



EMPLOYMENT TRIBUNALS

Claimant: Mrs P Jennings

Respondent: East Riding of Yorkshire Council

Heard at: Hull

On: 14-17 May 2018, 29 June 2018

Before: Employment Judge Rogerson

Members: Mr. N Pearce, Dr. B Bright

Representation

Claimant: Mr. C Milsom (counsel)

Respondent: Mr. E Beever (counsel)

JUDGMENT

1. The complaint of unfair dismissal fails and is dismissed.
2. The complaint of breach of contract (notice pay) fails and is dismissed.
3. The complaint of victimisation fails and is dismissed.

REASONS

Issues.

The issues had been identified at an earlier preliminary hearing and were the agreed issues to be determined for the complaints of unfair dismissal wrongful dismissal and victimisation.

Unfair Dismissal.

1.1. What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct (the claimant breached the council's recruitment policies and abused her position as a senior manager) a potentially fair reason for dismissal in accordance with section 98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and this was the reason for dismissal. The claimant does not accept that the reason advanced by the respondent is the true reason for her dismissal instead asserting that the real reason was the fact of her having carried out a protected act. However, even if the respondent establishes a potentially fair reason for the dismissal the claimant nevertheless asserts that it is unfair for the reasons set out below.

1.2. Did the respondent hold that belief in the claimant's misconduct on reasonable grounds having conducted a reasonable investigation? The burden of proof is neutral here but it helps to know the claimant's challenges fairness of the

dismissal in advance and they are identified as follows:

- 1.2.1. The involvement of Mrs. Rhodes as the key witness and investigator.
- 1.2.2. The failure to provide disclosure of documents, despite repeated requests for them.
- 1.2.3. The lack of transparency.
- 1.2.4. The failure to make contact, with key witnesses, including for example Mrs. Margaret Martin, the manager of Lifeline.
- 1.2.5. The failure to make any contact with medical practitioners prior to reaching a decision.
- 1.2.6. The failure to follow the ACAS guidelines on dealing with discipline of an employee on long-term sick.
- 1.2.7. The historic nature of many of the allegations.

1.3. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses open to a reasonable employer? The claimant avers that the respondent failed to give due weight to the fact of her ill-health at the time of the alleged misconduct. In any event dismissal was outside the range reasonable range of responses available to the respondent.

1.4. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

1.5. Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event?

Victimisation

1.6. Has the claimant carried out a protected act? The claimant relies upon the following:

- 1.6.1. Her email to Mrs. Rhodes and Mrs. Smithson of 16 October 2015.
- 1.6.2. Her grievance of 6 December 2015.
- 1.6.3. Her claim to the tribunal (1800143/16) of 21 January 2016.

The respondent concedes that the latter two acts amount to protected act but not the first.

1.7. If there was a protected act, has the respondent carried out any of the treatment set out below because the claimant had done a protected act?

- 1.7.1. Subjecting the claimant to disciplinary investigation.
- 1.7.2. Subjecting the claimant to disciplinary proceedings.
- 1.7.3. Dismissing the claimant.

The respondent concedes that the claimant was subjected to all three alleged detriments but denies it was because she had done a protected act.

Breach of contract

1.11. It is not in dispute that the respondent dismissed the claimant without notice.

1.12. Does the respondent prove that it was entitled to dismiss the claimant without notice because the claimant had committed gross misconduct in that she breach the council's recruitment policies and abused her position as a senior manager? NB this requires the respondent to prove on the balance of probabilities, that the claimant actually committed the gross misconduct.

1.13 It is not in dispute that the claimant's contractual entitlement was to 12 weeks' notice.

Findings of Fact

2. We heard evidence for the respondent from: Mrs. V Rhodes (Investigating Officer), Mr. Brian Bell (HR Manager), Miss Kirsty Gent (HR Officer) Mrs. Bridget Giles (Dismissing Officer). We heard evidence for the claimant from the claimant. We also saw documents from an agreed bundle. From the evidence we saw and heard we made the following findings of fact:

3. The claimant was employed by the respondent from 13 June 1988 until her summary dismissal on 25 October 2016.
4. The respondent has within it's remit statutory responsibility for the provision of 'Adult Social Care' which is defined as "the provision of social work, personal care, protection or social support services to adults in need or risk, or adults with needs arising from illness, disability, old age or poverty"
5. The claimant was part of the 'senior' management team and was the senior manager responsible for the Council's Community Service function which enables people to live independently in their own homes. She was responsible for 'Domiciliary Care', which was a registered service operating seven days a week 7 AM to 10 PM and she was also responsible for the 'Lifeline Service' providing responders and wardens 24 hours a day, 365 days a year.
6. From June 2014, she was working part time 22 hours over three days a week.
7. In 2010, the claimant was diagnosed with Chronic Fatigue Syndrome (ME). She has been treated for depression since 2014 and has been dyslexic since childhood. The respondent accepted these impairments were 'disabilities' in her claim to the Employment Tribunal made in January 2016, relied upon as the third protected act(see paragraph 1.6.3 above).
8. Mrs. Rhodes was 'Head of Business Management' from April 2015 with responsibility for overseeing the delivery of these community services. She was responsible for managing the claimant and two other senior service managers.
9. On 19 October 2015, the claimant commenced a period of sickness absence which continued until her dismissal on 25 October 2016.
10. Mrs. Rhodes was on holiday leave from 16 October 2015 to 26 October

2015. When she returned to work she was informed of the claimant's sickness absence from work for 'stress'.

11. Prior to taking her leave on 15 October 2015, Mrs. Rhodes had expressed some concerns to the claimant that she might be too 'preoccupied' with work having received an email the claimant had sent after her working hours. She told the claimant: "*I can see you sent this at gone seven last night, you really should not be working at that time, we are genuinely worried about you*"
12. In response the claimant emailed on 16 October 2015, informing Mrs. Rhodes that she intended to take time off work because "*I have now reached a stage where I am struggling both mentally and physically to keep going and think I'm near to a breakdown. For these reasons I will take some time off, in an attempt, to rest and think things through. I know there is nothing you can do or change and to be quite honest I think due to the time I've been under this type of pressure it has affected my health to a point of no return*".
13. The claimant requested that Mrs. Rhodes did not add this sickness absence to the monthly sickness report which was completed by support staff and she did not want this information shared with colleagues at her grade.
14. From our reading of the email it was clear that the claimant was simply explaining the circumstances leading to her absence from work which was likely to be lengthy and requesting that her sickness absence was kept confidential.
15. The claimant relies upon this email as a 'protected act' for her victimisation complaint, because she was making an allegation that the respondent was contravening the Equality Act 2010. This 'protected act' was disputed by the respondent because there is nothing in the email that makes any reference expressly or implicitly alleging any contravention of the Equality Act 2010.
16. We agree the comments the claimant chose to make in this email must be considered in the context of someone who knows how to assert a breach of the Equality Act 2010 when she wants to, and does exactly that in her grievance (6/12/2015) and in her claim to the Employment Tribunal alleging disability discrimination (21/1/2016).
17. On 16 October 2015, when the claimant sent this email she was not making any allegation of any breach of the Equality Act but was simply informing her manager about her intended absence from work and how that absence should be shared with her colleagues.
18. As a result of this intended lengthy absence, Mrs. Rhodes requested that the IT department let her have access to the claimant's work email account so that she could deal with any important work-related issues that arose during the claimant's absence. She had done this with another manager earlier in the summer and it was found to be a supportive measure. That employee had felt it was supportive because they were not contacted in relation to work-related matters and Mrs. Rhodes found it

helpful to be able to deal with any problems that arose during the absence.

19. We accepted that was the reason why Mrs. Rhodes had accessed the claimant's work-related emails following her absence. It was a 'supportive measure' to help the claimant and to help her to manage any work related problems that arose during the absence.
20. When Mrs. Rhodes accessed the claimant's email account for the first time she saw that an email had been sent at 23:32 on 9 September 2015. Noting the late timing in the context of the concerns she had already raised with the claimant about working late and that the email was sent from the claimant's home to her work email, she opened the email. She discovered a letter from the claimant who appeared to be representing herself as a social worker, sending an assessment letter in support of an individual's benefit claim (the JS letter).
21. Mrs. Rhodes was sufficiently concerned about the contents of the letter to seek advice from Human Resources (HR). On 27 October 2015, she spoke to Brian Bell, HR manager.
22. Separately, Mr. Bell had intended to speak to Mrs. Rhodes to raise a concern that had come to his attention on 15 October 2015 relating to the claimant's potential involvement in the recruitment of her husband (Mark Jennings) to a role in Lifeline. However, because Mrs. Rhodes was on leave until 26 October 2015, he had not had an opportunity to discuss this with her.
23. This 'recruitment' issue had only come to light on 15 October 2015 because a HR officer in Mr. Bell's team had seen the claimant in the Disclosure Service Office handing over a 'DBS' application for processing relating to the claimant's husband. Normally a 'DBS' check would not be completed unless a person had been appointed to a role because of the cost of the check to the respondent and the time involved in carrying out the check.
24. A 'desk top check' of recruitment processes that were live at this time showed that the claimant had initiated actions in relation to progressing her husband's appointment to Lifeline on 1 October 2015, when no vacancy was being advertised. The online recruitment system verified that there were no external vacancies advertised within Lifeline between 9 August 2015 and 25 October 2015.
25. As a result of these 2 matters, Mr. Bell advised Mrs. Rhodes there was sufficient cause to investigate these concerns under the respondent's disciplinary policy. That was the reason why an investigation process was initiated it had nothing to do with any alleged disclosure on 16 October 2015 (which in any event we found was not a protected act)
26. On 29 October 2015, Mrs. Rhodes access to the claimant's email account was stopped and was to be transferred to the investigating officer/HR officer to be appointed.
27. On 30 October 2015, Angela Ward was appointed as the investigating officer. She is a Strategic Service Manager, in another department who

was assisted by Kirsty Gent, HR Officer.

28. Kirsty Gent recalls a number of meetings with Mrs. Ward on 10 November 2015, 26 November 2015 and 7 December 2015 when emails and various recruitment documents were gathered with a view to discussing that evidence with the claimant at an investigation meeting. Most of the evidence that was used in the subsequent disciplinary process was collated by Mrs. Ward and Mrs. Gent and originated from the claimant's work email account.
29. Unfortunately, Mrs. Ward then commenced a lengthy period of absence which followed the terminal diagnosis and death of her husband. It was clear from the evidence that, but for these unfortunate events, Mrs. Ward would have continued as the investigating officer. Those circumstances could not have been foreseen at the time she was appointed as the investigating officer.
30. As a consequence of this, Mrs. Rhodes was appointed to replace Mrs. Ward which was a decision the claimant takes great exception to, describing Mrs. Rhodes as a 'key' witness. We did not find she was a key witness based on the evidence or the findings that were made. Looking at the organizational chart, and the claimant's senior position, the options were in fact limited. Mrs. Ward's investigation had already gathered most of the evidence from the claimant's email account which needed to be put to the claimant and other witnesses to comment upon.
31. Additionally, the claimant had raised a grievance on 9 December 2015, alleging a failure to make reasonable adjustments in relation to her disabilities (dyslexia and CFS). The claimant was being managed by her line manager Liz Smithson, under the respondent's attendance policy for her absence. Mrs. Rhodes had not been involved in either the attendance management or the grievance process and was a suitable replacement for Mrs. Ward.
32. The claimant alleges that Mrs. Rhodes was appointed as investigating officer as an act of victimisation because of her protected act. We do not agree. Mrs. Rhodes was appointed as a replacement for Mrs. Ward because of the circumstances of Mrs. Ward's absence and because Mrs. Rhodes was a suitable replacement.
33. Importantly, Mrs. Rhodes was not the 'decision maker' in the disciplinary process. She continued the investigation that had already begun by putting the documentary evidence that had been gathered to the claimant and other witnesses to comment upon. She conducted a series of investigative interviews which commenced in January 2016, which were transcribed and provided to the claimant to challenge if she wished.
34. On 14 January 2016, (page 408) the allegations were identified as *"irregularities relating to the execution of the council's policies and procedures"* and *"abuse of your position as a senior manager of the council, primarily in relation to recruitment and selection processes"*.
35. On 8 February 2016, the claimant was invited to attend an investigation interview, to take place on 11 February 2016, at a location convenient to

her home. Unusually she was given the right to have representation at that investigation interview and was provided with a copy of the disciplinary procedure.

36. The transcribed investigation interview notes are in the bundle at pages 460 to 489. Each page of the notes was signed by the claimant to confirm it was an accurate record. Additionally, the claimant was offered access to facilities to listen to the recording of the interview if she challenged the accuracy of the transcript. The claimant did not avail herself of this facility. We accepted the notes were an accurate record of the investigation meeting.
37. After concluding her investigation Mrs. Rhodes decided it was appropriate to recommend that the matter be referred to a disciplinary hearing because she believed there was a case for the claimant to answer. Mr. Skidmore, Director of Corporate Strategy and Commissioning made the decision that the case should proceed to a hearing and appointed Bridget Giles Head of Resource Strategy, to chair the disciplinary hearing. The reason why this matter proceeded to a disciplinary hearing was because there was a disciplinary case for the claimant to answer.
38. We found Bridget Giles to be an impressive witness who conscientiously and fairly carried out her role with an open mind. She was independent impartial and ensured the claimant was given every opportunity to put her case. We found her conduct of the disciplinary process was exemplary.
39. A letter was sent to the claimant inviting her to a disciplinary hearing on 15 March 2016 (see pages 529 to 530), 11 April 2016 and 20 April 2016. These dates were arranged to accommodate the claimant's request but on each occasion the claimant said she was unwell and unable to attend.
40. Mrs. Giles agreed to the claimant having some further time to recuperate and wanted to set a date for the disciplinary hearing in June 2016. She requested that the claimant provide dates of availability for that month so that the hearing could be listed at a suitable time for the claimant. No dates were provided by the claimant.
41. Finally, by letter dated 10th of May 2016 the claimant was invited to a disciplinary hearing on 17 June 2016. The letter sets out the 5 allegations which are;
 - irregularities relating to policy and guidelines on the use of electronic email
 - knowingly or recklessly (without consent) breached the council's data protection policy
 - knowingly or recklessly (without consent) breached the council's recruitment procedure
 - abuse of council resources for private purposes
 - breach of professional boundaries, abuse of your position as a senior manager.
42. The claimant had already been provided with all the documents in a previous disciplinary pack. The claimant was warned that if the allegations were found to be proven one possible outcome was dismissal for gross

misconduct. She was informed she could be accompanied. She was informed that if she was unable to attend and wished to have a representative speak on her behalf she could do so or could provide written representations or a written statement. She was warned that if none of these options was exercised a decision would be made based on the information available. The venue fixed for the hearing was arranged to avoid the workplace.

43. By email on 15 May 2016 the claimant responded advising that she was unwell and would not attend.
44. A further letter dated 9 June 2016 was sent to the claimant enclosing additional information which would be considered at the disciplinary hearing. It also requested that the claimant provide any documentation she wishes to rely on by 15 June 2016. The 'additional information' provided was recent correspondence exchanged between the claimant and the respondent to ensure that Mrs. Giles was fully briefed of the concerns the claimant had raised as part of the process.
45. The invitation letter makes it clear this was the fourth and final disciplinary hearing that would be arranged. The claimant had not provided any availability dates and was informed that the hearing would take place five weeks from the date of the letter, to give her sufficient time to prepare.
46. We find it surprising, given that a possible outcome was dismissal (if the allegations were found to be proven), that the claimant chose not to use any of the options offered to put forward her case or any mitigating circumstances.
47. The claimant has referred to breaches of the ACAS guidelines in relation to 'taking disciplinary action if an employee is off work ill' but that guidance does not say an employer cannot take any action. What it suggests is the employee is offered the opportunity to provide a written statement or is asked to nominate a representative to attend on their behalf if they are unable to attend. It suggests arranging the venue at a neutral location, if the issue is work related. Finally, the guidance accepts that there is a need to strike a "balance between how pressing the issue is and consideration of the employee's wellbeing and recovery".
48. We found that Mrs. Giles put that guidance into practice. We could not see what more the respondent could have done, except not have any disciplinary hearing at all, which was the outcome, the claimant wanted. Her approach throughout was to avoid/thwart the disciplinary process by not cooperating or exercising any of the options offered to her. She did not want to answer the allegations by offering her account, evidence or written representations to present her case. Her response was to complain about the decision that had reasonably been made to proceed with a hearing while she was on sick leave.
49. At this hearing, one of her complaints was that an investigation report was not provided for the disciplinary hearing. An investigation officer's report would have outlined the evidence gathered and the views of the investigating officer based on the evidence. The claimant had already been provided with the evidence gathered, she knew what the allegations

were and if she had wanted to she could have made written representations commenting on the evidence/ allegations for the decision maker to consider.

50. In any event Mrs. Rhodes oral presentation of the investigating officers report is recorded in the minutes of the hearing, which were provided to the claimant after the hearing for her to comment upon before any decision was made.
51. Mrs. Giles could have made a decision in the claimant's absence at the disciplinary hearing but decided not to. By a letter dated 28 June 2016 (pages 602 to 608) Mrs. Giles sent the claimant 14 further questions she wanted to explore with the claimant before making a decision. The questions were clear and focused and demonstrate how carefully Mrs. Giles was considering the evidence to explore areas where further explanation from the claimant would assist her in the decision making process. She also gives the claimant another opportunity to provide any further information that she wanted to present by 8 July 2016, before a decision was made.
52. In response the claimant requested further time. Mrs. Giles decided to seek advice from Occupational Health about any adjustments and whether the claimant would be able to respond to the questions in writing. Occupational Health Advice confirmed that the claimant was able to respond to the questions either in person or in writing, "*which would enable the hearing to reach a conclusion which would be more beneficial for the claimant*" (see pages 616-617). There was no suggestion that delaying the disciplinary process further was 'beneficial' for the claimant.
53. The claimant requested an electronic copy of the questions, which were provided. Mrs. Giles also agreed to a further period of two months until 23 September 2016 for the claimant to provide either a written response or have a further meeting.
54. This 13 week adjournment was another reasonable adjustment made for the claimant to enable her to answer the questions that had been provided. On 23 September 2016, the claimant returned the questions and the typed transcript of the disciplinary hearing with her comments. It was clear the claimant had the opportunity to comment on the case as presented by Mrs. Rhodes before any decision was made by Mrs. Giles.
55. Mrs. Giles carefully considered all the evidence that was provided in a very detailed and comprehensive outcome letter. She made her decision based on the findings of fact she made supported by the evidence she saw, which we also saw at this hearing. She did not have any knowledge of any protected act and was not dismissing the claimant because of any protected act.
56. In the claimant's witness statement she refers to the dismissal decision and states at paragraph 60 "*it is therefore apparent that the decision to dismiss was based on the perceived breach of the recruitment policy and the JS letter. In this case none of the people I was accused of assisting were interviewed as part of the process even though LB and VH still worked at the Council. Margaret Martin was also not interviewed in relation*

to the lifeline casual post my husband applied for. These were key witnesses that corroborated my version of events”.

57. Although at this hearing, in closing submissions, we were invited to find the claimant was someone who had shown ‘contrition’ that was not how the claimant presented to us. The claimant has failed to accept any responsibility for her actions in relation to the recruitment practices she followed for friends and family or in connection with the JS letter. This was despite the fact that the evidence against her came from the claimant whether in documents sourced from her email, the answers she gave in the investigation meeting, or her written answers in response to Mrs. Giles questions.
58. In those circumstances it was not clear what ‘corroboration’ VH LB and MM would have given that would have assisted the claimant to challenge her actions helping friends and family to get jobs at the council. Furthermore, if evidence from these witnesses was available and was supportive of her it is odd this evidence was not produced for this hearing when the tribunal had to decide the wrongful dismissal complaint.
59. The claimant also raises issues of alleged unfairness in relation to the respondent’s failure to seek medical advice. However Mrs. Giles did seek OH advice before making her decision and had to strike a balance between the claimant’s wish to continue to postpone the disciplinary process with the respondent’s need to decide these serious allegations of misconduct. It was reasonable for Mrs. Giles to base her decision on the information she had by the second hearing in September 2016.
60. The outcome letter dated 25th of October 2016 sets out the five allegations of :
- “1 Irregularities relating to policy and guidance on use of electronic mail*
 - 2. Knowingly or recklessly (without consent) breach the councils data protection policy .*
 - 3. Knowingly or recklessly (without consent) breach the councils recruitment policy and procedure.*
 - 4. Abuse of council resources for private purposes.*
 - 5. Breach of professional boundaries, abuse of your position as a senior manager;*
 - a) you have abused your position as a senior manager and breached professional boundaries in respect of your involvement in the recruitment process for posts within your service area for applicants that you are related to or have a close personal relationship, namely NJ, MJ, LB, DB and VH.*
 - b) you have abused your position as a senior manager and breached professional boundaries in implying that a letter you have written in a personal capacity in respect of JS was written on behalf of the council.*
 - c) you have abused your position as a senior manager and breached professional boundaries in obtaining sensitive information from staff regards a care home which was of a personal in interest you”.*

61. Mrs. Giles separated allegation 5 into 3 ‘sub paragraphs’ to better explain

the findings she made and her conclusions in relation to those allegations. It was reasonable for Mrs. Giles to refine the broader allegation of 'breach of professional boundaries and abuse of your position as a senior manager' in this way which led her to finding 5(c) of the third allegation was not proven.

62. We have to decide whether the respondent has proved to us on the balance of probabilities that the claimant by her conduct was guilty of a repudiatory breach of contract which entitled the respondent to dismiss summarily. We concur with and adopt all of the findings Mrs. Giles made to conclude the claimant's conduct was 'gross misconduct' in relation allegations 3 and 5 (a) and (b) for providing an unacceptable level of assistance in the application recruitment for family and friends and abusing her position as a senior manager. We set out the relevant parts of the decision below with highlighted parts being our emphasis.
63. "Allegation 3-knowingly or recklessly brackets without consent breach the council's recruitment policy and procedure.

Information has been presented to suggest that you knowingly or recklessly breached the council's recruitment policy and procedure in respect of your involvement in the application recruitment process of a number of individuals known to be family and family friends as follows:

*NJ: I have noted emails contained within the hearing pack between yourself and NJ in 2013, who I believe to be your **nephew**, which he has forwarded you a copy of his CV. Within the emails you state that "I will do an application tonight. I may need to contact you for some other information and it will get you in the council". NJ subsequently submitted an application for the role of contract and review technician. This has led me to believe that you have either scribed an application or had the intention of scribing an application on behalf of NJ for a role within the council. I understand NJ was not appointed.*

*VH: I have noted emails contained within the hearing pack between yourself and VH, who I believe to be a **friend of your daughters**, in which she has forwarded you a copy of her personal statement. In a subsequent email you have sent the personal statement back to VH with changes made to the personal statement. You have stated that you "formatted the application and improved some grammatical errors" but that the content to remained the same. However, from the evidence it is clear to me that the changes are substantially more than formatting and improving grammatical errors. I understand that VH subsequently submitted an application for the role of community support worker within the council using the text from the altered personal statement within her application form. I believe that you made changes to VH's personal statement to ensure that it sufficiently detailed all of the essential criteria of the person specification for the role advertised. References were sought for VH from a Jeff S who I believe to be **your daughter LB's partner and who is also the son of JS**, the latter for whom you wrote a supporting letter to the Department of Work and*

Pensions in respect of an attendance allowance application, therefore, bypassing any shortlisting process in respect of her application form.

Within the email which you sent to DB you state “if you want me to look over this prior to sending back let me know”. You state that DB did not send you an application to look as she did not submit an application for this role. However, I believe that had DB sent you an application to look at you would have made changes to this in the same way that you make changes to the personal statement of VH.

*LB: I have noted information contained within the hearing pack in relation to the appointment of **LB, your daughter**, to the role of Control Centre Operator on a casual basis in 2010. In particular, the emails between yourself and the council’s recruitment team requesting a blank application form, emails requesting references for LB. I note that the completed application form does not declare LB’s relationship to you as a senior officer, being that of her mother. I have also noted emails you sent from your work email accounts to your personal account attaching interview questions for the role of Control Centre Operator. Your level of assistance is acknowledged in an email attachment sent from your personal email account to your work email account in which you have prepared a very private and personal letter to your daughter which states “filling in application form, helping you get the Lifeline job”. The timeline of all of the information has been noted there is also evidence of your involvement in 2015 when LB secured a temporary lifeline control operator post whereby evidence describes that you were dealing with her DBS and progress chasing references. It has been presented to me that you have been involved in the recruitment process of LB in 2010 and again in 2015 to an unacceptable level.*

You have stated that you provided LB with assistance in the form of signposting her to information on the Internet and explaining to her what the role entailed. You deny providing LB with the interview questions for the role and you state that she did not have an interview for the role. No evidence has been presented to confirm that an interview did take place or the questions that were used for such an interview.

You state that you sent the interview questions to your personal email account as your head of service had asked you to develop a recruitment guide due to difficulties experienced in the application and shortlisting process for the role. I fail to understand how interview questions would have assisted you to fulfil this request in examining the difficulties experienced in the application and shortlisting process because the interviews do in fact take place at a later stage. I can however find no evidence addressing these challenges in a strategic manner, acting on behalf of the service. I believe, when examining the timeline of events that there was the opportunity for you to provide LB with the interview questions.

You state that as her mother you would have offered LB exactly the same assistance even if this post had not been with the local

authority. The difference being that you would have had significantly more information to hand in your role of service manager by which you could forward to LB which may not have been available to other candidates. The very private and personal letter you list written to LB refers to helping her get the Lifeline job and, on the balance of probability, I believe that you have assisted LB with her application more than you have indicated and that you sent these interview questions to your personal email account with the intention of assisting LB with the recruitment process. I understand LB is still employed by the council in the Lifeline service.

*MJ – the information contained within the hearing pack suggest that you submitted a DBS form for MJ, who I believe it to be **your husband**, for processing prior to him even submitting an application and receiving an invite to attend interview for the post of Control Centre Operator (casual). A number of your colleagues have confirmed that a DBS would be completed by applicants at the time of interview and thereafter following interview, only then would the DBS of the preferred candidate be processed. At investigation interview, you stated that a DBS would be processed for “all” those attending an interview, however you have since acknowledged that that is incorrect. Processing the DBS prior to submission of an application form would suggest that you expected MJ to be invited for an interview regardless of the shortlisting process of his application form. The processing of this DBS has resulted in an unnecessary and additional financial cost to the council and wasted time and resources. I believe from the evidence that following concerns raised by a colleague in respect of MJ’s relationship to you, Human Resources intervened cancelling the interview and instructing that post must be advertised in accordance with the recruitment policy and procedures. I believe MJ did not thereafter reapply.*

Taking all of the above into account, I believe that you have provided assistance to a number of individuals, known to be family and family friends, in the application and recruitment process for roles within the council to an unacceptable level. The recruitment policy and procedure outlines the council’s commitment to provide a fair and equitable process in the recruitment of staff. I believe that the assistance would have potentially given them an unfair advantage over all other applicants, particularly in the shortlisting process in order that the individuals were invited to attend an interview.

I have found this allegation to be proven and one which is materially significant in light of your senior role within the council and duration of employment at a senior level”.

64. Dealing next with allegation 5- “breach of professional boundaries, abuse of your position as a senior manager” which was separated into 3 parts:

“Allegation 5(a)-you have abused your position as a senior manager and breach professional boundaries in respect of your

involvement in the recruitment process for posts within your service area for applicants that you are related to or have a close personal relationship namely your nephew your husband your daughter your sister's niece and your daughter's friend".

*I refer to allegation three and in consideration of this allegation I would like to add that **I believe you have used your position and knowledge as a senior manager within the council to obtain information and assist individuals, known to be family and family friends, in the application and recruitment process for roles in the council.** I accept that you are not directly related to all of the named individuals, however I believe that you have assisted them to an unacceptable level the same and this would have potentially given them an unfair advantage over all other applicants in order to further their applications in the recruitment process.*

*I acknowledge that the roles within this particular service area may be difficult to recruit to and that you may have been working in the spirit of the service however this has to be balanced with policy and procedure. As a senior manager with 26 years extensive service and experience you are aware of the importance of adherence to such policies and certainly have vast experience of working within these policies. I believe from the evidence presented **you have undertaken the appropriate training,** according to your training records and therefore **should have stepped aside, declaring an interest.** I can also see no evidence that a strategic approach is being taken by yourself, as the senior service manager, to address the recruitment challenges you describe.*

Allegation 5(b)-you have abused your position as a senior manager and breach professional boundaries in implying that a letter you have written it in a personal capacity in respect of Mr. JS was written on behalf of the council.

*The information contained within the hearing pack suggests that you wrote a letter on behalf of a JS in relation to a claim for attendance allowance with the Department of Work and Pensions, which you have confirmed. I believe that JS is not a resident of East Riding but of the neighboring authority and therefore, he is not a client of the East Riding of Yorkshire Council. You described that you know Mr. JS's son Jeff S and who is in a relationship with your daughter LP. You state that you wrote the letter in your own time and which I do not doubt. Within the letter you state **"I am a qualified social worker I work for the East Riding of Yorkshire Council"***

You have signed the letter as Paula Jennings, Service Manager which is your current role within the council, and I believe that this implies that you are writing the letter on behalf of the council in your capacity as a Service Manager. I believe that a Department of Work and Pensions processing centre would not appreciate that Hull is not in the same administrative boundary as East Riding of Yorkshire Council because of the appearance of East Riding of Yorkshire in Mr. S's post

address, thus misleading them.

You state that you are being honest with the information you provided within the letter and no information within the letter was a lie. However, you have failed to clarify within the letter that you have no professional involvement with JS in your role of service manager with East Riding of Yorkshire Council. The letter reads very much that you are working with JS on a professional basis, referring to characteristics which he presented during your visit to his home. There is no inference that you are merely supporting a family friend, your daughter LP's partner JS's father.

*I believe that you have referred to your role within the council in the letter as you felt that this would **add weight** to the application for attendance allowance made by JS stop you state that you did not want to intentionally deceive anybody, however I believe that this letter had the potential to deceive the Department of Work and Pensions and therefore, further the financial personal interest of JS. It concerns me that there does not appear to be any acknowledgement of wrongdoing from yourself in respect of this letter and not least when taking into account your extensive experience spanning 26 years within a social care setting*

I have found this allegation to be proven and one which is materially significant in light of your senior role within the council and duration of employment at a senior level

Allegation5(c)-you have abused your position as a senior manager and breached professional boundaries in obtaining sensitive information from staff with regards to the care home at X location which was of a personal interest to you.

It appears that you approached your colleagues with your concerns regarding S following which a visit was undertaken to investigate the concerns raised. Information obtained in the course of the visit and subsequent investigations were fed back to you by your colleagues. This information included commercial sensitive information in relation to the care home which would not ordinarily be made available to a member of the public and personal information in relation to a resident of the care home.

*However, I believe that such information would often be discussed at team meetings within which you and your head of service were in attendance and therefore **it is quite possible that you could have access to this level of information and not that you used your position as a senior manager and breached professional boundaries to put pressure on your colleagues to share this information with you.** I believe this that this is debatable from the evidence presented. The colleague, who sent you this data, thus breaching data protection, has been subject to disciplinary investigations and proceedings.*

I found this allegation to be not proven.

The council expects the highest standards of conduct, and behaviour, from its employees particularly in respect of integrity and honesty, regardless of personal circumstances and in particular from that of a senior officer.

Despite your extensive service and experience with the council, this does not however negate the seriousness of your actions or conduct. Having fully considered the mitigation put forward by you during the disciplinary process I've determined that the effect of your actions, your knowledge of relevant policies as a fundamental part of your role are so serious that they amount to gross misconduct.

The case features a number of allegations that are categorised as gross misconduct and of concern is the bond of trust between you and your line management which is irrevocably broken beyond repair

65. The Claimant has during cross examination been taken to the relevant documentary evidence that Mrs. Giles considered. She was unable to explain why she provided additional assistance to these 5 family/friends giving them an unfair advantage in the recruitment process rather than declaring an interest and stepping away from the process. She suggested she was 'helping' those family/friends in the same way she would have helped others. Her explanation was untrue and unsupported by the evidence. The respondent was entitled to conclude, given the claimant's knowledge of the recruitment process, her seniority and length of service that trust in the claimant was broken 'beyond repair'.
66. It was put to Mrs. Giles that because no reference is made to the claimant's length of service and clean disciplinary record as mitigation no consideration was given to these factors in a positive way in the decision making process. Mrs. Giles did consider those factors but decided given the seriousness of the allegations and the number of allegations of gross misconduct that trust was broken. This was a long serving employee who knew the recruitment processes and procedures and was using her knowledge and position to help family/friends she had a 'connection' with. This was exactly the type of nepotism the procedures were designed to prevent.
67. The claimant appealed against the dismissal by letter setting out 8 grounds of appeal. She states the allegations are "**virtually all historic in nature. I have been dismissed for helping people back in 2010/2013. If indeed the council had genuine concerns about my actions it should have raised these issues in a timely manner**". This was not the response of someone who accepted any responsibility for her actions.
68. The appeal hearing took place on 16 December 2016 with Alan Menzies (Director of Planning and Economic Regeneration). The claimant attended with her husband as her 'companion'. We did not hear any oral evidence from Mr. Menzies who had provided a witness statement for the purposes of these proceedings which was not challenged by the claimant.

69. Mr. Menzies provided an outcome letter at pages 794 and 795 of the

bundle which addressed the eight grounds of appeal the claimant raised. His conclusions are supported by our findings of fact

70. The first ground is; *“You felt that the initial investigation was only commenced as the result of your reporting unfit for work and highlighting the council’s failure to make reasonable adjustments for your disabilities. You stated you felt this was victimisation”*.
71. He responds: *“Evidence was presented at the hearing that the investigation was commenced, as a result of, your emails being redirected to your manager during your sickness absence. Whilst this was as a result of your absence, it was a supportive measure to deal with day-to-day communications and ensure that your workload is managed in your absence. I did not see any evidence presented that it was a punitive action, as a result of your absence or is victimisation as the result of you bringing legal action against the council, as you assert. Indeed it **was supportive action which resulted in the discovery of the emails and led to the investigation”***.
72. The second ground of appeal is that *“you stated that the investigation was flawed, biased and disproportionate and should have been conducted by someone other than Yvonne Rhodes and was commenced with the intention of dismissing you”*.
73. He responds: *“having reviewed the investigation I felt that it was balanced and proportionate, given the serious nature of the allegations and your seniority with the council. You state that you felt Yvonne Rhodes should not have been appointed as the investigating officer. During the hearing it was explained that while another individual was initially appointed to investigate the matter, this individual was unable to commence the investigation and as a result another investigating officer was required. You stated this should not have been Yvonne Rhodes, however there was no reason presented to me to preclude Yvonne Rhodes from carrying out the investigation. While an ideal situation may have been that someone other than your line manager should have been the investigating officer, given the circumstances I do not feel it was inappropriate. Yvonne Rhodes did not have any decision-making ability in the process rather presenting her findings at the hearing for another manager, to make a decision. She was not involved in the issues raised prior to undertaking the investigation, other than in her capacity as line manager in this role which did not preclude her from undertaking the role of investigating officer”*.
74. The third ground of appeal is *“you claim that during the enquiry the council failed to answer a number of questions and has not been open transparent or fair and balanced”*.
75. He responds: *“You asserted that the council has failed to respond to a number of questions, however I have found details in the documents that your letters and queries were responded to in a fulsome and timely manner. You are provided with a full pack of information relied on by the council, at both the original hearing and the appeal, which was compiled during the investigation process and were given the opportunity to respond to any information produced and submit your own additional documents. I therefore find that the council has been open and transparent, providing*

you with the documents and given you opportunity to respond to the evidence put forward. You have been afforded additional time and opportunities to respond to the evidence in the pack. Indeed you are given an extended period from June to September in which to provide a written response to the questions from the original hearing. I believe this was a fair and balanced approach for the council take to ensure you were given adequate opportunity”.

76. The fourth ground is *“you stated that the decision to dismiss you was wholly d disproportionate to the allegations and it was totally unreasonable to dismiss you in light of your 27 year career with the council”*
77. He responds: *“in reaching my decision I consider the nature of the allegations, their severity and your employment history with the council. I also took into account your seniority and length of service. I am in agreement with the original decision that all allegations are proven with the exception of the allegation 2 and 5(c). I do not agree that the decision to dismiss you was disproportionate to the allegations and feel that they are serious enough to warrant summary dismissal. The council is **entitled to expect a high level of honesty and integrity from employees, regardless of personal circumstances, which you have failed to demonstrate.** Indeed, I feel that the council had the right to expect a far higher level of performance than you demonstrated”.*
78. The fifth ground is *“you stated that the allegations are virtually all historic in nature and that you been dismissed for helping people. You also state that the issues should have been dealt with at the time they occurred”*
79. He responds: *“while some of the allegations did relate back to 2010 not all of them were historic in nature. In addition there is no evidence that the allegations were not **dealt with in a prompt manner once they came to light.** Nor is there evidence that the council was aware of any of the issues raised prior to the investigation which commenced in October 2015 I believe that the allegations were dealt with as promptly as possible given the adjustments that were made to accommodate your health issues”.*
80. The sixth ground is *“you stated that the investigation was not fair or compliant with ACAS guidelines”.*
81. He responds: *“I found that the investigation was undertaken in line with the council’s disciplinary policy and procedure and this complied with the ACAS code of practice on discipline and grievance. I found no evidence that the investigation had been undertaken in an unfair manner or that a different process should have been followed”.*
82. The seventh ground is *“you stated that the council was aware that you are on sick leave with work-related stress and that you are suffering with depression. You also stated that you felt the council failed to take your disability and illness into consideration during the disciplinary process”*
83. He responds: *“I found considerable evidence that consideration is given to your illness and disability as part of the disciplinary process. A number of adjustments were made in order to accommodate you, including allowing you to bring a friend or your husband to meetings for support rather than a*

trade union representative or work colleague in line with the policy, a number of rescheduled hearings due to you being unable to attend and to allow additional time for you to prepare, additional clarification of the process and an extended adjournment to allow you to access support from occupational health, to respond to questions in writing with the support of your husband and a senior manager to act as your welfare contact during the process. These adjustments were put in place, in order to support you and allow you to fully engage with the process. Indeed, you attended the appeal hearing and clearly presented your case to me, which I considered in my decision”.

84. *The eighth ground of appeal is “you felt the council failed to take into consideration the effect the investigation has had on your health and that as the allegations weren’t criminal and due to your illness, the investigation could have **waited** until you are properly able to defend yourself”.*
85. *He responds “during the hearing it was presented to me that while the council acknowledged your illness which was demonstrated by the various adjustments made to the procedural and extended timescales allowed, a number of which are detailed above, it was under a duty to ensure that the issues were dealt with without undue delay in line with the council’s disciplinary policy procedure. As already stated, you are afforded the opportunity to attend the meeting and upon declining were given the opportunity to respond to questions in writing and were given three months to complete this task. I understand that during this period you are able to attend an employment tribunal and give evidence as a witness. While the council has a duty to take your illness and any disability into consideration I believe that it also has a duty to conclude the matter without unduly undue delay as you stated that the process was having an adverse effect on your health”.*
86. *Mr. Menzies concludes that “having considered the evidence presented at the appeal hearing by both sides, the bundle of papers provided in the mitigation you presented in addition to the points you raised your appeal, I believe your behaviour has breached the bond of trust and confidence between you and your manager and I’ve decided to uphold the decision to summarily dismiss you for gross misconduct”.*
87. *By way of clarification Mr. Menzie’s reference to the employment tribunal is the hearing in relation to the January 2016 claim which was heard between the 26 to 30 September 2016.*
88. *We found that the letter comprehensively dealt with each of the eight grounds the claimant raised at the appeal process and the reasons why the appeal was not upheld. The appeal process documentation we saw demonstrates a fair appeal process was followed. The grounds of appeal reflect are the grounds of unfairness the claimant relies upon for her complaint of unfair dismissal. We agree with Mr. Menzie’s conclusion that they were not made out for the reasons he succinctly gives in the outcome letter.*

Applicable law

89. Both counsel accurately set out the applicable law. For the unfair dismissal section 98(2) and 98(4) Employment Rights Act 1996. For the victimization complaint sections 27 and section 136 of the Equality Act 2010 apply. The list of issues also identifies the questions from the applicable law for the tribunal to decide. We also considered the written and oral submissions provided by both counsel before reaching our conclusions

Conclusions

90. Unfair Dismissal. The first question to decide was the reason for dismissal. We found it was a reason relating to the claimants conduct which was a potentially fair reason. We do not accept the dismissal decision had anything whatsoever to do with any protected disclosures. Mrs. Giles dismissed the claimant for gross misconduct because she found the claimant had used her position as a senior manager to assist family and friends in the application and recruitment process to their advantage. She had also abused her position as a senior manager by referring to her role within the council to mislead and add weight to an application for attendance allowance made by a family friend. Mrs. Giles was entitled to conclude the effect of that misconduct was so serious it broke trust and confidence irretrievably 'beyond repair'.

91. We were satisfied that Mrs. Giles at the dismissal stage and Mr. Menzie at the appeal stage both genuinely believed the claimant was guilty of gross misconduct. Their belief was based upon reasonable grounds and a reasonable investigation. Mrs. Giles analysis of the evidence and conduct of the process was thorough and fair. Mr. Menzie in his appeal outcome identifies all the steps taken in the process which lasted well over a year from start to finish. We did not find any of the complaints of unfairness were made out.

92. Mrs. Ward and Mrs. Rhodes carried out a reasonable and fair investigation. They gathered evidence and interviewed relevant witnesses in a case where the source of the material upon which adverse findings about the claimant were made came from the claimant.

93. There was no failure to provide disclosure of documents or any lack of transparency in the process and the ACAS guidelines were followed.

94. The fact that the claimant in her pleaded case still refers to the 'historic nature' of the allegations, as a ground of unfairness, shows a complete lack of insight into her own conduct, which supports Mrs. Giles conclusion.

95. Mr. Menzie addresses the historic nature of the allegations ground at the appeal stage, correctly stating that as soon as the allegations came to light in October 2015 they were "dealt with as promptly as possible given the adjustments made to accommodate the claimant's health issues".

96. The respondent adopted a fair procedure. The dismissal decision was a fair sanction which was well within the range of reasonable responses open to a reasonable employer faced with these circumstances. The claimant was in a senior management position. She knew what she was expected to do and what she was not expected to do. The respondent bent over backwards to accommodate her ill-health absence and got to a

stage where it was reasonable not to delay any longer given the seriousness of the allegations it was considering and the occupational health advice it had obtained.

97. For the victimisation complaint we have set out our findings of fact in relation to the disputed first protected act, at paragraph 17, explaining why we did not find it was a protected act. In any event we did not find that any of the 3 detriments (investigation disciplinary and dismissal) were because of any protected acts. The 'reason why' the investigation process started was because there was sufficient cause for concern to investigate the claimant's conduct. Those concerns continued during the 'disciplinary' because the evidence showed there was a 'case to answer'. It ended in dismissal because of the findings of gross misconduct and loss of trust and confidence made based on the evidence. The victimisation complaint therefore fails and is dismissed
98. For the breach of contract complaint we found the respondent has proved it was entitled to dismiss the claimant without notice because the claimant had committed gross misconduct in that she had breached the recruitment policies which required a fair and equitable process to be followed, by giving friends and family an unacceptable level of assistance to their advantage. She used her position and knowledge for the benefit of friends and family and abused her position as a senior manager. That proven conduct also had the effect of breaking trust and confidence, making any continued employment relationship impossible. The complaint of breach of contract (notice pay) therefore also fails and is dismissed.

Employment Judge **Rogerson**

20/07/2018