



EMPLOYMENT TRIBUNALS

Claimant: Mr S Safdar

Respondent: Asda Stores Ltd

HELD AT: Leeds

ON: 13 and 14 September 2018

BEFORE: Employment Judge Davies

REPRESENTATION:

Claimant: Ms H Gardener (counsel)

Respondent: Ms L Stratton (solicitor)

JUDGMENT having been sent to the parties on 18 September 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This was a claim brought by Mr S Safdar against his former employer, Asda Stores Limited. The Claimant has been represented by Ms H Gardener, counsel, and the Respondent by Ms L Stratton, solicitor. I was provided with an agreed bundle of documents and I looked at those to which the parties drew my attention. I heard evidence for the Respondent from Mr C Shackleton, Trading Manager, Mr P Thompson, General Store Manager, and Ms S Stringer, People Trading Manager. The Claimant gave evidence on his own behalf.

The Issues

2. We discussed at the outset of the hearing the issues to be decided. The Claimant accepted that the reason for his dismissal was the potentially fair reason of conduct. The remaining issues were therefore:

- 2.1 Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant, having regard in particular to whether:
 - a. there were reasonable grounds for that belief;
 - b. at the time the belief was formed the Respondent had carried out a reasonable investigation in the circumstances;
 - c. the Respondent otherwise acted in a procedurally fair manner;
 - d. dismissal was within the range of reasonable responses?
- 2.2 If the Claimant's dismissal was unfair, what is the chance, if any, that he would have been fairly dismissed in any event?
- 2.3 If the Claimant was unfairly dismissed, did he cause or contribute to his dismissal by his own culpable and blameworthy conduct?

The Facts

3. The Respondent is the well-known supermarket chain, Asda Stores Limited. I was referred to a number of its policies. The only one I need to refer to at this stage is the Disciplinary Policy. It contains particular provisions dealing with disciplinary proceedings against pharmacists employed at in-store pharmacies. The Policy makes clear that where there is any pharmacy incident, including suspected acts of theft or dishonesty, that leads to an investigation and potentially disciplinary action, the Respondent's Superintendent Pharmacist must be notified. Further, the Superintendent Pharmacist must be consulted throughout the process as a subject matter expert. This includes when the investigation is started and finished, when formulating the allegation and before a final decision is made. In this case the Superintendent Pharmacist is a Mr Tuddy. The Disciplinary Policy goes on to set out examples of potential gross misconduct specific to pharmacists. One of those examples is failure to report any investigatory or disciplinary action or failing to report any conditions imposed on practice by any regulatory body either prior to employment or during employment.
4. Mr Safdar was given a contract of employment and a handbook. The handbook made reference to the Disciplinary Policy but he was not actually given a copy of it. He could access it on the intranet. As well as the Superintendent Pharmacist, the Respondent has a Regional Pharmacy Coach called Mr Cooper.
5. The Claimant has been a registered pharmacist since 2012 and started working for the Respondent in March 2013. His contract of employment did not say anything about notifying his employer of any investigation against him, but it did say that he must keep his employer fully informed of any change to his General Pharmaceutical Council ("GPhC") registration.
6. In September 2013 the Claimant moved to the Halifax store as a Pharmacy Manager. His line manager was Ms H. While their relationship was initially fine, eventually issues developed within it. By April 2018 the Claimant had submitted a lengthy grievance about Ms H and also a Manager called Ms W. That related in large part to difficulties about his rota and working hours. He said in his evidence that he had raised his concerns about that with the General Store Manager ("GSM"), who had given a fairly dismissive response. That had affected the Claimant's relationship with the GSM.
7. In November 2016 the Claimant's relationship with his partner ended and she made a complaint to the GPhC about him. The GPhC wrote to him on 25 January 2017. They told him that they had received some information about him, which they were reviewing as part of their statutory duty. They were at a very early stage and were asking for

information. The letter said that the author was managing the GPhC's investigation of the concerns. It then set out what the GPhC's role was and what the process was. That made it clear that once information had been gathered a decision would be made, which might be that the matter was closed or it might be that it was referred to an investigating committee. The investigating committee might in turn refer the matter to a fitness to practise committee.

8. The Claimant was asked to provide some information. The letter said that the GPhC would disclose information about an investigation to employers and might request further documents. They would therefore be grateful if the Claimant could provide them with his "employer's contact details" so that they could obtain further information from the employer. No restrictions were imposed on the Claimant's ability to practise at that stage.
9. It is not disputed that the Claimant spoke to the other Pharmacy Manager at Halifax, a Mr T. He then provided Mr T's name and the address of Asda stores at the Halifax store in response to the request from the GPhC. The GPhC wrote to Mr T asking him particular questions about the Claimant's hours of work, the position he held, his role, whether there had been complaints about him, whether he was able safely and competently to carry out drug administration and so on. Mr T responded to the GPhC on 20 February 2017 providing answers to those questions that were all positive so far as the Claimant was concerned.
10. The Claimant says that he also verbally informed the GSM on the shop floor about the GPhC proceedings in January or February 2017. I return to that below.
11. It was shortly afterwards, on 1 April 2017, that the Claimant put in his grievance against Ms H and Ms W. He was signed off work with stress with effect from 3 April 2017 and he remained off work until September. During that period he went through a grievance investigation meeting. His grievance was partially upheld. He appealed and his appeal was partially upheld. There followed mediation between him and Ms H and he returned to work on 18 September 2017. The grievance was conducted by Mr Shackleton.
12. In October 2017 the GPhC wrote to the Claimant with an allegation that his fitness to practise was impaired by virtue of a medical condition. They asked for his response to that and he provided it. That seems broadly to have coincided with the GPhC telling Mr Tuddy in about mid-October that the Claimant's name was on a list of ongoing investigations involving pharmacists employed by Asda Stores. Mr Tuddy contacted Mr Cooper, who did not know anything about the investigation. He in turn contacted Ms H on 1 November 2017. She asked the Claimant whether he was being investigated by the GPhC and he confirmed that he was and explained the circumstances.
13. That led to the instigation of a disciplinary investigation against the Claimant led by Ms Wolstenholme. She held an investigatory meeting with the Claimant on 6 December 2017 to deal with an allegation that he had failed to report an investigation by his regulatory body. The Claimant explained to Ms Wolstenholme that the allegations had been made by his ex-partner to the GPhC and were false. He said that the matter was not at the investigation stage yet and he went on to say that he had notified the manager he worked with and the GSM. He said that the GSM was more interested in Saturday working. That is the issue that had been the subject of the Claimant's grievance. The Claimant told Ms Wolstenholme that he told the GSM about the GPhC issue on the shop floor and that he did so verbally. He confirmed that he had also told Mr T. He agreed that Mr T was a manager, but that Ms H was his line manager.

14. Although no point was taken about this, the tone of the notes of the investigation meeting certainly gives the impression that by the end Ms Wolstenholme had rather formed a view and was pressuring the Claimant into agreeing with that view by repeatedly asking the same question. Ms Wolstenholme also interviewed Ms H, who said that she had not known anything about the investigation, and Mr T. It appears that the interview with Mr T was not as part of the Claimant's disciplinary process but because separate disciplinary proceedings were brought against him for knowingly providing a false employer's reference. In the course of that investigation Mr T told Ms Wolstenholme that the Claimant had told him that he had reported the matter to his employer.
15. Ms Wolstenholme also investigated the matter with the GSM by telephoning him on 11 December 2017. She asked him whether he knew that an investigation was being conducted by the GPhC into the Claimant. He said that he did not. She then asked whether the Claimant ever disclosed it to him and recorded the GSM's answer as, "No he didn't." She went on to ask what steps the GSM would have taken if it had been reported and the GSM said that he would have sat down with the Claimant, understood what the Respondent's responsibilities were and so on. The GSM also confirmed that Mr T and the Claimant were not friends, they were just peers.
16. Ms Wolstenholme held a further investigation meeting with the Claimant on 13 December 2017, during which she told him that the GSM had told her that he had not had any conversation with the Claimant about the GPhC proceedings. The Claimant's response was that the GSM did not listen. He said that he had not got to the point of being able to tell him what the allegation was and that he was not interested. During the course of this meeting the Claimant also confirmed that if something like this happened again he would go to the Superintendent Pharmacist. At the end of the meeting he was suspended and Ms Wolstenholme recommended that he face disciplinary proceedings.
17. On 14 December 2017 the Respondent therefore wrote to the Claimant inviting him to attend a disciplinary hearing on Tuesday 18 December 2017. He was provided with a copy of the notes of the two investigation meetings that he had attended, but not with the notes of the conversation with the GSM or the meetings with Mr T.
18. The Claimant telephoned on Sunday 16 December 2017 and asked for the hearing to be re-arranged. It was by that stage very short notice. He wanted to be represented by a member of his union the Pharmacists Defence Association ("PDA"). The meeting was re-arranged for 29 December 2017 and a letter was written informing him of that.
19. On 22 December 2017 the Claimant telephoned again and he followed that up with an email on 27 December 2017 saying that a representative from the PDA was available to accompany him to a disciplinary hearing on 15 or 16 January 2018. On 29 December 2017, the hearing was rescheduled to 5 January 2018. Plainly that was not one of the dates on which he had said his representative was available and there was no indication of whether those dates had been taken into account. He contacted the Respondent again on 2 January 2018 saying that he was entitled to bring his own representative and reminding the Respondent that his representative was available on 15 and 16 January 2018. He chased it up again on 4 January 2018 and eventually later that day the disciplinary hearing was rescheduled for 12 January 2018. That of course was still not one of the dates he had provided when his representative was available. He contacted the Respondent again on 8 January 2018, to reiterate the dates on which his representative was available. Eventually he telephoned Mr

Shackleton and he was told that the hearing would go ahead without him if he did not attend on the 12 January 2018.

20. I was not provided with any evidence about why the Claimant's dates were ignored on two occasions or were not accommodated when the hearing was re-listed. Nor was I given any substantive explanation as to why the hearing had to take place on the 12 January 2018 rather than 15 January 2018. Indeed, Mr Thompson accepted in cross-examination that it would have made no difference at all. It seemed to me that this was policy for policy's sake. This was an allegation that dated back to the previous January. It had taken the Respondent some weeks from finding out about the GPhC proceedings to actually instigating an investigation. It does not seem to me that anyone really turned their mind to whether it was reasonable to postpone the hearing until 15 or 16 January 2018 so that the Claimant's chosen trade union representative could accompany him. They were just slavishly applying the policy, which said that the disciplinary hearing had to be listed within seven days of the previous hearing.
21. In the meantime a number of things had happened. First, Mr Shackleton had conducted disciplinary proceedings against Mr T. He had found that Mr T had committed misconduct and issued him with a first written warning. Secondly, on 21 December 2017, having contacted Ms H and others, the Respondent wrote to the GPhC answering again the questions that Mr T had answered the previous February. The Respondent made clear that it had no concerns about the Claimant's fitness to practise, notwithstanding the fact that he was currently facing the internal disciplinary proceedings to which I have referred. Thirdly, on 9 January 2018 the GPhC wrote to the Claimant to confirm that the case had been closed without any action being taken against him.
22. The disciplinary hearing took place as planned on 12 January 2018. It was conducted by Mr Shackleton with Ms Twydale present as a note taker. The Claimant attended without his representative. At the outset Mr Shackleton asked him if he wanted to be represented and he said that he did but that they were not letting him have a representative. Mr Shackleton told him that he could have a representative and he pointed out that he was not being allowed his chosen representative. Mr Shackleton said that he had had to re-arrange the hearing four times and needed to hold it in a timely fashion. He said that it was not reasonable to wait a month for a representative. Mr Shackleton offered to arrange a company representative and a Ms Bateman was brought to assist the Claimant. He had a 25 minute discussion with her and when they came back into the disciplinary hearing he was asked if he was happy to continue with her as his representative. He said that she would do but that she had told him it was a bit over her head. Ms Bateman confirmed that she had had her training and was happy to represent the Claimant. A short while later there was a further adjournment for a document to be obtained. After that adjournment Ms Bateman repeated the Claimant's request that the hearing be adjourned so that he could be accompanied by his own trade union representative. The notes record that Ms Twydale simply said, "No." After that point in the hearing there is nothing in the notes to suggest that Ms Bateman took any further part.
23. During the course of the disciplinary hearing the Claimant made a number of points. He said that the GPhC letter did not say that he was being investigated. This related to his point that while the letter did include the word "investigation" at various points, there was only a formal "Investigation" when a complaint was referred to an Investigation Committee and that these proceedings had not reached that stage. The Claimant also said that he had provided Mr T's contact details to the GPhC because

he was in the pharmacy. He said he had told the GPhC that he worked for Asda and, given that he was a pharmacist and not a till operator, he thought it was appropriate to provide the contact details of the other Pharmacy Manager. He also told Mr Shackleton that the section of the Disciplinary Policy that was being relied on by the Respondent [to which I have referred above] did not say that he had to report the matter to his line manager. It just said that it had to be reported. Mr Shackleton's response at that point was that he was not getting into a debate about the policy wording.

24. During the course of the disciplinary hearing Mr Shackleton did not ask any questions of the Claimant about whether he had told the GSM about the GPhC proceedings and he did not discuss with him what the GSM had said on the telephone to Ms Wolstenholme. He certainly did not put to him that he had *not* told the GSM or ask him to comment on that suggestion.
25. At the end of the hearing, seemingly by way of summing up, the Claimant said that he did not present any risk. He said that if anything like this happened again he would tell the Superintendent Pharmacist and that if he was unsure he would ask for help. He confirmed that he had told Mr T and he reiterated that he had told the GSM but that he was not interested.
26. After an adjournment to consider the matter Mr Shackleton gave the Claimant his decision. He started by saying that it was clear that the Claimant understood the investigation and the reasons for it, but did not accept that he could have acted differently. He said that the Claimant had chosen to tell Mr T about the GPhC proceedings over the GSM, thinking that same level reporting was acceptable and that it was not. Mr Shackleton did not make any finding about whether or not the Claimant had reported the matter to GSM. Having summarised a number of points, Mr Shackleton told the Claimant that his decision was to summarily dismiss him. He did not ask the Claimant before doing so whether there was anything he wanted to say in mitigation or about the appropriate sanction.
27. This outcome was confirmed to the Claimant in a letter dated 12 January 2018. It summarised Mr Shackleton's findings in the same way that he had summarised them at the end of the disciplinary hearing. There was again no finding about whether the Claimant had told the GSM about the GPhC proceedings and certainly no explanation about why the GSM's version of events had been preferred.
28. Mr Shackleton was asked about a number of these matters in cross-examination. His answers included the following:
 - 28.1 Mr Shackleton said that at the start of the disciplinary hearing he was unaware that two of the dates that had been fixed and re-arranged had been fixed in the knowledge that the Claimant's representative was not available on those days. He was pressed to explain why he had insisted in going ahead when the Claimant asked for an adjournment to have his own representative present and he said that it was because he had said he would do it with Ms Bateman. He was then asked why that did not change when Ms Bateman was saying that the Claimant wanted to have his own representative later in the hearing. He was unable to explain why he went ahead.
 - 28.2 Mr Shackleton confirmed that having conducted Mr T's disciplinary proceedings he had the documentation relating to that to hand, although he did not refer to it during the course of the Claimant's disciplinary hearing. He said that it was all "part of the same spectrum." Mr Shackleton accepted that during the course of

- both investigatory meetings and during the disciplinary hearing the Claimant had said that he would behave differently if this happened again and that he would report the matter to the Superintendent Pharmacist.
- 28.3 Mr Shackleton confirmed that although his outcome letter and the outcome given verbally were silent on the matter, he had found that the Claimant did not report the matter to the GSM. He accepted that the GSM had never been asked in detail about the Claimant's versions of events, i.e. that this was a conversation on the shop floor and that he had not been listening and had been talking about Saturday rotas. He accepted that the GSM was not asked whether he might not have heard or might not have understood or might have forgotten the conversation.
- 28.4 Mr Shackleton confirmed that when deciding that he preferred the GSM's version of events, he did not take into account the fact that Mr T had told Ms Wolstenholme that the Claimant had told him that he had reported the matter to his employer. Mr Shackleton accepted that this potentially corroborated the Claimant's versions of events. He was asked why he did not believe the Claimant when he said he had reported it to the GSM. He said that it was because the Claimant would not have asked Mr T for the employer reference if he had reported it to the GSM. He was asked about that in a little more detail. It was clear that he thought the GPhC asked the Claimant to provide the information that Mr T was ultimately asked to provide. It seemed to me that he did not realise that all the Claimant had been asked to do was to provide employer contact details.
- 28.5 Mr Shackleton was asked how he had been able to reach a decision that he believed the GSM's version of events and not the Claimant's when he had not asked the Claimant about it, or told the Claimant what the GSM said, or suggested that that might be right. He said that he did not know. He then went on to suggest that he had preferred what the GSM said because the Claimant had provided Mr T's name to the GPhC. He was asked why it mattered that the Claimant had provided Mr T's name to the GPhC and why that affected the question whether or not he had reported the matter to the GSM. He said that he did not know.
- 28.6 Mr Shackleton accepted that if the Claimant had had a conversation on the shop floor with the GSM as he described that would have been reporting it within the confines of the Disciplinary Policy. He did not know why he had not told the Claimant what he thought the Policy meant.
- 28.7 As far as the sanction of summary dismissal was concerned, Mr Shackleton confirmed that he did not discuss with anybody else, including the Superintendent Pharmacist, the Pharmacy Coach or the Store Managers, whether there was trust in the Claimant. He did not think about whether any broken trust could be mended. He did not consider the fact that it had been two months before the Claimant had actually been suspended and he did not consider the fact that a positive reference had been sent to the GPhC in the knowledge that the Claimant was facing these disciplinary proceedings. Furthermore, he did not take into account the fact that the Claimant had said three times on different occasions that he would act differently and would report the matter to the Superintendent Pharmacist in future. Indeed, Mr Shackleton proceeded on quite the opposite basis: that the Claimant had not indicated that he would behave differently in future.

- 28.8 When he was asked about why he had decided that summary dismissal was appropriate, Mr Shackleton's initial answer was, "It was a gross misconduct offence which carries dismissal." He was not able to identify any mitigating circumstances. In light of the fact that there was no discussion about potential mitigation or alternatives to summary dismissal, it seemed to me that that really reflected his approach: because it was gross misconduct, summary dismissal automatically followed.
29. I also note that at this stage there had been no consultation whatsoever with Mr Tuddy.
30. The Claimant appealed against his dismissal and set out a number of grounds of appeal in writing. He said that the sanction was excessively harsh. He dealt in detail with what he said he had reported to the GSM. He made the point that Mr T had not been interviewed and said that there was also another witness who had seen him speak to Mr T about it. He requested that these two were interviewed and that the notes were provided. He made his point about the Disciplinary Policy being unclear about what he was actually supposed to do and he set out a number of other concerns.
31. The appeal hearing took place on 8 February. It was conducted by Mr Thompson with a note taker present. The Claimant was on this occasion accompanied by his representative from the PDA, a Ms Helme. He still had not been given copies of the investigation notes involving Mr T nor had he been given the note of the conversation with the GSM. He was not asked about that by Mr Thompson during the course of the appeal hearing.
32. At the outset of the appeal hearing Mr Thompson took issue with Ms Helme's approach and he was asked about that in his evidence to me. It seemed to me that he took a remarkable approach to the role of a trade union representative. He seemed to think that the representative was there only to assist the employee if they became upset or if they did not understand the question. Indeed, he had gone to the trouble of writing a long note during one of the adjournments of the appeal hearing, apparently complaining about the fact that Ms Helme had a notebook in front of her with 20 different grounds of appeal that she was ticking off as they went through. He said in his evidence to me that Ms Helme did not understand her role, but it seemed to me that it was Mr Thompson who did not understand Ms Helme's role. That evidently made for something of a hostile or confrontational appeal meeting. The Claimant plainly became somewhat agitated or animated during the course of it and the approach that was being taken to his representative no doubt contributed to that.
33. The appeal hearing lasted four hours and afterwards Mr Thompson investigated a number of the points that had been raised. He did so by sending emails to people including Mr Cooper, Ms Twydale, Ms H and Ms Wolstenholme. He does not appear to have probed further than the responses they gave, which were to some extent set out in the appeal outcome. Mr Thompson also said that he spoke to Mr Tuddy before and after reaching his decision and once during the appeal hearing as well. No note was kept of any of those discussions. When I asked him what the role of the appeal manager was, Mr Thompson was rather unclear whether he was deciding afresh if there had been misconduct and what the sanction should be, or was reviewing the decision made by Mr Shackleton.
34. The appeal hearing was re-convened on 12 March 2018 for Mr Thompson to give the Claimant his decision. However, that attempt was abandoned when the Claimant became agitated, and Mr Thompson set out his decision in writing instead. The outcome was that the Claimant's appeal was rejected.

35. In respect of the appeal, I make the following particular findings:
- 34.1 One of the Claimant's points was that he had not been provided with notes of the discussion with Mr T. That was followed up by Mr Thompson after the appeal hearing with Ms Twydale. The Claimant was told that because the notes were part of the investigation into Mr T's conduct they were on his personal file. It was suggested to him that his disciplinary invitation letter had told him that he could put forward any suggested questions to be explored with the relevant witnesses. That, of course, did not help the Claimant in his appeal. How could he know what questions might be relevant if he had not seen what Mr T said?
 - 34.2 Mr Thompson did not know why he had not asked to see for himself what Mr T had said. He accepted in cross-examination that it might have been relevant.
 - 34.3 Mr Thompson was asked about the Claimant's concern that he had not been allowed to be accompanied by his trade union representative. He confirmed in cross-examination that when he had referred to the fact that the hearing had been re-arranged four times, he did not know that two of the dates had been fixed knowing that the Claimant's representative was unavailable on those dates. He accepted that he ought to have known that. The investigation Mr Thompson carried out into this issue appears to have comprised simply asking Ms Twydale and accepting what she told him. In his outcome letter on this point he set out an extract from the notes of the disciplinary hearing. That extract related to the start of the hearing when the Claimant indicated that he would proceed with Ms Bateman and she said that she was happy to do it. Mr Thompson said that that did not support the Claimant's versions of events. He failed entirely to refer to what was said on the next page of the notes, after the adjournment, when Ms Bateman asked for an adjournment so that the Claimant could have his own union representative. That seemed to me to be cherry picking from the transcript and to betray a failure properly to grapple with the Claimant's ground of appeal. As I have indicated Mr Thompson accepted in cross-examination that it would have made no difference if the disciplinary hearing had taken place on the 12 or 15 January 2018.
 - 34.4 The Claimant's last point was a general point that he essentially disagreed with all the points Mr Shackleton had made in his summing up. He said that those points were not true or valid. Mr Thompson did not deal with those in any detail. He essentially wrapped it up with a little more than an assertion that this was Mr Shackleton's interpretation based on what he reasonably believed to be true having considered the facts of the case as presented to him. Mr Thompson carried out no detailed analysis of what Mr Shackleton had decided or why. For instance, Mr Thompson had not picked up that Mr Shackleton had said something that was patently wrong when he said that the Claimant had not given any indication that he would act differently in future, despite the fact that the Claimant was recorded at least three times saying he would report it to the Superintendent Pharmacist in future.
 - 34.5 Mr Thompson did not deal at all with the point that the Claimant had set out at some length in his appeal letter, i.e. that he said he had told the GSM about the GPhC proceedings. Mr Thompson made no finding himself and he set out no reasoning or rationale for finding that Mr Shackleton's approach was reasonable. I find that at the stage of the appeal there was still no proper consideration of this fundamental plank of the Claimant's defence, i.e. his assertion that he had properly reported the matter because he had told the GSM.

- 34.6 In cross-examination Mr Thompson said that he believed that the Claimant did not tell the GSM, because the GSM was an experienced store manager whom he knew well and because the GSM had nothing to gain. That had not been explored with the Claimant either at the disciplinary hearing or at the appeal. Mr Thompson did not appear to have considered the possibility that the GSM might have forgotten, not heard or misunderstood. He did not appear to have considered the fact that the GSM had simply been asked a bald question and had not been given any detail about when this was supposed to have been done, where, what was supposed to have been said or anything of that kind.
- 34.7 Mr Thompson insisted that he had taken points in mitigation into account, but when he was asked to specify what mitigation in the Claimant's case was taken into account rather than rehearsing the matters generally that might amount to mitigation, he could not identify any point.

Legal Principles

36. The right not to be unfairly dismissed is contained in s 94 Employment Rights Act 1996. It is well-established that in a claim for unfair dismissal based on a dismissal for misconduct, the issues to be determined having regard to s 98 are: did the employer have a genuine belief in misconduct; was that belief based on reasonable grounds; and when the belief was formed had the employer carried out such investigation as was reasonable in all the circumstances? Furthermore, the question for the Tribunal is whether dismissal was within the range of reasonable responses open to the employer. The range of reasonable responses test applies to all aspects of the decision to dismiss including the procedure followed. It is not for the Tribunal to substitute its view for that of the Respondent. The Tribunal's role is not to decide whether the Claimant was guilty of the conduct alleged, but to consider whether the Respondent believed that he was, based on reasonable grounds and following a reasonable investigation.
37. As regards the remedy for unfair dismissal, a basic award is payable under s 122 and a compensatory award under s 123 of the Employment Rights Act. Pursuant to s 122(2) and s 123(6), both the basic and compensatory awards may be reduced because of conduct by the employee. Under s 123(6) the relevant conduct must be culpable or blameworthy; it must actually have caused or contributed to the dismissal; and it must be just and equitable to reduce the award by the proportion specified. By contrast, the basic award can be reduced where conduct of the Claimant before the dismissal makes that just and equitable. There is no requirement that the conduct should have caused or contributed to the dismissal.
38. Where the Tribunal considers that there is a chance that the employee would have been fairly dismissed in any event, then the compensation awarded may be reduced accordingly: *Polkey v A E Dayton Services Ltd* [1987] 3 All ER 974. Guidance on how to approach that issue is set out in the case of *Software 2000 Ltd v Andrews* [2007] IRLR 568.

Application of the Law to the Facts

39. The first issue is whether the Respondent acted reasonably in all the circumstances in dismissing the Claimant for misconduct. I find that it did not. The process it followed was outside the range of what was reasonable and no reasonable employer would have dismissed in the circumstances. The reasonableness of the investigation and belief, the procedure and the sanction overlap and I considered them together. In reaching my decision, I placed particular weight on the following matters:

- 37.1 The Respondent's approach to the Claimant's trade union was unreasonable. There was a slavish approach to the Disciplinary Policy with no actual consideration of the fact that from an early stage the Claimant had provided available dates and that by the end of it those were three days away from the date on which it was insisted that the hearing must go ahead. This was a hearing of some importance for a professional person, which might have severe consequences for his ability to practise his profession. The Claimant was someone who had been off work with stress early in the year for a number of months. He wanted a representative who was expert in the field of pharmacy. The witnesses confirmed that there was no reason why the hearing could not have been delayed a further three days. The conduct complained of was by now almost a year old and it had taken the Respondent a significant period to get on with an investigation once it knew about the GPhC proceedings.
- 37.2 This was not remedied at the appeal stage. For the reasons set out in the detailed findings of fact, Mr Thompson failed properly to consider or address this ground of appeal. Indeed matters were exacerbated by his own approach toward the Claimant's trade union representative at the appeal stage.
- 37.3 The approach to the Claimant's fundamental defence, that he had reported the GPhC proceedings to his GSM was completely flawed and unreasonable. The evidence from the GSM was never disclosed to the Claimant. He had no chance to see what the GSM had been asked or what he had said. He did not therefore have any chance either to question the GSM himself or to identify questions that he wanted putting to him. Furthermore, neither at the disciplinary stage nor at the appeal stage did either decision maker discuss with the Claimant his case that he had told his GSM. Still less did they suggest to him that he might not be telling the truth or put to him the GSM's version of events. Neither at the dismissal stage nor at the appeal stage did anybody actually set out a finding about whether or not the Claimant had told his GSM about the GPhC proceedings, never mind explaining why they had reached a decision that he had not. Neither decision-maker took into account that Mr T's investigation notes contain material that might corroborate the Claimant's version of events and both seemed to assume that the only alternatives were that the Claimant was lying or the GSM was lying. Neither seems to have acknowledged the possibility that one or other might be mistaken or have forgotten. The point relating to Mr T was of course exacerbated by the fact that what he had said had never been provided to the Claimant either.
- 37.4 The Respondent breached its own policy by failing to consult the Superintendent Pharmacist throughout. There is a reason for the Superintendent Pharmacist to be involved in these cases. It is precisely because they may contain either pharmaceutical or regulatory areas of expertise that are not within the ordinary expertise of the store managers. This was not remedied by Mr Thompson discussing the matter with Mr Tuddy at the appeal stage. The Policy calls for consultation throughout. Even when he was contacted, Mr Tuddy was not provided with any of the papers or documents so as to form any sound view on the matter.
- 37.5 Mr Shackleton's approach to sanction was that because this was gross misconduct the Claimant should be summarily dismissed. There was no proper consideration of alternatives or of mitigation either at the dismissal stage or the appeal stage.

37.6 Crucially, Mr Shackleton's approach was wrongly based on the contention that the Claimant had not said that he would act any differently in future. Again, that was not corrected at the appeal stage.

40. It follows that the Claimant's claim of unfair dismissal is well-founded and succeeds.

Further findings of fact: *Polkey* and contributory fault

41. For the purposes of *Polkey* and contributory fault only, it is necessary for me to make findings about whether in fact the Claimant committed misconduct. The Respondent relied on two matters. First, it said that the Claimant had not reported the GPhC proceedings to the GSM.

42. On a balance of probabilities on the evidence before me I find that the Claimant had reported the matter to the GSM. The GSM was not called to give evidence by the Respondent. It could have asked for a witness order but it did not. The Claimant's evidence was broadly speaking credible. He was cross-examined on it. It was consistent with the account he has given throughout this matter and it was to some extent corroborated by Mr T telling Ms Wolstenholme that the Claimant had told him that he had reported the matter. Therefore, I find that the Claimant had reported the matter to the GSM in the way he described.

43. The second point relied on by the Respondent was that the Claimant had provided Mr T's contact details to the GPhC. There is no dispute that he had, as set out in the findings of fact above.

Contributory fault

44. That brings me to the question whether the Claimant caused or contributed to his dismissal by culpable and blameworthy conduct. Given my finding that he did inform the GSM of the GPhC proceedings, this can only be based on the fact that he provided Mr T's contact details to the GPhC rather than those of the GSM, Asda Head Office or the Superintendent Pharmacist.

45. Ms Gardner submitted that this would have been a counsel of perfection. I noted that the GPhC were asking for the employer's contact details. I do not consider that this was meant to be a peer in the pharmacy, but the employer's general contact details. That ought to have been obvious to the Claimant. On the other hand, the Claimant did tell the GPhC that he worked for Asda. He provided Mr T's name but with the Asda store address at Halifax. The GPhC knew that he worked for Asda. It was they who told Mr Tuddy that the Claimant was on their list in October. The disciplinary proceedings brought against the Claimant were not about how he communicated with the GPhC. They were about a failure to report his matter to his employer. That was the real focus of the Respondent's concern. However, he could have done better in terms of the information provided to the GPhC and that would no doubt have headed this matter off because the GPhC would have corresponded with the Respondent via the most appropriate channels. I consider that the Claimant's approach was to some extent culpable, but at a very minor level and I consider that it contributed only very modestly to his dismissal. Therefore, I have assessed the level of contribution at 10%. I consider that it is appropriate to reduce the basic and contributory awards by that amount.

Chance of a fair dismissal in any event: *Polkey*

46. As set out above, I find that there was fundamental unfairness in this process at a number of levels and that the sanction of summary dismissal was outside the range of

reasonable responses in the circumstances. I have to consider whether, on the balance of probabilities, there is a chance that the Claimant would have been fairly dismissed if a fair procedure had been followed. If so, how big is that chance?

47. The shortcomings in the Respondent's approach were wide-ranging. As set out above, there were failures: to disclose relevant evidence to the Claimant; to allow him to be properly represented by his expert trade union representative; properly to consider or make findings about whether the Claimant reported the matter to his GSM or not; to take into account his evidence that he had learnt his lesson and would act differently in future; and to consider any mitigating features and any alternatives to summary dismissal. A fair process would have required a different approach to all those matters. It would also have included a proper consideration of what the Disciplinary Policy actually said and required, and of what Mr T had said that might corroborate the Claimant. Furthermore, the disciplinary allegation was not about what the Claimant said to the GPhC but about a failure to report it to the Respondent. There are a number of cumulative steps, each of which, if corrected, might have led the Respondent to come to a different view from the one it came to. Nonetheless, I consider that there is a small chance that the Respondent might have fairly dismissed the Claimant in any event. They might, fairly, have come to the view that he had not reported GPhC proceedings to his GSM and that he should be dismissed as a result. Given the number of stages at which a different view might have been taken, I assess that as a small chance and that is why I have found that there is a 10% chance the Claimant would have been fairly dismissed in any event.

Remedy

48. The parties agreed that the reduced basic award payable to the Claimant was £1760.47.
49. The Claimant has obtained work at a higher rate of pay than his employment with the Respondent and I was told that he had suffered no net loss of earnings to date. He sought £500 compensation for loss of statutory employment rights. The Respondent said that the award should be £350. I consider that an appropriate starting point is a week's pay. The Claimant's week's pay is more than £500. He had four years' service. He will need to work for two years to secure the most valuable employment rights. In those circumstances the higher sum of £500 was appropriate. The Claimant also claimed £83.33 for the proportionate contribution to his GPhC fees and the Respondent agreed with this figure. Finally, the Claimant sought £183.27 in respect of pension losses and the Respondent agreed that this was payable. The total compensatory award was therefore £766.20 (£500+£83.33+£183.27) reduced by 20%, i.e. £613.28.

Employment Judge Davies

15 November 2018