably of great concern for Boots but conversely when it is established that the alleged breach happened in a private location between two people the position must change in all respect and certainly in consideration of sanctions to be imposed……

The claimant had to wait some two months to get the appalling result of her 23 December Appeal Hearing and her grievance was rejected. She then faced a failure to pay her while off sick and a failure to communicate with her when she had hopes of making a phased return to work. She had been pressed to the point where she knew she had no alternative but to resign her position.

In spite of having had no legal advice her letter of 28 February sets down in clearest terms why she feels her position has been made untenable setting out details in her 3rd and 4th paragraphs. Those terms are repeated in the claimant's ET1 her loss of trust and confidence rendering her resignation inevitable. In their ET3 the respondent denies that the claimant is relying on a repudiatory breach but if she is then she has affirmed any such breach. The facts narrated herein establish that such an argument is wholly unfounded."

Remedy

79. Finally, the claimant's solicitor made submissions about remedy. These are considered below in my calculation of the Compensatory Award.

Respondent's Submissions

80. The respondent's solicitor also made written submissions which are referred to for their terms.

81. In support of his submissions he referred to the following cases: -

Kaur v. Leeds Teaching Hospitals NHS Trust [2018] IRLR 833;
BBC v. Becett [1983] IRLR 43;
IBM UK Holdings Ltd v. Dalgleish [2018] IRLR 4;
Braganze v. BP Shipping Ltd [2015] IRLR 487;
Private Medicine Intermediaries Ltd & Others v. Hodgkinson EAT0134/15;
Western Excavating (ECC) Ltd v. Sharp [1978] ICR 221;
Chandhok & Another v. Tirkey UKEAT/0190/14/KN;
WM Morrison Supermarkets Plc v. Various Claimants [2018] EWCA Civ 2339;
Assamoi v. Spirit Pub Co. (Services) Ltd EAT/000/50/11;
Leach v. The Office of Communications [2012] IRLR 839;
Sawar v. SKF (UK) Ltd EAT/0335/09;

Private Medicine Intermediaries Ltd & Others v. Hodgkinson UKEAT/0134/15;
R v. The Secretary of State for Foreign and Commonwealth Affairs [1985] IRLR 28;
Buckland v. Bournemouth University [2010] IRLR 445;
Nelson v. BBC (No.2) [1980] ICR 110;
Cox v. Northern Devon Healthcare NHS Trust UKEAT/0632/11;
Firth Accountants Ltd v. Law [2014] IRLR 510;
London Ambulance Service NHS Trust v. Small [2009] IRLR 563;
Parkar Foundry v. Slack [1992] IRLR 11;
Polentarutti v. Autokraft Ltd [1991] ICR 757;
RSPCA v. Cruden [1986] IRLR 83;
W Devis & Sons v. Atkins [1977] 2 ALL ER 321;
Baker v. Birmingham Metropolitan College (Employment Tribunal);
Mabey Plant Hire Ltd v. Richins CA 1993 (May);
Simrad Ltd v. Scott [1997] IRLR 147;
James Consulting Ltd v. Walton [2015] IRLR 368

"Respondent's Position – Summary"

82. It was submitted that the claimant's approach at the Tribunal Hearing was to attack the respondent's witnesses for a failure to conduct a full investigation but that is not the test for an unfair dismissal, let alone a constructive unfair dismissal case. Further, it was submitted, with reference to **Chandhok** and **Chapman**, that the alleged failure to conduct a full investigation was not cited as a reason for resigning (P.268-269) and does not appear in the ET1.

83. It was further submitted that it was not suggested that the claimant had not had a fair hearing which "*is equally suggestive of the claimant at the time having no issues with the scope of the investigation*".

84. The respondent's solicitor then went on in his written submissions to summarise the grounds for the claimant's resignation which were "*cited at the time of resigning:*"

"Ground 1"

85. The respondent was not entitled to give a final written warning. It was submitted, with reference to **Becett**, that where such a sanction is not "*totally disproportionate…… the Tribunal would fall into error in substituting its own view from what might have been appropriate and cannot found a constructive dismissal claim.*"

86. It was submitted, that the respondent, in the circumstances, was entitled to impose a final written warning.

"Ground 2"

87. The level of support/contact as accepted in evidence means there was no "fundamental breach or even a breach of contract".

"Ground 3"

88. The decision to withhold CSP, it was submitted, was in accordance with the express terms of the claimant's contract and that the respondent was entitled to exercise its discretion in this regard.

"Ground 4"

89. This related to a period of two months between the claimant's disciplinary hearing and her resignation. However, it was submitted that it was accepted by the claimant in cross-examination that no part of the process was unduly delayed.

"Ground 5"

90. This related to the alleged failure on the part of the respondent to arrange a phased return. However, it was submitted, there was no evidence that the claimant contacted the respondent in this regard, without reply and in any event "*at no point was the claimant fit to return to work*."

91. It was further submitted, with reference to **Western Excavating**, that if there was any breach of contract it was not fundamental.

"Case actually before the Tribunal"

92. The respondent's solicitor referred in his written submissions to **Chandhok** and **Chapman** and referred to several "areas of evidence" which he submitted "*were not part of the essential case that the respondent was required to answer*".

93. The respondent's solicitor then addressed each of the aforesaid Grounds in considerable detail and submitted that "trust and confidence" was intact when the claimant resigned, and she had "every opportunity to return".

94. It was submitted: "*The claimant didn't want to go back having made a mistake, was disenchanted with the prospect of rebuilding her reputation and needed the money, resigned and took other employment…..*

"The claimant was fit to work at the point she resigned but chose not to because she wished to pursue other opportunities and not return; she did not resign at that point because of a breach of contract, as evidenced by the time line of events and failure to wait for the planned communications on the day she resigned as set up by the contact with her on 26 February 2018 (P.264).

The Issues & The Tribunal's Decision

95. Having resigned, it was for the claimant to establish that she had been constructively dismissed. This meant that, under the terms of s.95(1)(c) of the Employment Rights Act 1996 ("the 1996 Act"), she had to show that she terminated her contract of employment, in circumstances such that she was entitled to do so without notice by reason of her employer's conduct. It is well established that means that the employee is required to show that the employer is guilty of conduct which is a fundamental breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee, in those circumstances, is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to enable him to leave at once.

96. The correct approach to determining whether there has been a constructive dismissal was discussed in **Western Excavating**, the well-known Court of Appeal case, to which I was referred. According to Lord Denning, in order for an employee to be able to establish constructive dismissal, four conditions must be met: -

"*(1) there must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach;*

(2) that breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous interpretation of the contract by an employer will not be capable of constituting a repudiation in law;

(3) he must leave in response to the breach and not for some other unconnected reason; and

(4) he must not delay too long in terminating the contract in response to the employer's breach otherwise he may be deemed to have waived the breach and agreed to vary the contract."

97. Accordingly, whether the employee is entitled to terminate his contract of employment *'without notice by reason of the employer's conduct'* and claim

constructive dismissal, must be determined in accordance with the law of contract. It is not enough to establish that an employer acted unreasonably. The reasonableness, or otherwise, of the employer's conduct is relevant, but the extent of any unreasonableness has to be weighed and assessed and a Tribunal must bear in mind that the test is whether the employer is guilty of a breach which goes to the root of the contract or shows that the employer no longer intends to be bound by one or more of its essential terms.

98. So far as the present case was concerned, I was mindful that there is implied into all contracts of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

99. Browne-Wilkinson J in **Woods v. WM Car Services (Peterborough) Ltd [1981] ICR 666** described how a breach of this implied term might arise: - "*To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.*"

100. In **Malik V. BCCI [1997] IRLR 462** Lord Steyn stated that, in assessing whether there has been a breach of this implied term it is the impact of the employer's behaviour on the employee that is significant – not the intentions of the employer. Moreover, the impact on the employee must be assessed objectively.

101. When I considered these authorities, I recognised that a wide range of behaviour by employers can give rise to a fundamental breach of the implied term of trust and confidence.

102. What then of the present case? Customer confidentiality is of paramount importance to the respondent and rightly so. It is a fundamental aspect of their pharmacy business and is expected by its customers. Any breach would be a serious matter. The claimant was aware of this.

Final Written Warning

103. The main reason for the claimant's decision to resign was that the final written warning was not appropriate. That was her consistent position throughout the disciplinary process, a specific point she raised at the Appeal (P. 200, for example), in her resignation letter when she claimed she had been *"wrongly accused"* (P. 268), and in her claim form when she challenged *"the disciplinary sanction"* (P. 13, Para 11).

104. That issue required me to consider what evidence the respondent had about what the claimant said and the circumstances and context in which she made the comment which the respondent considered constituted misconduct.

105. The only direct evidence the respondent had was an admission from the claimant, freely made, that she said, *"half of Nairn is on anti-depressants"* and that she was responsible for dispensing medication in the Nairn store.

106. But that comment was made in the privacy of her own home to a friend, not in public; it was made in direct response to a comment from B that the Nairn residents were "miserable"; she denied that it was made with reference to A, or indeed any other individual; she claimed it was made some time after they had spoken about A and her husband. The respondent had no evidence to the contrary, other than A's e-mail in which she communicated what she alleged she had been told by B. It was unspecific and hearsay at best.

107. The purpose of the claimant's comment was not to inform B. It was a *"throw away comment",* according to the claimant, and even Alison Winter who took the decision to issue the final written warning accepted that it was *"a careless*

comment", which had *"not directly breached patient confidentiality"* (P.187/188).

108. Also, it was a comment which was obviously factually incorrect, the sort of hyperbole often used in everyday conversation. It could not possibly be construed as referring to an individual. It is the sort of extravagant language which is not meant to be taken literally.

109. It was also the evidence of Ms Winter and Ms MacLeod that, having advised the claimant in the invitation to the Disciplinary Hearing that the "potential outcomes were a final written warning or dismissal" (P.154), they were constrained by these two sanctions. According to Alison Winter, who issued the final written warning, no lesser sanction, including taking no action was available; according to Gayle MacLeod she could have upheld the Appeal, but could not have imposed a lesser sanction such as a verbal warning or a written warning. I found this to be incomprehensible.

110. By all means, when requesting the attendance of an employee at a Disciplinary Hearing advise the employee concerned that dismissal is a "*possible"* outcome, to convey the seriousness of the situation. That is not uncommon. Indeed, it is prudent for an employer to do so, but that does not mean that a lesser sanction is no longer an option.

111. It was very surprising that there was any reference at all to a final written warning in the respondent's letter. The reference to the possibility of dismissal, the most severe sanction of all, was quite sufficient. The reference to a final written warning suggested to me that the decision was preordained and indeed it was, in the sense that the options were limited, according to the respondent's witnesses.

112. Further, during the Appeal Hearing, when emphasising that she had not told B that A was on anti-depressant medication, and explaining why that was so, the claimant made a passing reference to A's husband also being on the

same medication (P.218). That was done solely to make the point, within the confines of the Appeal Hearing, not in public. When giving evidence at the Tribunal Hearing, Ms MacLeod said that she *"took account of"* that comment when deciding to refuse the Appeal. When I questioned her what that meant, she explained that information was confidential and should not have been disclosed by the claimant.

113. That comment made in these circumstances, in that context, could not, by any stretch of the imagination, be construed as a breach of confidentiality. It was not something which should have prejudiced the claimant, but apparently it did as in the "Appeal Outcome" letter Ms MacLeod recorded that this was *"a further breach of confidentiality"* (P.259).

114. That was a quite astounding finding, especially as Ms MacLeod's ironic response to the allegation of inconsistent treatment (Appeal point 3), was that any disciplinary action which the respondent had taken in relation to a similar customer complaint against the Store Manager was "confidential" (P. 259).

115. When I considered all these factors, along with the claimant's 11 years' unblemished service with the respondent and the absence of any reliable evidence that the respondent' s good name had been brought into disrepute, I had little difficulty at arriving at the view, as the claimant had maintained consistently, that the final written warning was inappropriate. In my view it was manifestly inappropriate. With reference to **Bocett**, it was *"totally disproportionate".* It was also quite clear that this was one of the reasons why the claimant felt that she had to resign.

116. Another contention by the claimant was that the respondent had failed to carry out a "proper investigation". During the disciplinary proceedings she quite properly raised the importance of establishing exactly what B had communicated to A about their conversation in the claimant's house. That was crucial to the investigation, as it was the claimant's consistent position from the outset that at no time during her private conversation with B had she

informed her that A was taking anti-depressant medication. As the claimant explained in her written statement, she had "*no control over how B has construed our conversation to A*" (P.114), which she reiterated at the Disciplinary Hearing (P. 180). Exactly what was communicated could easily have been established by the respondent investigating further with A and B but that was never done.

117. That was one of the reasons why the claimant and her trade union representative claimed at the Appeal that there had not been a *"proper investigation*" (P.216, for example).

118. That point, in my view, was well made. Not only was the respondent unaware of what had been communicated by B to A, the claimant had consistently and vehemently denied telling B that A was taking medication. That conflict could only properly be resolved by further investigation with A and B, by explaining C's position to them and asking for their comments.

119. The respondent's position was that such an investigation was not something which Boots *"normally do",* as it was "*an internal matter"*. That was a wholly unsatisfactory explanation. They did not even take steps to enquire of A and B whether they would be prepared to comment further. Also, it had been A who had made the complaint in the first place and she "had given permission to investigate" (P.160). So, being asked for further comment would not have been unexpected.

120. Also, the respondent's Area Manager, Claire Wilson, at the foot of A's e-mail of complaint had noted that A was "*happy to discuss with AM/SM*" (P.149) which I understood to mean Boots Management.

121. There was no impediment to seeking further information from A and B or, at the very least, asking them if they were prepared to do so. The investigation was not balanced. It was fundamentally flawed and the claimant's contention that there had not been a proper investigation was well-founded.

122. As the respondent's solicitor submitted, quite properly, with reference to **Chandhok** and **Chapman**, a failure to fully investigate was not pled as being a reason for the claimant's resignation and I was mindful of that. He also objected at the Tribunal Hearing to criticism of the process by the claimant's solicitor. However, it was still relevant to my consideration of the basis on which the respondent issued the Final Written Warning and the claimant's contention that it was not merited which was an alleged reason for her resignation and *was* part of the case (Para 11 in the Paper Apart to the claim form at P.13). The failure to carry out a proper investigation was raised during the disciplinary process and at the Appeal (P. 216, for example). The fact that the respondent chose not to investigate further meant that the only direct evidence the respondent had about what was said, the circumstances and the context, was the claimant's account. The only conflicting evidence they had was A's complaint which was hearsay and lacking in detail and could not reasonably have been preferred to the claimant's consistent, credible and reliable account.

123. It also meant, in relation to the only allegation relied upon for issuing the Final Written Warning, that the respondent did not have any direct evidence, that their *"good name"* had been *"brought into disrepute".* They only had hearsay evidence which was unreliable, as it was disputed, not detailed and had not been investigated or tested in any way. It was not possible to find that there was substance in the allegation and issue a Final Written Warning because of that, without knowing what had been communicated to A and whether it was accurate. During the Appeal Hearing, in response to the claim that there had not been a proper investigation Ms MacLeod said, *"We may never understand why it came to be a customer complaint"* (P. 217/218) and yet she still refused the Appeal continued to maintain that the claimant had *"disclosed information regarding patients"* (P. 259), rejected the Appeal and supported the decision to issue a Final Written Warning.

Other reasons for claimant's resignation

124. In her Appeal, the claimant raised two other matters of concern in addition to the appropriateness of the final written warning (P. 200/201).

125. The first was the requirement in the final written warning that the respondent *"needed to see an immediate and sustained improvement in her conduct".* That did not seem to make any sense to the claimant as the first allegation against her had been dismissed, her annual appraisals had always been excellent, she had almost completed her NVQ3 and she had been awarded an honorarium for her work at the Nairn store.

126. She was advised by Ms MacLeod at the Appeal Hearing that this wording went in all the respondent's outcome letters of this nature and was not directed specifically at her (P.222) and this was confirmed in the outcome letter itself (P.259).

127. This was a minor factor in the claimant's decision to resign, but nevertheless it was understandable that she was dissatisfied with this explanation.

128. The other point the claimant raised on Appeal and in her claim form, about inconsistency of treatment, when viewed objectively in the context of a constructive unfair dismissal claim, was of greater significance. She alleged that a previous Store Manager had been treated much more leniently than she had been for an alleged breach of confidentiality, following a similar complaint.

129. The point was investigated by the respondent. The Store Manager was interviewed (P.210-213). From the information provided by the claimant and the statement which was taken from the Store Manager, it was clear that this also involved a customer complaint and what appeared to be an admitted breach of confidentiality, in circumstances which did not appear to be

dissimilar. However, in the case of the Store Manager he was not given a warning, only some sort of verbal reprimand.

130. While there appeared to be a clear inconsistency of treatment, I remained mindful that the test was not the reasonableness of the employer's conduct, as the present case involved a complaint of constructive unfair dismissal. However, what was significant, in that context, was the respondent's response to this allegation which was as follows (P.259): -

"*You then went on to inform me of a similar incident involving your Store Manager at the time back in November 2015 where a complaint was made as a result of him delivering medication to the customer's workplace and discussing her daughter's medication in front of her work colleagues, you felt you were dealt with much more harshly than he was by his Line Manager which led you to feel you had been discriminated against. I explained that I was unable to comment on the previous complaint as the matter was confidential. However as a company we take every customer complaint very seriously and each would be fully investigated and any learnings put into place to prevent the same thing happening again.*"

131. That was not a satisfactory response. It was not a proper response at all. It did not address the issue in any meaningful way. The claimant was justifiably dissatisfied with that response. That was another factor in her decision to resign.

132. The failure to address the claimant's appeal points adequately was aggravated by the delay in advising her of the outcome. The Appeal Hearing took place on 23 January; despite reminders from the claimant, she was not advised of the outcome until 21 February (P.258/259); the response from the respondent in that outcome letter was unsatisfactory. Nor was any phased return suggested. This added to the claimant's dissatisfaction at the way she was being treated and she resigned shortly thereafter on 28 February (P.268), advising that she felt her position was *"untenable".*

133. There were a number of factors, therefore, the cumulative effect of which led to the respondent damaging the relationship of trust and confidence. The

most significant was the issuing of the final written warning which was wholly inappropriate in all the circumstances and the decision not to retract it. Had the claimant not resigned, she would have returned with this warning hanging over her head for 12 months. She was aware that any further complaint in that period, if substantiated, would result in her dismissal. She had no confidence that the respondent would investigate properly and support her. She was not prepared to return in those circumstances. These were not circumstances, in my judgment, she could reasonably have been expected *"to put up with"* (**Woods**).

134. For all these reasons, therefore, I decided that the respondent had, without reasonable and proper cause, conducted itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation, since it necessarily goes to the root of the contract. I arrived at the view, therefore, the respondent was in material breach of contract.

135. Not only did the respondent have a duty to its customers to take reasonable steps to ensure confidentiality, it had a duty to take reasonable steps to maintain the trust and confidence of its employees. In that latter duty it failed. It appeared to me that in their overwhelming and blinkered desire to demonstrate to its customers the importance of confidentiality, it lost sight of its duty to its employees. I believe that was why initially one of the allegations was a breach of confidentiality *"in the public domain"* which was persisted with even after it had been established that the comment had been made by the claimant in the privacy of her own home to a friend.

136. I was also satisfied, with reference to **Western Excavating**, that the claimant resigned in response to that breach and that she did not delay too long in terminating the contract. She had exhausted all procedures open to her and her justifiable concerns had still not been satisfactorily addressed. It was not long after she received intimation that her Appeal had been unsuccessful, the

last formal procedure open to her, that she resigned. It was not something she did lightly. She regretted having to do so. She had enjoyed her work and was proud of the progress she had made to such a senior position. She was also uncertain whether she would be able to complete her studies for her SVQ3 qualification. She did not have another job to go to, but she felt she had no option as she had lost all trust and confidence in the respondent and they had made her position "untenable". I believed her. I had no difficulty rejecting the submission by the respondent's solicitor that she resigned *"because she wished to pursue other opportunities and not return".* It was abundantly clear that was not the case. Her evidence to the contrary was consistent, credible and reliable. It was *"a massive decision",* as she put it.

137. I was satisfied, therefore, that in all the circumstances, viewed objectively, the claimant was constructively dismissed. I was also satisfied that the dismissal was unfair.

Grievance

138. I also record, for the sake of completeness, my views on how the respondent dealt with the claimant's grievance which she raised on 8 January 2018 in relation to "withholding my salary when off sick" (P.202).

139. Her grievance was addressed by Gayle MacLeod at a meeting on 23 January 2018 (P.228/232).

140. It was not disputed that payment of Company Sick Pay (CSP) which I understand "tops up" SSP to normal salary, when an employee is signed off work due to ill-health, is a discretionary matter for the respondent.

141. In the outcome letter Ms MacLeod explained that it can be withheld if it coincides with a "disciplinary or grievance investigation/hearing" which she believed was the case.

142. The way the respondent communicated its decision not to pay CSP to the claimant by text message was not entirely satisfactory and a more supportive employer might well have reinstated her pay when they had the claimant's account and when it was clear that what she said was not in the public domain. But, in my judgment, in the context of a constructive unfair dismissal complaint the respondent's decision not to pay CSP was not a breach of contract and nor was it a factor in the undermining of the implied term.

143. The respondent was entitled, contractually, to make that decision and it could have been reviewed had the claimant returned to work. It was not insignificant that claimant did not appeal against the outcome.

Remedy

144. The remedy sought by the claimant was compensation. The claimant's solicitor produced a Schedule of Loss which is referred to for its terms.

Basic Award

145. It was not disputed that in the event of a finding of unfair dismissal the Basic Award would be **£3,919.50** in terms of the claimant's Schedule.

Compensatory Award

146. So far as the Compensatory Award is concerned, I was satisfied, based on her credible and reliable evidence, that the claimant had taken reasonable steps to mitigate her loss, and bearing in mind that she was 47 years of age, had worked with the respondent exclusively for over 10 years and was committed to working for them, long-term. That was why she was studying for the SVQ3 qualification. I decided, in all the circumstances, therefore, that it would be just and equitable to award her compensation to reflect her financial loss.

147. Shortly after her dismissal, the claimant was able to obtain temporary employment at a Care Home for about a month. She then secured employment at Lloyds Pharmacy in Nairn in the period from 28 March until 29 September when she left to do supply teaching.

148. In his submissions, the respondent's solicitor maintained that the calculation should cease when the claimant left the Care Home or, in the alternative, when she left Lloyds, as the *"chain of causation"* had been broken. While I was mindful that in terms of s.123(1) of the 1996 Act the compensation is in respect of loss sustained *"in consequence of the dismissal",* I was not persuaded that that submission was well-founded.

149. The reason for this was that her initial work at the Care Home was only on a temporary basis and her earnings at Lloyds are comparable with what she is now earning doing supply teaching. The fact that she changed jobs did not break the chain. It had no bearing on the calculation. Her financial loss continued at the same rate and I was satisfied that she had taken reasonable steps to mitigate her loss which was not challenged by the respondent. It was clear that she sustained a loss of earnings to the date of the Tribunal Hearing and she has an ongoing loss. I was satisfied, in these circumstances, it would be *"just and equitable"* to award her compensation from the date her employment ended until the date of the Tribunal Hearing and for the future.

150. It was agreed that when she was employed by the respondent she earned on average £317 net per week. Had she remained in the respondent's employment, therefore, she would have earned **£10,144** for the 32-week period from the date her employment ended on 28 February 2018 until the date of the Tribunal Hearing on 11 October 2018.

151. In his written submissions, the claimant's solicitor set out the earnings which she had received in that period, which I was satisfied were reasonably accurate. They total, **£5,792**, leaving a balance of **£4,352**.

152. The claimant also has an ongoing wage loss of around £50 net per week. It will take her some time to achieve the level of earnings she enjoyed with the respondent, if she ever does. I decided in the circumstances, therefore, it would be just and equitable to award her compensation to reflect her future loss of earnings for a period of 26 weeks, a total of **£1,300**.

Loss of statutory rights

153. It was not disputed that in the event of an unfair dismissal finding it would be appropriate to make an award for so-called "loss of statutory rights". I am satisfied that the **£350** sought is reasonable.

154. Accordingly, the total Compensatory Award is **£6,002** and, when this is added to the Basic Award of **£3,919.50**, the total award of compensation is **£9,921.50.**

155. In arriving at this award, I was mindful that Tribunals are entitled to take a broad view. I also had regard to the fact that the claimant had been studying for a SVQ3 qualification. She had done well in her studies which were close to completion and I was satisfied that she almost certainly would have secured this qualification with a resultant salary increase had she remained in the respondent's employment. I was satisfied, with reference to **Wilton**, to which I was referred by the respondent's solicitor, that a "*real and substantial*" chance had been lost. I have not quantified this loss, but simply record that it was a factor which I had regard to when considering what would be a just and equitable award.

Contributory Conduct

156. I record, for the sake of completeness, that, in all the circumstances, I was not persuaded that the claimant had contributed in any way to her dismissal and that a deduction in the award of compensation would be appropriate to

reflect that. The *"careless comment"* she made to B was the only possible contributory conduct on her part. However, I was of the view that the nature of the comment and the circumstances and context in which it was made did not contribute to her dismissal. It did not warrant a final written warning and that was a material factor in the claimant's decision to resign.

CSP

157. The claimant's solicitor also submitted that I should make an award that would reflect the respondent's failure to pay the claimant CSP when she was off work. This would appear to be a breach of contract claim but it does not arise on the termination of her employment and nor can it be included in the Compensatory Award, as it is not a loss sustained as a consequence of the dismissal. I do not consider, therefore, that the Tribunal has jurisdiction to consider such an award and it is refused.

Employment Judge: Nicol Hosie
Date of Judgment: 22 November 2018
Entered in Register: 22 November 2018
and Copied to Parties