EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		
Ms D Cullinane	and	Leidos Europe Limited

Hearings held at Reading on 30 & 31 August 2018 - Full Merits Hearing

Representation **Claimant:** Mr R Preston, partner
Respondent: Mr T Brown, counsel

Employment Judge Mr S G Vowles (sitting alone)

JUDGMENT having been sent to the parties on **17 January 2019** and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Submissions

1. On 9 October 2017 the Claimant presented a claim to the Tribunal complaining of unfair dismissal and wrongful dismissal.

2. On 10 November 2017 the Respondent presented a response and both claims were resisted. The Respondent claimed that the Claimant was fairly and lawfully dismissed by reason of gross misconduct.

3. At the start of this hearing the Claimant clarified that the start of her witness statement headed *"Overview"* was what was said to be unfair and unlawful about the dismissal.

Evidence

4. The Tribunal heard evidence on oath from Mr Neil James (Human Resources Business Partner) for the Respondent.

5. The Tribunal also heard evidence on oath from the Claimant Ms D Cullinane (Contingent Operational Stocks PEPS Manager).

6. The Tribunal also read documents in a bundle provided by the parties.

Findings of Fact

Background

7. The Respondent is the prime contractor on a major Ministry of Defence (MOD) Logistics Services contract.

8. The Claimant was responsible for supervising the day to day running of a team which was responsible for preparing reserves for military operations on behalf of the MOD. This team is called the Contingent Operations Stocks Team. In this role, the Claimant had access to confidential MOD information. She was therefore required to work on a particular IT platform which has restricted access, called the Defence Information Infrastructure ("DII"). Two of the applications on the DII were files: one called PEPS which stands for Primary Equipment Packs; and the other one called Shelf and Packed. Those two files were referred to during the hearing as "the files".

9. The Claimant was required to access and maintain the files. They contained confidential information belonging to the Respondent's customer, the MOD. Both of the files would be used to deliver equipment and commodities to troops in the event the UK Government decided to deploy a military force anywhere in the world. Mr James said in the worst case scenario, if the wrong equipment was sent due to any inaccuracies or if the PEPS file or the Shelf and Packed file went missing, people could die. It was therefore vital that those files were maintained on a regular basis and securely protected. The Claimant's responsibility was to carry out this maintenance on a daily basis.

10. Mr James said that when working on any files stored on the DII system, the correct practice was to take a copy of them so that the file can still be seen on the virtual bookshelf rather than move the file to another location such that it is no longer visible. He said that access to the DII system and to the virtual bookshelf was highly restricted, that the Claimant and other people with access to it were security checked and he said that the only three employees who had access to the files were the Claimant, Mr Ron Preston (the Claimant's partner and colleague at work who acted as her representative at the later disciplinary meeting and during the course of this Tribunal hearing) and Paul Heffey who was the PEP clerk.

11. There were strict written rules on the operation of the DII system, referred to as the user security instructions for DII. Mr James said that an important part of keeping such information secure was ensuring the copy of the file was visible in the virtual bookshelf at all times and that the file was returned to the bookshelf as soon as it was no longer required, for example, for maintenance.

17 May 2017

12. In April 2017 the Respondent informed the Claimant that it was proposing

to restructure its operations team which would result in the creation of two new supervisor posts. The Claimant applied for one of these roles but she was unsuccessful. At a meeting on 17 May 2017 she was given feedback regarding her interview.

13. Thus far, there was no dispute on the above facts. But the parties disagreed on what happened next.

14. Mr James said that during the meeting on 17 May 2017 the Claimant asked the Operations Support Manager, Emma, if the Respondent would be prepared to offer her a severance package under which she would leave her employment and that it was decided that the Respondent would agree to her request for a severance package.

15. The Claimant's account was that it was not she who had requested a severance package but it was imposed upon her.

2 June 2017

16. On 2 June 2017 the Claimant had a meeting with Alison Noon-Jones and Simon Wilton, Head of Operations. This was a protected conversation because it involved the possibility of a severance package but both parties waived the privilege of that conversation for the purposes of this hearing. During that meeting the Claimant was offered £10,000 and a draft settlement agreement was produced at the meeting. Mr James said that at the end of the meeting Alison Noon-Jones encouraged the Claimant to go home and consider the officer, and reassured her that she would remain on full pay whilst she decided whether she still wanted a severance package. He said that the meeting took place at around 11.00am and that after the meeting, the Claimant returned to her desk for a short period and then left the premises.

17. The Claimant said that in fact she was offered the £10,000 and then told to clear her desk immediately and leave the building. She said she was not, as Mr James said, paid thereafter until 21 July 2017 when her pay was backdated to 2 June 2017. Mr James described how shortly after the Claimant left the office on that day, it came to Paul Heffey's attention that the two files were missing from the system.

Investigation

18. Mr James then went on to describe extensively in paragraphs 31 to 37 of his witness statement the investigation which followed but it became clear that all of that had been conveyed to him verbally by Mr Stuart Vall, the Security Operations Manager. Mr James said that Mr Vall led an investigation into the missing files. He said *"Stuart felt that it was likely that Dee* [the Claimant] *was the only person to have worked on the files on 2 June and in any event the last person to have worked on the files."* It was considered that she may have removed the files. He said that this was particularly so because the investigation revealed that she had been angry

when she left the premises on 2 June 2017 after the protected conversation referred to above and when she returned to her desk. He went on to say that while the investigation was continuing, a few days after 2 June 2017 back up files were retrieved but the actual files remained missing.

19. Mr James said that he was kept informed of the progress of the investigation but was not involved himself. He said he understood from mr Vall that the investigation into who had access to the files and how the system worked would take some weeks. In fact, Mr Vall did not produce any investigation report nor it seems did he keep any record of his investigation. He simply reported his findings verbally to Mr James.

20. Mr James said that as the investigation was being carried out into the missing files, discussions on a potential severance package for the Claimant continued. He said ultimately an agreement could not be reached and accordingly he wrote to the Claimant on 28 July 2017. It had been approximately one week since they had last communicated and various matters had come to light recently. There were two matters. The first one was:

"Following your departure from site, it appears that a number of MOD files, specifically two critical access database files, PEPS and Shelf and Packed were no longer present or accessible on the system. It is known that you accessed these files prior to your departure. Significant recovery work via our security function was required to restore the aforementioned information and a full investigation has since commenced. The potential impact to the customer was deemed to be severe and put us to significant amounts of work as I am sure you are aware, amendment, transfer or deletion of data held on authority systems could be deemed a criminal offence and the matter is serious, hence we are investigating it further. We are concerned that it appears circumstantially that you may have deleted or transferred the files although we are obviously going to investigate further before we reach any conclusions in that regard. …

Having considered the above, I have asked Stuart Vall, Security Operations Manager, to investigate the issues and to produce investigation findings. … Since the issues under investigation are potentially serious and could if it is the case that you have in fact engaged in such actions amount to serious or gross misconduct. In accordance with the Leidos disciplinary policy, we have decided to suspend you pending investigation of the issues. During this period of suspension, you will be entitled to receive full pay and benefits. …

You will be interviewed as part of the investigation and Stuart Vall, Security Operations Manager, will contact you further directly. Following the investigation and subject to its findings, the matter may depending on the outcome of the investigation proceed to a disciplinary hearing."

21. Although Mr James told the Claimant that Mr Vall would interview her as

part of the investigation, in fact he never did so. The matter proceeded directly to a disciplinary hearing.

Disciplinary Hearing

22. On 11 August 2017 Mr James wrote to the Claimant to invite her to the disciplinary hearing. He set out two issues although the second one was not pursued. The first issue was:

"Immediately following your departure from site on 2 June 2017, it appears that two critical access database files were no longer present or accessible on the system PEPS and Shelf and Packed and further there was a file titled 'Dee' which again had been removed". …

It appears that you deleted these files while angry about your earlier discussion."

23. The Claimant was told that she had a statutory right to be accompanied at the hearing and that it could result in a finding of serious or gross misconduct and a disciplinary sanction up to and including summary dismissal could be applied.

24. The hearing took place on 17 August 2017. Minutes were produced in the bundle before the Tribunal. It was headed *"Disciplinary Meeting Minutes".* In attendance at that meeting was Mr James, the Claimant, Grace Nelson (note-taker), Stuart Vall (Security Operations Manager), and Ronald Preston (Senior Business Analyst) who was assisting the Claimant.

25. During the course of the hearing Mr James said to the Claimant: *"After you left, files were seen to be deleted. Files that we use a lot within the business, also a file marked "Dee"".* The Claimant said *"Dee"* was a file which contained her personal details. She was asked about files being missing and Mr James said *"We need to understand your point of it". The* Claimant said: *"The maintenance process for those two specific databases, maintenance has to happen. Meeting in Abbey Wood those detail so stock modules need to be so when they were ran they would pull in the information and all the others linked. If that data did not get added, it would not then run in the report. I took it off in the morning prior to the meeting, put it in my desktop to do amendments, and then replace it once it was finished doing its repair. Shortly after that I was pulled into the meeting with Simon and Alison."*

26. She went on to explain: *"It was a routine thing. Paul is aware of the processes that it has to be removed, put on desktop and compressed and then gets reinstated. If for whatever it was on my desktop then that's why you couldn't see it. If a folder or file is deleted by accident as people do these things can get reinstated via SPOC. I know that did happen and the report has been produced with all those files."* She said the main thing was compacting it.

27. She was asked by Mr Vall: *"Was there not an opportunity to present to us what you have just said"* and she said *"Nobody has called me into any meetings. Why did no one call me in?"* She said *"I don't know if the files are still in my desktop or in the folder. I was asked to leave within 20 minutes and this was totally unexpected. I don't think I shut down my desktop completely. They may have been sat on my desktop or deleted by accident. I was angry."* The Claimant disputed that she said she was angry. She said that was a typographical error and that she in fact said she was not angry.

28. She went on to say: *"I did not delete any files or intend to cause any damage."* Later on during the meeting, she said *"I wasn't angry and plenty of people can vouch for that."*

29. At the end of the meeting Mr James told the Claimant that her employment was being summarily terminated for gross misconduct and that her last day of employment would be 17 August 2017.

30. In a letter dated 22 August 2017 he confirmed that decision and enclosed the notes from the meeting. He summarised the reasons for the termination:

> *"Firstly, you confirmed that you deleted the personal file entitled Dee. Secondly, you indicated that you could have by accident deleted the files PEPS and Shelf and Packed as you in your own words were angry following the earlier meeting of 2 June 2017. Thirdly, you have known for some time and at minimum since my letter dated 28 July that the files were missing and deliberately withheld information regarding both their location and any maintenance work you may have done to the files on 2 June 2017. Fourthly, you ignored a clear recommendation to avoid any potential conflict of interest by inviting your partner (that was Mr Preston) to accompany you as your companion and fifthly, you denied any knowledge of ongoing investigations to recover missing files though it is very clear from Mr Preston's actions and offering during the disciplinary meeting that both of you are fully aware of the issues."*

31. The letter offered the Claimant the right to appeal. It said that any appeal hearing would be heard not by Ms Noon-Jones but by an alternative senior HR executive within the business.

32. The Claimant did not present an appeal against the dismissal.

Decision

Unfair Dismissal

33. Under section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by her employer.

34. For cases involving misconduct, the relevant law is set out in section 98 of

the Act and in the well-known case law regarding this section, including British Home Stores v Burchell [1978] IRLR 379, Post Office v Foley [2000] IRLR 827, and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23. From these authorities, the issues for the Tribunal to determine were as follows.

35. Firstly, whether there was a potentially fair reason for the dismissal under section 98(2) and did the employer have a genuine belief in the misconduct alleged. The burden of showing a potentially fair reason rests with the employer.

36. Secondly, whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the employee under section 98(4), in particular did the employer have in mind reasonable grounds upon which to sustain a belief in the misconduct and, at the stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Did the investigation and the dismissal fall within the range of reasonable responses.

37. Thirdly, the Tribunal must not substitute its own view for that of the employer, but must assess the actions of the employer against the range of reasonable responses.

38. The ACAS Code of Practice on Disciplinary Procedures (2015) sets out the steps which employers must normally follow in such cases. That is, establish the facts of each case, inform the employee of the problem, hold a meeting with the employee to discuss the problem, allow the employee to be accompanied at the meeting, decide on appropriate action and provide the employee with an opportunity to appeal.

39. The complaint of unfair dismissal was summarised by the Claimant in her witness statement under the heading "*Overview as follows"* and she set out seven matters:

    (1) No supporting physical evidence that the Claimant had removed, relocated or deleted any of the alleged files.

    (2) No impact on producing business reports as per reporting schedules.

    (3) No proof of any intent or malice.

    (4) No intention of the Respondent agreeing a return to work date.

40. I did not find that items 5, 6 or 7 were relevant to the issues that I have to determine.

41. Applying the relevant law to the facts found above, I find that the dismissal was unfair. My reasons are as follows.

42. I find that the investigation into the Claimant's alleged misconduct was wholly inadequate and fell well outside the range of reasonable responses. That is despite the Respondent being a large organisation with considerable resources at its disposal. It employs 250 people on the MOD contract alone and 1,100 in total in the United Kingdom.

43. Mr James said that Mr Vall conducted an investigation into the allegation that the Claimant deleted the files but apart from a few emails on 2 June 2017 which gave what was quoted as a *"heads up to senior managers*" that files were missing, nothing whatsoever was recorded in writing by Mr Vall or by anyone else. There were no witness statements, no records of any interviews, and no investigation report was ever produced. Mr James said that Mr Vall reported matters to him verbally but even Mr James did not make a written record of what had been reported to him.

44. In the absence of any written records, Mr James must have relied upon his own memory of what Mr Vall told him, but there is no record of what Mr Vall told him or when, or what the detail was.

45. I find as a fact, and it was not disputed, that neither Mr Vall nor Mr James interviewed the three people who had access to the files. That is Mr Heefey (although it was he who reported the missing files) or Mr Preston or the Claimant. She was not asked about the missing files until 17 August 2017 at the disciplinary hearing when she was dismissed. That was some two and a half months after the files were found to be missing.

46. The failure to interview those people at an early stage, or at all, was an omission bordering on the perverse. A reasonable employer would have spoken to the only three people who had access to the files as soon as possible to establish what had happened to the files. No reasonable employer would have failed to take those steps.

47. The Claimant was told in the suspension letter dated 28 July 2017 that Mr Vall would produce an investigation finding and that she would be interviewed as part of that investigation. Only following the investigation, and subject to the investigation findings, would a disciplinary hearing be held. None of that happened despite the Claimant being informed in writing that it would happen.

48. The Claimant was criticised at the disciplinary hearing and in the dismissal letter for not coming forward earlier with her account of what may have happened to the missing files. This was referred to in Mr James' dismissal letter as withholding information, but she had been assured that she would be interviewed by Mr Vall about such matters during the investigation and before any disciplinary hearing. She was not given any opportunity to put forward her account before the disciplinary hearing because she was not interviewed beforehand. No questions were posed to her in the 28 July

2017 letter.

49. No reasonable employer would have assured the Claimant that she would be interviewed and investigation findings produced and then, without any explanation, renege on those assurances and then criticise her for not giving an earlier explanation.

50. It follows that the first and only opportunity the Claimant had to put forward her account was at the disciplinary hearing referred to above. She denied deleting the two files and she said that the files had either been deleted by accident or, more likely, they were still on her desktop on her computer. Having heard that, a reasonable employer would have immediately investigated whether they were still on her desktop but the Respondent failed to take even this simple step. Mr James said at paragraph 49 of his witness statement: *"I did not consider at this stage* [and by this stage he meant the disciplinary hearing] *in the process that it was appropriate or proportionate to carry out an investigation into whether the files may be on Dee's desktop. I spoke to Stuart Vall about this at the time and Stuart explained that this would be an extremely onerous process".*

51. I find that it would have been an obvious and simple task, if no-one else knew the Claimant's password, to have her log on to her computer under supervision and see if the files were still there. Mr James accepted that could have been done. If they were still there, then the Claimant would have been exonerated of the main allegation of deletion of the two files.

52. No reasonable employer would have failed to look into the Claimant's explanation. Any problems in doing so due to the passage of time were entirely of the Respondent's own making having delayed speaking to the Claimant about the desktop for two and a half months. She could have been spoken to about this on 2 June 2017 or shortly thereafter.

53. The ACAS Guide on Disciplinary Action emphasises that the more serious the allegations, the more thorough the investigation conducted by the employer should be. In this case the seriousness was emphasised by Mr James who referred to the potential for loss of life. The consequences for the Claimant were serious in being dismissed after nine years' service. Here, however, the investigation was anything but thorough.

54. Mr James in his evidence initially said that the severance package negotiations and the disciplinary process were kept separate. Yet it is clear from the evidence that the disciplinary process was delayed for two months pending the outcome of the severance package negotiations and that was confirmed by Mr Brown in his closing statement. Mr James confirmed that if a severance package had been agreed before 28 July 2017 the disciplinary process would have been abandoned. This was despite his earlier evidence about the seriousness of the conduct and his later finding that it was so serious that it amounted to gross misconduct justifying summary dismissal.

55. I find that the two processes were, in the mind of Mr James, clearly inextricably linked. The inadequate and unreasonable investigation, the extensive delay in pursuing disciplinary action and the willingness of the Respondent to abandon the disciplinary process if a severance package was agreed, casts serious doubt upon whether Mr James had a genuine belief in the Claimant's misconduct, much less gross misconduct.

56. For the above reasons, I find that the investigation fell outside the range of reasonable responses and it would not therefore provide sufficient reasonable grounds upon which Mr James could sustain a belief that the Claimant was guilty of the alleged misconduct which would have justified dismissal.

57. The dismissal was both procedurally and substantively unfair. There was no fair reason for the dismissal and the dismissal was outside the range of reasonable responses.

58. The claim for unfair dismissal therefore succeeds.

Wrongful Dismissal

59. The test for wrongful dismissal is different to the test for unfair dismissal. In the former, the reasonableness or otherwise of the employer's actions is not relevant. The question is whether, in the Tribunal's view, the employee was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract.

60. Looking objectively at the evidence placed before me, there was no reliable or sufficient evidence of gross misconduct such as to justify summary dismissal. The Claimant denied the allegation and the Respondent failed to carry out a sufficient investigation to look into her explanations or to establish guilt. The investigation was wholly inadequate and could not support a finding of misconduct, much less gross misconduct. I find there was no evidence of conduct within the scope of gross misconduct amounting to a repudiatory breach of contract entitling the employer to treat the contract as terminable without notice by reason of the conduct of the employee. The dismissal was therefore also wrongful.

Remedy

61. I went on to consider some further matters which relate to remedy.

Contributory Conduct

62. Contributory conduct is dealt with in section 122(2) Employment Rights Act 1996:

(2) Where the Tribunal considers that any conduct of the complainant

before the dismissal (or where the dismissal was with notice,before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.

63. And in section 123(6):

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

64. In the case of Nelson v The British Broadcasting Corporation [1980] ICR 110 it was said that:

For conduct to be the basis for a finding of contributory fault, it has to have the characteristic of culpability or blameworthiness. Conduct by an employee capable of causing or contributing to dismissal is not limited to actions that amount to breaches of contract or that are illegal in nature. It could also include conduct that was perverse, foolish, bloody-minded or merely unreasonable in all the circumstances in order for a deduction to be made under section 123(6) of the Act, the causal link between the employee's conduct and the dismissal must be shown to exist.

65. In assessing the issue of contributory conduct, I must look at the conduct of the Claimant but as stated above, there was insufficient evidence due to a seriously flawed investigation on which I could make a finding of blameworthy conduct. No reliable evidence existed on which to base such a finding.

Polkey Reduction

66. Secondly, I considered whether there should be a reduction in accordance with the principles set out in the case of Polkey v AE Dayton Services Ltd [1988] ICR 142. The Polkey principle requires a Tribunal to assess whether, if a proper procedure had been followed, the Claimant would (not could, but would) have been dismissed by this employer. That is, in this case, if a reasonable investigation had been conducted, would a fair dismissal have followed.

67. I have found above that the dismissal was both procedurally and substantively unfair. Because the investigation was so poor and the evidence so uncertain, it is difficult to reconstruct what would have happened if a reasonable and fair investigation had been conducted. The Appeal Courts have said that just because it is a difficult exercise to undertake, Tribunals should nevertheless do it.

68. The only evidence I heard about the desktop, and the likelihood that the missing files were there, was from the Claimant. That evidence could not be contradicted by the Respondent because it took the deliberate decision

not to look at the desktop. It was in no position therefore to deny that the missing files were, and perhaps still are, there. Accepting the Claimant's undisputed evidence, I find that if a reasonable investigation had been conducted, it is likely, on the evidence that I have heard, that the Claimant would have been exonerated because the missing files would be found on her desktop. I therefore find that there was insufficient evidence to provide sufficient grounds for a fair dismissal even if a reasonable investigation had taken place. I therefore find that there should be no Polkey reduction.

Failure to Comply with ACAS Code of Practice

69. On the subject of any reduction in the amount of the compensatory award under section 207A Trade Union and Labour Relations (Consolidation) Act 1992, I heard submission from Mr Brown on behalf of the Respondent and from Mr Preston on behalf of the Claimant.

70. Mr Brown said that the Claimant's failure to appeal against the dismissal was a serious failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. It was unreasonable and the compensatory award should be reduced by the full 25% allowed under section 207A of the Act.

71. The Claimant was asked during the course of the Tribunal hearing about her failure to appeal. She was asked *"Were you given the right to appeal"* and she said *"Yes"*. She was asked: *"Was that by someone independent"* and she said *"Yes"* and she was asked why she did not in those circumstances appeal. She said it was because she thought it was "*a waste of time".*

72. The relevant provision of the Code of Practice is paragraphs 26-29 which is headed: *"Provide employees with an opportunity to appeal"* and paragraph 26 says:

Where an employee feels that disciplinary action taken against them is wrong or unjust, they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place and employees should let employers know the grounds for their appeal in writing.

73. So clearly the Code of Practice does require in those circumstances a Claimant to present an appeal, but the Claimant failed to do so in this case. I find that amounted to an unreasonable failure to comply with the ACAS Code of Practice. There was no good reason for the failure. If the Claimant had appealed and been successful, these Tribunal proceedings may have been avoided. That is the purpose, at least in part, of an appeal.

74. However, the Claimant's failure to comply with the Code of Practice was not wholesale. For example, she did attend the disciplinary meeting and put forward her case and her explanations. But the failure to present an

appeal was a serious failure because an appeal is an important part of a disciplinary process. I consider that it is just and equitable therefore to reduce the compensatory award – not by the full 25% requested by the Respondent, but by a substantial percentage, namely 20%.

Remedy Hearing

75. A half day Remedy Hearing (three hours: 10.00 am – 1.00 pm) was then listed for 20 December 2018 and a case management order in respect of that hearing will be made separately.

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Employment Judge Vowles

Date: 6 March 2019

Sent to the parties on

8 March 2019

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For the Tribunal office