EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111163/2018

Held in Glasgow on 5, 6 and 7 November 2018 and held in Chambers on 10 December 2018

Employment Judge: F Jane Garvie

Mrs S McGinn	**Claimant** **Represented by:** **Mr G Bathgate - Solicitor**
South Ayrshire Women's Aid	**Respondent** **Represented by:** **Mrs T Stirton - Employment Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

(1) the claimant was unfairly dismissed in terms of section 98 of the Employment Rights Act 1996;

(2) the Tribunal orders that the respondent shall pay a Monetary Award of Eight Thousand, Two Hundred and Sixty Five Pounds and Twenty Nine Pence (£8,265.29);

(3) the prescribed element is Three Thousand and Sixty Three Pounds and Forty Two Pence (£3,063.42) and

(4) the Monetary Award exceeds the prescribed element by Five Thousand Two Hundred and One Pounds and Eighty Seven Pence (£5,201.87).

REASONS

Background

1. In her claim, (the ET1) submitted on 5 July 2018, the claimant alleged that she had been unfairly dismissed. She seeks compensation, if successful.

2. The respondent submitted a response, (the ET3) in which they deny that the claimant was unfairly dismissed. The parties were directed to send replies to Date Listing letters. The claimant's representative replied. The respondent did not. The file was referred to me as the duty judge and I directed that three days be allocated on the basis of the reply from the claimant's representative while noting there had been no reply from the respondent's representative. Notices for the Final Hearing were issued dated 3 September 2018, duly allocating three days as indicated above. A case management order was issued dated 22 August 2018 and a reply was received from the claimant's then representative under cover of an email of 20 September 2018. By email dated 30 October 2018, the claimant's then representative advised that they were no longer instructed. On 31 October 2018, my colleague, Employment Judge Shona Maclean directed that the claimant be asked if she intended to proceed with the hearing on her own behalf. A letter to that effect was issued on 1 November 2018.

3. By email of 1 November 2018, the claimant replied, advising that she was now represented by Mr Bathgate. Meanwhile, by email of 1 November 2018, the respondent's representative advised that "all documentation has been passed to the claimant's former representative".

4. By email also of 1 November 2018 an application was made for a postponement of the Final Hearing commencing on 5 November 2018. By email of 1 November 2018, objection was taken to that postponement application for the respondent. By email of 2 November 2018, the parties were informed that Employment Judge Mary Kearns had considered the application for postponement but refused it.

5. By email of 2 November 2018, Mr Lawson of Mr Bathgate's firm set out a further application regarding the postponement refusal which was copied to the respondent's representative. Comments were received on 2 November 2018 with the respondent's representative continuing to object the postponement request. Judge Kearns directed that the postponement application was refused but the claimant's representative could renew their application on Monday, 5 November 2018. This was notified to the parties in an email of 2 November 2018.

The Final Hearing

6. At the start of the Final Hearing, Mr Bathgate explained that he had had the opportunity to meet the claimant on the preceding Friday and so he was now in a position to proceed at least on 5 November 2018 although, as of that date, he had another hearing which he would require to attend on Tuesday, 6 November 2018 in Edinburgh Sheriff Court. As it transpired, that hearing did not proceed on 6 November 2018 and accordingly Mr Bathgate was available on all three days, namely Monday, 5 through to Wednesday, 7 November.

7. It was agreed with the representatives at the conclusion of the hearing that it would be helpful to have written submissions and they were directed to exchange these by no later than 21 November 2018 on the basis that their final written submissions would then be sent to the Tribunal office by no later than close of business on Monday, 26 November 2018.

8. It is also appropriate to narrate that, at an early stage in the proceedings, it became apparent that there are two service users of the respondent's organisation whose names appear in the joint bundle and who are referred to in the course of the investigation, disciplinary and appeal hearings, (see below). It was agreed that there would be no objection to an order being issued to prevent the disclosure of their identities in terms of Rule 50 (3)(b) of Schedule 1 of the Employment Tribunals Rules of Procedure (Constitution and Rules of Procedure) Regulations 2013. These individuals are referred to respectively as X and Y.

9. An Order to that effect was issued on 6 November 2018, this having been agreed with the representatives on 5 November 2018. There were no observers at the hearing on 5 November 2018 nor were there any press present.

10. The respondent provided a joint bundle. In addition, the claimant's former representative had provided a Schedule of Loss which it was agreed would be updated by Mr Bathgate and attached to his written submissions.

11. During the course of the hearing, additional documents were provided by Mr Bathgate. They were added into the joint bundle with the page numbering continuing on from the last page of the joint bundle.

12. Evidence was given on behalf of the respondent by three witnesses. Ms Shirley Middleditch who is the respondent's Assistant Manager, Ms Pat McLellan who is the respondent's Vice-Chair and Mrs Margaret (Rita) Miller who is the chair of the respondent's Board of Directors.

13. The claimant also gave evidence.

Findings of fact

14. The Tribunal found the following essential facts to have been established or agreed.

15. The claimant commenced employment with the respondent on 10 December 1990. Her employment was terminated summarily on 3 April 2018. Throughout her employment the claimant worked as a Support Worker within the respondent's organisation. The respondent's organisation is funded by public funds from the local authority (South Ayrshire Council), the Scottish Government and, from time to time, by grants from charitable trusts. The respondent is itself a charitable trust.

16. There are ten members on the Board of Directors. There is a full time Manager who, at the time of the claimant's dismissal, was Ms Hazel Bingham. There is also an Assistant Manager, Ms Middleditch.

17. In addition, there are three teams of Support Workers. The claimant was in the WSS Team. She was full time but worked as an office based support worker although, on occasions, she could be out of the office with a client or service use, visiting other places either locally or sometimes when a service user had a car she would drive the claimant to wherever they were to attend a meeting, for example one that was being held outside Ayr. The claimant does not drive.

18. Within the claimant's team there are three other full time Support Workers who are described as being "Outreach" in that they are not office based. There is also one part time Support Worker whereas the claimant was office based.

19. There is also one Training Worker who is full time and office based. There is an Accommodation Team, comprising two full time Support Workers and one full time Support Assistant who are all based at a refuge operated by the respondent. Separately, there is also a Children and Young People's Team with one full time Support Worker and two part time Support Workers all of whom are also based at the refuge, (page 29).

20. The respondent has a disciplinary policy, (pages 30 – 36) which is set out as an extract from a staff handbook. It is referred to as being Version 1 at pages 49 to 55 of that handbook and appears at pages 30 – 36 of the bundle.

21. In it, there is a section entitled, "14. Discipline" and below there is a paragraph entitled, "Gross Misconduct".

22. This reads as follows:

> "Gross misconduct is misconduct of such a serious and fundamental nature that it breaches the contractual relationship between the employee and SAWA. In the event that an employee commits an act of gross

misconduct, SAWA will be entitled to terminate summarily the employee's contract of employment without notice or pay in lieu of notice.

If an employee commits an extremely serious disciplinary offence SAWA may dismiss them without prior warning and without notice.

Some examples of offences which constitute gross misconduct are:

- Criminal offence which affects the individual's ability to carry out her job;
- Physical assault by an employee on any other persons;
- Theft, misappropriation or unlawful destruction of property of SAWA, its employees, associates and service users;
- Serious infringement of safety rules or negligence which causes unacceptable loss, damage or injury;
- Supplying security access codes to any unauthorised person;
- Unauthorised disclosure of information or misuse of trust of a serious nature;
- Making malicious or unfounded allegations of a serious nature;
- Deliberate falsification of any documents or claims, including time sheets, overtime or expense forms;
- **Misconduct at work or away from work of such a serious nature as to bring into disrepute either the employee's position or SAWA;** (Tribunal's emphasis)
- Sexual/racial discrimination;
- Harassment of a serious nature;

- Deliberately accessing internet sites containing pornographic, offensive or obscene material;
- Persistent alcohol or drug abuse;
- Engaging in unauthorised employment during hours when contracted to work for SAWA or during periods of designated leave, for example annual or sick leave, time off for training etc;
- Failure to disclose unspent criminal conviction(s) or any convictions, whether spent or not, in respect of posts exempt under the terms of the Rehabilitation of Offenders Act 1975;
- Providing false information on a job application form;
- Bribery offences under the Bribery Act 2010;

Please note this list is not exhaustive.

We retain discretion in respect of the disciplinary procedures to take account of your length of service and to vary the procedures accordingly. If you have a short amount of service (less than 2 years) you may not be in receipt of any warnings prior to dismissal.

23. **SAWA reserve the right to allow an external third party to chair/attend any meetings on our behalf."**

24. The claimant was provided with a Statement of Main Terms of Employment, (pages 67 – 72). This refers to the claimant's employment having commenced on 10 December 1990, (page 67). It gives her job title as "Refuge Support Worker reporting to the Manager". It was signed by the claimant and the respondent on 5 February 2014, (page 70).

25. There was also an amendment to the Statement of Main Terms of Employment dated 22 April 2014, (page 71) confirming that the claimant would now be office based. This was signed by the respondent on 22 April 2014 and by the claimant on 30 April 2014.

26. There is also a Code of Conduct, (pages 37 – 38) and the Scottish Social Services Council Codes of Practice, (pages 39 – 66). At page 65 it states:

> "**I will**
>
> 6.1….
>
> 6.2 Maintain clear, accurate and up-to-date records in line with procedures relating to my work."

27. The respondent received complaints from two service users who are referred to as X and Y respectively, (see above). Both were received while the claimant was on holiday. The respondent does not operate a handover process for staff who are going on holiday.

28. X made a complaint on 6 March 2018 during a telephone call to one of the claimant's colleagues who explained to her that the claimant was then on annual leave. X explained that she was moving house on that date and was unsure what was happening with delivery of a fridge/freezer and whether it was to go to her old or new address. The member of staff who took the call said she would contact X once she had looked into it.

29. This individual could not find any details on the respondent's IT system which is called Oasis about X. The claimant was this service user's Support Worker. Oasis is used as the respondent's only means of recording information about service users. Oasis is a cloud based IT system. The respondent does not have back up paper files. This individual spoke to another member of the Support staff who was also unsure of the position.

30. On returning the call to X, as promised, the colleague who took the original call noted that X was unhappy and so further enquiries were made and a

statement was provided which sets out the steps taken by this colleague in the claimant's absence on holiday, (page 83).

31. It transpired that a cheque had been received from an organisation called the Buttle Trust. The cheque was located and later cashed by the respondent. It was not in dispute that the claimant had received the cheque and passed it to management. The Buttle Trust from time to time awards cash grants to the respondent to use for designated service users. The Trust had decided to make such a monetary grant to the respondent for X's benefit as well as agreeing to supply a fridge/freezer to X.

32. The complaint from Y was made on 5 March 2018 when she attended the respondent's office and met the Manager. She made notes of the discussion with Y and a further note of 6 March sets out additional information following a telephone call from Y on 6 March.

33. During the disciplinary process the claimant accepted that Y had asked for a letter of support from the respondent to be sent to the local authority about an application Y was making to be re-housed. This was to be done by the claimant as Y's Support Worker.

34. Following Y's meeting with the Manager, Ms Bingham made a note setting out the terms of Y's complaint. It was dated 5 March 2018, (page 75).

35. The Manager then received a telephone call from Y on 6 March and she made a note of the additional information provided to her in that call, (page 76).

36. Y's position was that she had asked the claimant three times to provide a letter of supporting Y's application to be rehoused. Y understood that the claimant would do so before going on holiday. It was not in dispute that the claimant failed to provide such a letter to Y before she went on holiday.

37. Both complaints (i.e. the one from X and the other from Y) were received while the claimant was on holiday.

38. By letter dated 12 March 2018 the claimant was invited to attend an investigation meeting to be held on 14 March 2018. It was explained this would be with the Assistant Manager, Ms Middlemarch and a Mr Billy Muir who is described as being the respondent's HR Support, (page 95).

39. The letter explained there was to be an investigation and the issues were as follows:

> "**That you divulged personal information to this service user in breach of SAWA Code of Conduct Policy;**
>
> **That you failed to provide, on a number of occasions, a lettter of support to South Ayrshire Council Housing Department on behalf of this service user;**
>
> **AND**
>
> **You failed to ensure that this service user received the Fridge Freezer and cash grant from Buttle Trust the details of which were sent to you to be actioned;**
>
> **AND**
>
> **You failed to adhere to and record this process under SAWA procedures**."

40. The claimant duly attended the investigation meeting held on 14 March 2018. In addition to those mentioned in the letter, the claimant had Ms Lorna Sargent with her as her companion. Notes of that meeting are set out at pages 97 – 99. The notes were apparently prepared by Mr Muir who is shown as being the note taker. They were signed by Ms Middleditch on 14 March 2018. She as the investigating officer. The claimant also signed them on that date.

41. The notes record that the meeting commenced at 2.30pm and ended at 4.10pm.

42. There was reference to Y having asserted that the claimant had discussed personal issues with her. Also, it was explained that Y asked the claimant to provide a letter for her, supporting her application to be rehoused by the local authority.

43. The claimant explained that Y had issues with her neighbour. This was an issue in relation to anti-social behaviour; it was not in relation to domestic abuse although Y had, in the past, used the respondent's service when she had been the subject of domestic abuse.

44. The claimant explained that Y was not affected by domestic abuse but rather her issue was in relation to alleged anti-social behaviour towards Y by her neighbour. The claimant had been informed by Y that this neighbour had asked Y out but she declined the offer. The claimant understood that Y was not in a relationship with this neighbour.

45. During the investigation meeting, the claimant accepted she had been asked by Y to provide a letter in support of Y's request to be rehoused. The claimant accepted that she had not done so, (page 98).

46. She was also asked if she accepted that the allegations, if true, could damage the respondent's reputation with both their service users and the funders losing trust and confidence in the organisation. This specific question was put to her by Ms Middleditch, (again see page 98). The claimant replied:

> "I don't believe I did that. I was giving the support needed."

47. The claimant was then asked about service user X and whether she accepted that she had agreed to provide assistance to X. The claimant confirmed she had spoken to X. The claimant made an application to the Buttle Trust for a monetary grant and a fridge/freezer for X.

48. The claimant had then received a cheque from the Buttle Trust. She spoke to management as this was the first time she had received a cheque and she did not know what to do with it. Her recollection was that the cheque was put into the respondent's safe, (page 98). She recalled there was email correspondence with the Trust but she had not seen these emails in advance of the investigatory meeting. The claimant thought she had recorded it on Oasis.

49. Emails to Support Workers are sent to their individual email accounts. Only the Support Worker then has access to such emails as the respondent's procedures do not allow anyone other than the recipient of an email to access such emails. In the past, the respondent had been able to access Support Workers email individual email accounts if a Support Worker was absent from work but they were no longer able to do so.

50. The claimant when asked if these allegations against her by X could damage the reputation of the respondent with the service users and funders losing trust and confidence in the organisation (page 99) replied, "I don't believe I did anything wrong. The woman knew she was getting it but did not have an address for it to be delivered." This was a reference to the fridge/freezer.

51. The claimant's understanding was that X was moving to a house on a new development and, while the claimant knew from X the street/road of the development, X did not have a house number. This was because the claimant had understood that the house number had not yet been allocated by the Post Office to X.

52. Support Workers are required to make electronic notes and other relevant information about service users on the respondent's computerised system, (Oasis). The claimant accepted that, in relation to X, she had not recorded information on Oasis which was what she should have done. She did not offer an explanation for having failed to do so, (page 99).

53. The letter of support sought by Y from the respondent to be sent to the local authority in relation to her application to be rehoused was provided to Y at a later date by one of the respondent's other staff.

54. Prior to this investigation meeting taking place, Ms Middleditch had made internal enquiries. She prepared an investigation report, (pages 101 – 106). This included reference to statements taken from members of staff, (pages 105 and 106), an email and letters from the Buttle Trust, (pages 109 -111). She also provided copies of the Codes of Conduct and Code of Practice, (page 106).

55. By email dated 20 March 2018, the respondent wrote to the claimant, (pages 107 – 108). That letter came from Ms Bingham as the respondent's Manager. This invited the claimant to attend a disciplinary hearing on 29 March 2018 to be chaired by Mr William Muir, HR consultant with a Ms Pat McLellan, Vice Chair of the Board and the Manager, Ms Bingham to be in attendance as the note taker.

56. The letter set out the following allegations:

> "**It is alleged:**
>
> - **that you discussed personal issues with Y on a number of occasions in breach of SAWA Code of Conduct Point 4.12;**
> - **that you failed to support Y by issuing a letter to South Ayrshire Council in support of her housing application;**
> - **that you failed to record this on Oasis, therefore breaching the SSSC Code of Practice point 6.2;**
> - **that you failed to inform Management with regards to the letter therefore breaching SSSC Code of Practice point 2.5**
>
> **and**

- **that you failed to properly assist X over helping her to obtain a Fridge/Freezer and cash granted to her;**

- **that you failed to record this on Oasis therefore breaching the SSSC Code of Practice point 6.2;**

- **that you failed to fully inform Management with regards to this matter therefore breaching SSSC Code of Practice point 2.**

and

- **that by these actions you have potentially damaged the good reputation, amongst service users, partners and funders, of South Ayrshire Women's' Aid.**

These allegations if upheld will constitute Gross Misconduct and could lead to an award of up to and including dismissal from this employment."

57. The claimant was informed that she was entitled to be accompanied either by an accredited trade union official or work colleague. Copies of the documents to be discussed were said to be enclosed.

58. There was a letter from an individual at the Buttle Trust which was attached to an email of 16 February 2018. This was addressed to the claimant and was timed at 15:56. The letter was also dated 16 February 2018. It referred to X and advised that the application which had been made for a grant had been successful and a cheque for £110 to enable X to purchase essential household items would be issued. It also referred to a fridge/freezer which was to be delivered by the Co-Op, (page 110).

59. By letter dated 19 February 2018, (page 111) and addressed to the claimant the Buttle Trust enclosed a cheque for the said sum of £110. The letter went

on to explain that the cheque should be presented to the bank immediately and, if the funds were no longer required, then the cheque was to be returned.

60. The claimant had then spoken to the Assistant Manager to ask her what should happen to the cheque as she had not previously dealt with cheques and so did not know what was the respondent's procedure in processing cheques.

61. There was also a statement from another employee dated 19 March 2018, (page 115) setting out her involvement in dealing with X's enquiry in early March when the claimant was on holiday.

62. A further statement from another Support Worker about X was dated 15 March 2018, (page 117) as well as an earlier statement from that individual about Y, (page 116).

63. Ms Bingham provided a statement, (page 118) which confirmed receipt of the cheque that had been provided from the Buttle Trust, explaining that management had not been asked to follow up on the supply of a letter for Y as well as confirmation that the claimant had asked management about making arrangements to bank the cheque from the Trust.

64. There was also a copy of a statement from Ms Middleditch dated 6 March 2018 in relation to the call taken by her from X.

65. The claimant duly attended the disciplinary hearing on 29 March 2018. Mr Muir chaired that meeting and Ms Bingham was the note taker, as arranged. The claimant was accompanied by a union representative, Mr Bennett, and Ms McLellan was present for the Board of Directors.

66. The meeting is recorded as starting at 10am and having closed at 11am. Notes from that meeting were prepared, (pages 120 – 124). These notes were not provided contemporaneously to the claimant. Instead, she was sent the notes for consideration and comment after the meeting. She had the

opportunity to discuss this with her trade union representative. They then provided comments which are set out at pages 126 – 128.

67. The disciplinary hearing notes were later signed by Ms McLellan on 3 April 2018, (page 125) but not by the claimant. At page 128, it is noted that the amended notes had been viewed by Mr Muir and Ms McLellan and that,

> "They both can agree some of the changes but not all.
>
> No agreement reached on the notes as at 18th April 2018.
>
> Therefore, I have added your amendments as part of the notes of the meeting."

68. Ms McLellan decided that she needed to make further enquiries in relation to the Oasis system and how it operates. She was not familiar with it, since as a Board Member, she was not directly involved in its day to day operation.

69. Enquiries were then made with the respondent's IT (i.e their third party) provider. This is a company called itworks.co.uk. Ms Bingham, (the Manager) received a reply from a Mr Scott Philip dated 29 March 2018 at 16:02 hours,(page 129) in relation to enquiries about the Oasis system which is used by the respondent's staff to record all interactions, meetings, calls etc with service users as explained above.

70. There was also an earlier email from him to Ms Bingham of the same date timed at 13:17, (page 130) and then a further email on the same date at 13:18 (again page 130). Page 140 sets out all of the checks that had been made by Mr Philip regarding the claimant's usage of the Oasis system.

71. Page 139 set out Ms McLellan's rational for her decision following the disciplinary hearing and in light of the information provided to the respondent by Mr Philip of it works.

72. By letter dated 3 April 2018, (pages 141 – 143) the claimant was informed by Mrs McLellan of the outcome of the disciplinary hearing. That letter set out the allegations as follows:

> "The meeting had been arranged to discuss the following allegation made against you:-
>
> - **that you discussed personal issues with Y on a number of occasions in breach of SAWA's Code of Conduct point 4.12;**
>
> - **that you failed to support Y by issuing a letter to South Ayrshire Council Housing Department in support of her housing application after being asked to do so on a number of occasions; and**
>
> - **that you failed to record this on Oasis, therefore breaching the SSSC Code of Practice point 6.2;**
>
> **and in the case of X**
>
> - **that you failed to properly assist X over helping her to obtain a Fridge/Freezer and cash granted to her;**
>
> - **that you failed to record this on Oasis therefore breaching the SSSC Code of Practice point 6.2;**
>
> **and**
>
> - **that by these actions you have potentially damaged the good reputation, amongst service users, partners and funders, of South Ayrshire Women's Aid**"

73. Ms McLellan indicated that she considered there was sufficient evidence to support the claimant having divulged personal information to Y, however this turned on Y's word against the claimant. She advised therefore that she did not uphold that allegation.

74. She noted the claimant had admitted that she did not provide the letter that had been requested by Y nor had she uploaded details about that request on to the Oasis system.

75. The claimant had accepted that contact with service users must be recorded on Oasis and that it was also an SSSC requirement that the respondent ensure that records were made of all contacts with service users.

76. It was explained that contact had been made with the third party IT provider in order to check what the claimant had recorded on the file. Their response was that the IT provider found that that there had been access to the service user's file on five occasions by the claimant and it was their view that it would not be possible for a user such as the claimant to leave that computer system without saving notes that had been made.

77. There was also reference to the claimant having met Ms Middleditch to discuss comments made by the claimant that she was not feeling well in the week commencing 26 February 2018 and she had been advised that she could go home but refused to do so.

78. While Mrs McLellan accepted the claimant had "never intentionally set out to harm the reputation of" the respondent, it was her view that, at the disciplinary hearing, the claimant's attitude demonstrated that she did not fully understand the potentially damaging consequences of not uploading notes and emails to all cases i.e. of service users such as X and Y for whom the claimant was their designated Support Worker.

79. There was also reference to SSSC and Mr Bennett having enquired if the matter had been raised with them. Ms McLellan confirmed in her letter that a reference had been made to the SSSC for them to decide if action should be taken under their rules. So far as the respondent was concerned, she had advised Mr Bennett that the respondent would have regard to its disciplinary policy and take action that it deemed appropriate. It was explained that this was standard practice.

80. Ms McLellan's letter continued:

> "Over the issue regarding the investigation report, it is standard practice for the investigating officer to make recommendations in their outcome that the disciplinary manager can then accept or amend once they have reviewed all relevant documentation. After taking all the available evidence into account it is my belief that you have been guilty of Gross Misconduct by your actions in failing in your duty to adhere to the procedures of both Ayrshire Women's Aid and SSSC. You failed on a number of occasions to update these two service user's notes in line with these policies, and by your actions you have caused me to lose the required trust and confidence in you continuing to be employed by South Ayrshire Women's Aid. Therefore you are **Summarily Dismissed** from South Ayrshire Women's Aid employment and are not entitled to any notice pay as per your contract of employment."

81. The letter advised the claimant that her last day of employment would be 3 April 2018 and her final pay would be paid on 10 April 2018. The claimant did not receive that letter until some days later as it was posted out to her. Nothing turns on the date of when she received the letter of dismissal.

82. The claimant was also sent a copy of the notes of the meeting and she was advised of her right of appeal.

83. By letter dated 11 April 2018, (page 144), the claimant appealed against that decision. In it, she indicated that she felt the dismissal for Gross Misconduct was unfair. Her letter continued as follows:

- I feel that the timing was short between the initial complaints and dismissal.
- I also think that the meeting was not fairly heard, and it finished abruptly.
- I felt that the way the meeting was conducted in a confrontational and at times aggressive manner.

I would like to ask why the reasons for dismissal were different than the initial allegations?"

84. The claimant then sent a further letter dated 12 April 2018, (page 145) in which she referred to her previous letter. Both letters were addressed to the Vice Chair, said to be Rita Miller although she is, in fact, the Chair of the Board of Directors.

85. In her letter of 12 April 2018 the claimant wrote:

> "Further to my letter of the 11th April, I just wish to make clear that the main point which I feel was unfair regarding my dismissal was the severity of the sanction as I feel that dismissal is not within the band of reasonable responses available."

86. That letter was copied to the union representative.

87. By letter dated 11 April 2018, (page 146) Mrs Miller acknowledged the letter of appeal although it is signed on her behalf by Ms Bingham.

88. It noted that an appeal was requested and that this had been scheduled for 23 April 2018 and would be heard by Mrs Miller with Mr Muir also being present.

89. The letter continued as follows:

> "My understanding is that you are raising this appeal based on the following points:
>
> - That the decision of Gross Misconduct is unfair
> - You feel that the timing was short between the initial complaints and dismissal.

- You think that the meeting was not fairly heard, and it finished abruptly.

- You feel that the way the meeting was conducted in a confrontational and at times aggressive manner."

At this meeting I will seek to establish all the facts of the case and to discuss the grounds on which you are appealing."

90. It was confirmed the claimant had the right to having a colleague or an accredited trade union representative accompany her.

91. The appeal hearing duly took place on 23 April 2018. Mrs Miller chaired it with Mr Muir present as the note taker. The claimant attended with her union representative also in attendance.

92. The appeal notes record the meeting as starting as 09:55am and ending at 11:40am, (pages 147 – 150).

93. At the appeal hearing, the claimant provided a closing statement which was read out to the appeal panel, (pages 151 – 152). It was accepted at the appeal hearing by the claimant's union representative that the claimant had not processed the notes about the two service users, X and Y, that she should have done but it was submitted this was not, in his opinion, worthy of a charge of gross misconduct, (page 152). It was also submitted that the investigating officer did not act fairly and should not have made such a recommendation and that it was, in effect, lobbying for a desired final outcome. It was pointed out that the claimant had 28 years of service and no previous disciplinary record.

94. The Chair was also asked to consider whether the decision to dismiss fell within the range of reasonable response. It was submitted it did not and that in considering this range of reasonable responses, the importance of length of service and past conduct were of significance.

95. Following the appeal hearing, Mrs Miller took time to consider her decision. She made notes that are set out at page 205. In these, she referred to having had no previous involvement, having intentionally absented herself from a Board meeting where the issue was raised.

96. She noted there were five reasons for the appeal and she considered all the information, including the claimant's note of amendment to the original disciplinary hearing and the additional information provided by Ms McLellan after the hearing this being in relation to the information from the third party provider, (Itworks) on the claimant's use of the Oasis operating system and a timeline from Ms McLellan which Mrs Miller considered was useful to her in reaching her decision.

97. She also considered the claimant's workload during January and February 2018.

98. It was her view that the information provided about the IT system was very detailed and indicated that, on various occasions the claimant had opened up a case file but had not typed up any information on to the case file notes. Mrs Miller's understanding was that, if anything was typed, it would create an electronic marker which would be traced whether or not the note was saved by the person using the Oasis system. Any notes made would auto save to the cloud.

99. She also obtained information on the claimant's workload from the minutes of a team meeting which was provided by Ms Middleditch.

100. She noted that during the appeal hearing, there had been short adjournments and following the hearing she assessed all the information and her decision was as set out in her letter which was that she was unable to uphold the claimant's appeal.

101. By letter dated 2 May 2018, Mrs Miller wrote to the claimant (pages 206 – 209).

102. She referred to the five reasons set out in the appeal by the claimant. She then dealt with each point in turn.

103. In relation to point 1, she noted that the claimant had not added notes in relation to service users X and Y, that she had not set out to damage the respondent's reputation but at no time did she provide any other explanation for failing to add notes to the computer system.

104. The claimant had accepted she had been fully trained in the range of tasks for using the Oasis system and she should have been aware of the importance of entering notes onto the system as part of the respondent's legal requirement as set out by the SSSC.

105. Mrs Miler considered the point raised that the disciplining officer, (Ms McLellan) had "been led into making the allegation one of Gross Misconduct" but she considered that it was appropriate for the investigating officer to make a recommendation in their report and the disciplinary officer had the option to accept the recommendation or reject it.

106. In relation to the point 2, regarding the timing of the meetings, these were within the respondent's disciplinary process. It was confirmed that Mr Muir chaired the disciplinary hearing but Ms McLellan was the discipling officer and it was she who made the decision to dismiss the claimant.

107. In relation to point 3, Mrs Miller noted that the claimant had expected to receive a decision at the end of the disciplinary hearing but Ms McLellan had to investigate further points. She noted it was her understanding that Ms McLellan had not been aware of all the emails sent to her but the union representative agreed that the emails were available at the meeting and were referred to in the minutes of the meeting.

108. In relation to point 4 that the meeting was confrontational, Mrs Miller noted that the claimant's representative felt that she was very upset after the

meeting and that she could "sympathise with you and totally accept that this would be a very stressful situation."

109. In relation to the claimant not being given time to answer questions, she considered that such meetings may feel confrontation but there was a duty on the disciplining officer to ask questions so as to make an assessment of the facts.

110. Mrs Miller then concluded:

> "I have discussed this point with parties who attended the meeting and they did not concur with your view that it was confrontational. If this was the case, that the meeting was confrontational, I would have expected either you or Mr Burnett, or both, wold have made comment about this at some point during the meeting."

111. In relation to point 5, her conclusion was as follows:

> "I believe that as this was treated as Gross Misconduct that a summarily (*sic)* dismissal does fall within the band of reasonable responses."

112. Mrs Miller then referred to the written statement which was provided to her at the appeal hearing, advising that she had taken this into account. She concluded that the claimant had received training on the Oasis system and had admitted such but the claimant and her representative had "failed to grasp the potential seriousness of you (the claimant) failing to add these notes onto the (respondent's) Oasis system. She continued that "Failing to update these notes onto SAWA Oasis system could have very serious consequences to the organisation. These actions could lead to damaging SAWA reputation which could in turn lead to funders, service users and the general public losing confidence in SAWA as a service provider as well as having legal consequences with the SSSC. In both cases this resulted in your failure to follow through on the necessary actions needed to fully support the service users. This resulted in other staff and management team having to rectify the

situation with no notes on the Oasis System to offer guidance. It is with ever greater regret to SAWA that this caused additional and unnecessary distress to the service users concerned."

113. Mrs Miller did not accept that the claimant had "a very high workload". Her information suggested that the claimant had at least two hours to follow up after each appointment with the service user so as to complete her actions and write up her notes (on the Oasis system).

114. She concluded that the penalty awarded at the disciplinary hearing should remain unchanged and that:

> "Having considered all the circumstances my decision is that the penalty awarded at the disciplinary hearing remains unchanged. I share the view of my colleague that "by your actions you have caused me to lose the required trust and confidence in you continuing to be employed by South Ayrshire Women's Aid.""

115. The letter concluded that as the appeal had been unsuccessful, the summary dismissal remained in place.

116. After the claimant met one of the service users for whom she had responsibility it was her practice to use hand written notes that she had made while meeting the service user and she would then transfer that information or the relevant information onto the Oasis system. As indicated, the claimant accepted that in the case of X and Y she failed to record file notes onto Oasis. She was unable to explain why she had not done so.

117. The claimant had been trained how to use Oasis and it was never suggested that she had not been trained or that she needed more training on its use.

118. The respondent did not have a paper based system in addition to Oasis so if information was not put onto Oasis by a support worker then the respondent

had no way of checking what had been discussed with a service user given there were no paper based files.

119. The claimant was signed off as unfit to work by her G.P. following her dismissal, (page 235) and remained unfit to work until 10 August 2018. The first Statement of Fitness to Work is dated 12 April and covered the period from 12 April to 10 May 2018. The reason given in the Statement is, "Acute reaction to stress". The claimant had chest pains and was sent for tests. She also received some counselling and was referred to the Community Practice Nurse.

120. The claimant received a further Statement covering the period from 4 May to 29 June 2018 and again the same diagnosis was given, (page 236).

121. A third Statement covered the period from 27 July to 10 August, (page 236A). The same diagnosis was given as before. There was no suggestion that the claimant became fit after 29 June until 27 July 2018, the latter date being the start of the third Statement.

122. The claimant made an application to work in a similar role but was unsuccessful in that application. The claimant is aged 64. It had been her intention to retire as at 5 May 2019. She applied for a role in a training role in counselling/support but there would have been a training cost of £1500 and the claimant did not have capital to enable her to pay for such a course.

123. The claimant has sciatica and osteoporosis so is unable to seek work that would involve lifting. She did find a volunteer unpaid post which she was allowed to undertake as it involved her working less than 12 to 16 hours per week and so is allowed to do this in terms of Job Seeker's Allowance.

124. The claimant has been in receipt of Job Seeker's Allowance with effect from 20 April 2018, (page 227). She understood that this would end on or about 18 November 2018, (page 228).

125. In relation to quantification of the compensation sought if the claim were to succeed, Mr Bathgate provided an updated Schedule with his written submission. This update does not materially differ from the earlier one provided by the claimant's former adviser under cover of an email dated 20 September 2018 which was copied to Mrs Stirton on that date.

Observations on the witnesses

126. The Tribunal found that the witnesses all gave their evidence clearly and in a matter of fact manner. While the claimant became quite emotional and upset on occasions, she did endeavour to explain what she had understood was the case against her and what she recalled she had said at the investigation disciplinary and appeals hearings. As indicated above, she accepted she failed to record information about X and Y onto the Oasis system. She did not offer an explanation to the respondent at any of the investigation, disciplinary or appeal meetings nor did she seek to suggest that she lacked training on the use of Oasis.

127. In relation to Ms Middleditch, there was no suggestion that the notes from that investigation were inaccurate and, as indicated above, they were signed by Ms Middleditch and the claimant on the date of the investigation meeting.

128. In relation to the disciplinary hearing, it was apparent that there were points of disagreement between the claimant and her representative and the respondent and this led to the amendments provided by the claimant and her representative, (pages 126 – 128). While the respondent accepted some of the changes they did not accept all of them but the amendments from the claimant in her notes were added as part of the minute of the disciplinary hearing.

129. Ms McLellan gave the clear impression that her principal concern was about the service users and possible reputational damage to the respondent. She decided that she had lost trust and confidence in the claimant albeit this was a conclusion reached by her following the disciplinary hearing and the further

investigations made into the Oasis system at her request by the third party provided, itworks.

130. In relation to the appeal hearing, it was very apparent that Mrs Miller was focused on the potential reputational damage to the respondent's organisation and that this, in turn, caused her to conclude that she had lost all trust and confidence in the claimant which echoed the view taken by the dismissing officer, Ms McLellan at the disciplinary hearing. Mrs Miller was not aware of what was meant by the reference in the claimant's second appeal letter to the "range of reasonable responses". She did not suggest that she sought advice on this point from HR support.

The Law

131. Section 98 of the Employment Rights 1996 Act states:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a)…..

(b) relates to the conduct of the employee

(c) ….

(d) ….

(3) …..

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Submissions

132. As indicated above, the representatives agreed to provide their written submissions and they are set out below. In addition, there was then further correspondence with the representatives which was sent to them on 23 November for reply by 30 November. The purpose of this was to inform them that it was brought to the Judge's attention that the respondent's written submission was hand delivered to the reception area of the Tribunal office by Mr Billy Muir on that date and there was a hand written note from the clerk advising that Mr Muir was attending as a panel member in another case on 23 November. The letter explained that while the Judge had seen reference in the productions to a Mr Billy Muir he was not called as a witness in this hearing. The Judge had previously sat with Mr Muir in the past but not recently. Mr Bathgate was to be informed of the position and, if either he or the respondent's representative wanted to provide written comments, they were to do so by no later than 30 November. No replies were received and so a reminder was issued which was dated 3 December for reply by 10 December.

133. Mr Bathgate by email dated 5 December noted that it would have been appropriate for Mr Muir's involvement in this tribunal process and the fact he is a tribunal member to have been articulated to the Judge prior to the proceedings commencing. He continued that, given the hearing was

effectively completed, the claimant was prepared to proceed on the basis that the judge would issue her judgment on the basis of the evidence led and the submissions made. He then went on to comment, in passing, that given Mr Muir's involvement in the internal process it was not appropriate for him to correspond with the Tribunal in relation to the applications being made on behalf of the claimant to postpone the hearing on 1 and 2 November 2018.

134. The respondent's representative's reply to the reminder dated 3 December was dated December 2018 and it re-attached their written submission which had already been received.

Respondent's submission

Submissions for McGinn V SAWA

1. The facts of this case are quite clear the respondent reacted to two complaints that were made against the claimant by two separate service users; X (Pages 83 to 86) and Y (Pages 75, 76 and 79 to 82). Hazel Bingham, SAWA manager, instigated an investigation and put the claimant on a paid precautionary suspension pending the investigation process.

2. The claimant was on holiday when the two complaints were made week commencing 5th March 2018. Hazel Bingham received the complaint from two service users, the first from Y and the other complaint from X. Due to the seriousness of these complaints she decided that it would be best if the claimant was contacted prior to her return to work from holiday and that she should be issued with a letter inviting her to an investigation meeting (Page 95) and to avoid any potential embarrassment to the claimant and to safeguard the investigation process that she advised the claimant in writing (Page 96) that she would be placed on paid precautionary suspension. The suspension was decided upon to ensure the smooth running of the investigation process and the seriousness of the complaints.

3. It also has to be considered, at this time, that the claimant went on holiday and knew that she had not either issued a letter to Y and had not followed the process required to deal with X being able to receive the appliance that she had requested. The claimant had failed to add notes to either service users case notes on Oasis which would, at least, have allowed her colleagues to understand where the issues in each case were, and might have avoided the distress that both service users encountered by the claimant's failure to add notes; she knew she was duty bound to in every interaction with a service user. (you might want to quote sections from the investigation/disciplinary/appeal minutes here)

Investigation.

4. Shirley Middlemarch was asked to carry out the investigation process. She considered the two complaints from the service users and during the course of the investigation it became apparent that there had not been any notes added to either of the two service users case notes on the Oasis system (Pages 77, 78 and 85) used by the respondents, this is a breach of the SSSC Code (Pages 45 to 66), the claimants Job Description (Pages 73 and 74), Code of Conduct (Pages 37 and 38) and the respondents Disciplinary Policy (Pages 30 to 36). A number of SAWA employees were interviewed (Pages 79, 80, 83 and 84) during the process along with the claimant. The claimant was accompanied at the investigation meeting and was given the opportunity to review the minutes (Pages 97 to 100) of that meeting and amend or add anything that she felt appropriate, in fact she did before signing the document.

5. After referring to the respondent's Disciplinary Policy, Code of Conduct, the SSSC Code and the Employee's Job description the investigating officer concluded, after the investigation was completed (Pages 101 to 106), that these were serious allegations that the claimant should have the opportunity to answer to at a disciplinary hearing.

6. It was also decided at this time that Hazel Bingham, SAWA Manager, should play no part in the disciplinary process, as she had been involved in dealing with the service user's complaints. She did, however, attend the disciplinary hearing, only as the note taker. The Board decided that Pat McLellan should hear the disciplinary, she is a volunteer Board Member of SAWA.

7. The claimant was invited to attend a disciplinary hearing (Page 107 and 108) where a number of allegations were made against her, these were put to her in writing and she was accompanied at the hearing by her trade union representative.

Disciplinary Hearing.

8. Pat McLellan, the disciplining officer, offered the claimant ample opportunity to explain her actions and why she had not added any notes, as is required by both SSSC (Pages 45 to 66) and SAWA Code of Conduct (Pages 37 and 38).

9. The claimant admitted that she had not drafted the letter, as was requested by Y, despite being asked three times, by the service user, to do so. She claimed that she was intending to do this when she returned to work from holiday. The claimant admitted at every stage of the Investigation, Disciplinary and Appeal that she failed to add any notes regarding this on Oasis, in breach of her regulatory duty (Doc SSSC). This failure damaged the relationship between the service user and SAWA and could have had a wider damaging effect on SAWA's ongoing reputation with both the general public and its funders.

10. The claimant also confirmed that she had been trained on the Oasis system and also understood that it is mandatory under the SSSC regulations (Pages 45 to 66) that notes must be added every time a SAWA employee has an interaction with a service user. She also confirmed that she had been trained on this (Pages 137, 138, 153 and 154). The claimant also admitted that she had been supported on a

number of occasions with additional training sessions to improve her note entry skills (Pages 153 – 06/12/2016, 155 and 156).

11. The Claimant stated that she thought that she had added notes in the X case but had forgotten to save them. The disciplining officer asked that a report be requested from the IT company (Pages 129 to 136) and this clearly shows that the claimant did not enter any notes on the X case, in fact she had reviewed the service user's case notes on five separate occasions and still did not add any notes, e-mails or letters in Oasis to document the issue raised in the complaint (Page 131).

12. At the meeting the disciplining officer felt that both the claimant and her Trade Union representative totally failed to grasp the potential seriousness of the claimant failing to add notes on Oasis, as was seen by her/his comments in the Minutes of Disciplinary Hearing (Pages 125 box 3 and 128 "It is my belief the you are escalating the seriousness of the situation to a greater level than the SSSC has"). Neither the claimant or her rep showed any understanding over the possible damage to SAWA's reputation with the service users and the wider general public, the possible penalties raised against them by the regulator; in the worst case could mean the service being closed down with job losses for colleagues.

13. More importantly the effect this could have on SAWA service users who are in many cases the most vulnerable people in society who are at their lowest ebb and seeking professional help and support from SAWA employees. It is imperative that all employees follow the rules over adding notes in every case they work on. In the worst-case scenario, failing to add notes on a service users' case could lead to potential criminal cases failing and serious injury to the service user or other women.

14. The disciplining officer had quite simply lost trust and confidence in the claimant and found her "untruthful". Given the breakdown in the working relationship it was not fair or reasonable to expect the claimant

to continue to work for SAWA; she simply could not trust the claimant over her adding notes to every case or putting service users and other women in harms' way.

15. Before making the decision to dismiss the claimant the disciplining officer fully considered both her long service and her previous clear disciplinary record (Page 139). She expected that, as the claimant had worked in SAWA for over 28 years, that she would have been fully aware of the importance that notes must be added in **every** contact with a service user.

16. She also considered that the claimant had been receiving support over her note taking for some considerable time something that the claimant confirmed at the hearing (Page 121A boxes 10 to 19).

17. However, she also had to consider the potential damage to SAWA's reputation from service users, the general public and funders, their legal responsibilities and the very serious consequences that could arise in a case where notes had not been recorded properly, or at all, when making her decision. She also considered that the claimant, and indeed her Trade Union representative, appeared to totally disregard or not fully understand the potential seriousness and consequences of the claimant not adding notes to service user's cases (Pages 125 box 3 and 128 "It is my belief the you are escalating the seriousness of the situation to a greater level than the SSSC has").

18. The claimant was dismissed by letter (Pages 141 to 143).

Appeal Hearing.

19. The claimant appealed the decision in two letters stating her reasons for the appeal (Pages 144 and 145). She was invited to attend a meeting which would be chaired by Rita Miller; a Board Member of SAWA (Page 146).

20. The meeting was held on 23rd April 2018 and the claimant was again accompanied by her trade union representative. Each point was addressed, in turn, in the appeal outcome letter (Pages 206 to 209).

21. The appeal officer discussed the five points, the claimant agreed as the reason for the appeal, in turn as seen in the Appeal Hearing Minutes (Page 147). The claimant added that she potentially suffered from dyslexia. When asked if she had raised this previously with SAWA management she agreed that she had not.

22. Before making the decision to uphold the decision, to dismiss the claimant, Rita Miller fully considered both the claimants long service and her previous clear disciplinary record (Page 205). She also considered that the claimant had been receiving support over her note taking for some considerable time (Pages 137, 138, 155 and 156) something that the claimant confirmed at the hearing. The claims made by the claimant, over her excessive workload being responsible for her failure to add notes to Oasis were fully investigated. Having reviewed this it was found that the claimant's workload was not high, in fact her workload was lower than many of her colleagues, who comply with the need to input notes (Pages 200 to 204).

23. She also had to consider the potential damage to SAWA's reputation from service users, the general public and funders, their legal responsibilities and the very serious consequences that could arise in a case where notes had not been recorded properly or at all when making her decision. Again, she found that the claimant and indeed her Trade Union representative appeared to totally disregard or not fully understand the potential seriousness and consequences of the claimant not adding notes to service user's cases (Pages 99, box 7 starting "I don't believe I did anything wrong" and 148 boxes 3 and 5).

Respondents Witnesses Evidence.

Shirley Middleditch

24. Mrs Middleditch was a reliable witness and presented consistent evidence throughout the investigation and at Tribunal. Mrs Middleditch was confident that the Claimant had been appropriately trained and fully understood the Oasis system, used to record details of any interaction with the client. Furthermore, the Claimant could provide no reason for her failure to enter notes for X and Y also failing to follow SSSC regulations, SAWA Code of Conduct and her contractual obligations.

25. The complainant agreed at Tribunal that process had been followed and signed the Minutes of the meeting as a true reflection of the meeting.

Pat McLellan

26. Ms McLellan was a reliable witness and presented consistent evidence throughout the disciplinary and at Tribunal. Ms McLellan was confident that the Claimant had been appropriately trained and fully understood the Oasis system, used to record details of any interaction with the client.

27. The claimant stated at the investigation and disciplinary that she had recorded notes for the claimant but had forgotten to save them to the system. Ms McLellan requested further details of this from their provider, IT Works and a report was provided (Pages 129 to 136). The report clearly stated that what the claimant had claimed regarding putting notes onto the system and these not being saved was not possible. Ms McLellan therefore found this to be “untruthful”, as stated at the Tribunal. Furthermore, the Claimant could provide no reason for her failure to enter notes for X and Y also failing to follow SSSC regulations, SAWA Code of Conduct and her contractual obligations and did not take responsibility for or recognise the seriousness of her actions.

28. Ms McLellan sourced information as the claimant claimed that her caseload was excessive and this document (Page 200 to 204) negates this claim. Ms McLellan finally considered all information relating to the complaints, Investigation and Disciplinary including the claimants' length of service and clean disciplinary record (Page 139) before deciding and advising of an outcome. Ms McLellan summarily dismissed the claimant and stated that she had caused Ms McLellan to lose the required trust and confidence in the claimant.

Rita Miller

29. Mrs Miller was a reliable witness and presented consistent evidence throughout the appeal against dismissal and at Tribunal.

30. Mrs Miller allowed the complainant ample opportunity to go through each of the five points of appeal, as stated in the Minute of the Meeting (Page 147).

31. Mrs Miller was convinced from the meeting that the Claimant had been appropriately trained and fully understood the Oasis system, used to record details of any interaction with the client. Mrs Miller considered that the Claimant stated that she had put notes onto the system but not saved them, in direct conflict with the IT Works report (Pages 129 to 136) that was given to the complainant right before the meeting. The complainant again failed to provide any reason for her failure to enter notes for X and Y, failing to follow SSSC regulations, SAWA Code of Conduct and her contractual obligations.

32. Mrs Miller listened to the closing statement (Pages 151, 152) as presented by the Trade Union representative and retained a copy of the statement for consideration.

33. In considering the Appeal against dismissal Mrs Miller gave full and thorough consideration to all information presented up to and including the appeal. Mrs Miller also summarised her thought process when coming to her decision (Page 205).

34. I was Mrs Miller's decision that she could not uphold the Appeal as stated in her detailed outcome letter (Page 206 to 209).

35. Mrs Miller shared the view of her of her fellow Director that the claimant by her actions "have caused me to lose the required trust and confidence in you continuing to be employed by SAWA".

Claimant Evidence

Susan McGinn

36. Mrs McGinn, the Claimant, did not provide consistent evidence throughout the case and indeed contradicted her own statements and responses across the Investigation, Disciplinary, Appeal and Tribunal. This suggests that the claimant is not a reliable witness and provides evidence of the statement, at the Tribunal, from Ms McLellan that the claimant was "not truthful".

37. The following are examples of this:

38. At investigation the claimant stated that the request by Y for a letter was not progressed as the client was not suffering domestic abuse (Page 97, 98 and 121A). At the Tribunal the claimant agreed that the client may still have been suffering the effects of domestic abuse even after several years;

39. The claimant stated at Investigation, Disciplinary and Appeal that she believed that she had entered information onto the Oasis system for the complainants and must not have saved it (Pages 99, 121A, 122, 123126, 148 and 151). At the Tribunal she agreed that this was not possible given the IT Works report; only when this evidence surfaced did the complainant withdraw the previous claims.

40. The claimant stated she had a high case load and gave this as one reason for not entering notes onto the system (Page 149). The claimant then stated she was not saying she had a heavy case load (Page 149). A report was produced comparing the claimant and other

staff's workload (Pages 200 to 204). The Chair of the Appeal hearing considered this and the February team meeting minutes and ascertained that the complainant did not have a high case load (Page 208).

41. The claimant and their legal representative agreed at Tribunal that process had been followed and there were no issues with this. The claimant however raised concerns regarding the Disciplinary meeting (Pages 149, 151 and Letter of Appeal).

42. Throughout the entire process of Investigation, Disciplinary, Appeal and Tribunal the claimant was unable to provide **any** reason to explain her continued failure to enter notes onto the Oasis system;

43. The claimant did not, at any time throughout, accept the seriousness of her actions or take responsibility for her failure to add notes and provide the expected support to the two service users. Furthermore, she failed to accept that this could cause serious and significant damage to the organisation (Pages 98, 99, 123, 148 and 208).

Legal Tests.

44. **British Home Stores Ltd v Burchell [1978] IRLR 379** sets out the test by which Employment Tribunals can decide whether employers have acted reasonably in dismissing employees for misconduct and capability issues.

45. In terms of misconduct, the Burchell case could be reduced down to a three-step test:

46. Did the employer genuinely believe the employee was guilty of the alleged misconduct?

47. Did the employer have genuine grounds to suspect that the employee was guilty of misconduct?

48. Did the employer carry out a reasonable investigation before making a final decision about the employees' guilt?

49. Looking at the first test, the respondent has produced evidence (Pages 129, 130 and 131 - access notes summary) in the IT report requested by the disciplining officer that the employee did not add notes to the two cases, Y and X. The claimant falsely claimed that she had added notes to the X case but had forgotten to save them.

50. The IT report clearly shows that this is not possible, once a note has been added on Oasis it must be saved before the individual can log out of the system. The report also showed the claimant had reviewed the case notes on a number of occasions; on these occasions she must have seen that she had not added any notes on the cases during the timeframe involved in the cases.

51. Referring to the second test, the respondent had evidence to support this, the claimant failed to update notes, emails or letters to X case notes as seen in the IT report. She also failed to add any notes to Y's case notes. She admitted this at the disciplinary, appeal hearings and again during the tribunal hearing.

52. In addressing the third test, the respondent fully complied with the ACAS code of practice in this case by holding a fair and thorough investigation process (Pages 97 to 100) followed by discipline (Pages 107, 108 and 141 to 143) and appeal meetings (Pages 146 and 206 to 209). The claimant confirmed after the discipline and appeal meetings that she was happy that she had a fair hearing. She also confirmed this at the tribunal hearing.

53. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses as seen in Iceland Frozen Foods Ltd v Jones 1982 IRLR 439). The Tribunal must therefore be careful not to assume that

merely because it would have acted in a different way to the employer that the employer therefore has acted unreasonably. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the respondent's decision to dismiss, including any procedure adopted leading up to dismissal, falls within that band of reasonable responses. If so, the dismissal is fair.

54. We would also respectfully remind the tribunal that they must not simply consider whether they personally think that the dismissal is fair and they must not substitute their decision as to what was the right course to adopt for that of the employer as seen in Iceland Frozen Foods Ltd v Jones.

55. Their proper function is to determine whether the decision to dismiss the employee fell within the band of reasonable responses 'which a reasonable employer might have adopted.' The ET must answer the question without substituting themselves for the employer.

56. The respondent has decided the case referring to their disciplinary policy (Pages 30 to 36) and believe that the claimant was fully aware of her responsibility to add notes to every case that she worked on. She admitted in the case of Y that she did not add notes and in the other case of X claimed that she forgot to save the notes that she claimed she added to the Oasis system. It was clearly proven in the IT report (Pages 129 to 136) that this was not possible.

57. During the appeal hearing both the claimant and her Trade Union Representative still maintained that this was the case. In fact, the Trade Union Rep stated on a number of occasions that the only thing the claimant had done wrong was that she failed or forgot to add notes to Oasis (Page 148)

58. This clearly showed to the respondent that the claimant and her representative still did not accept that she had not entered notes on

the case and therefore could not be trusted in the future to add notes to cases. To be frank the respondent simply believed that they had lost trust and confidence in the claimant and were therefore unable to continue with the employer/employee relationship.

59. Both the disciplinary and appeal officers carefully considered all the options available to them (Pages 139, 140 and 205) before making their final decisions to dismiss and then uphold the dismissal of the claimant.

60. We ask that the tribunal prefer the evidence offered by the respondents witnesses in this case to the evidence offered by the claimant. During both the disciplinary and Appeal hearing both the claimant and her Trade Union representative consistently failed to accept or understand the seriousness and the potential consequences that SAWA could face by claimant's failure to add notes, as she was required to do, to the Oasis system.

61. We would also ask that the tribunal find that this was a fair dismissal which was within the bands of reasonable responses from a reasonable employer, which was made entirely due in response to the conduct of the claimant's actions in failing to add notes, e-mails and letters to the Oasis system, when she knew this was a mandatory function this led to the respondent losing trust and confidence in the claimant.

62. If the tribunal is minded in finding for the claimant due to any procedural error then I would like to refer you to **Polkey v AE Dayton Services Ltd UKHL 8, ICR 142** the respondent would ask that the tribunal consider making a Polkey reduction to any award made.

63. The claimant has been totally responsible for this incident by her actions. The respondent was simply acting on two separate complaints made by service users against the claimant, this led to them discovering serious breaches of protocol over the entering of

notes, e-mails and letters on service users case notes to the Oasis system.

64. SAWA adhered fully to the ACAS code of practice and had a reasonable believe supported by evidence that the claimant did not enter the notes and knew that she had not done so when she knew this was a mandatory function of her role within SAWA as a support worker.

65. We would ask that a 100% reduction be applied due to her actions, as she is totally responsible for not adding the notes when she knew, and admitted this, on every occasion she dealt with a service user.

Response by the Respondent to the Claimant's Submission

66. In response to the claimant's submissions we would respectfully ask the tribunal to give no weight to the claims made that neither service users X or Y were suffering domestic abuse at the time of these incidents; this is simply a red herring being raised and bares no impact on the decision to dismiss the claimant. Both X and Y were only known to the Claimant as they had suffered domestic abuse in the past and the claimant agreed at the ET that it was perfectly reasonable to conclude that they may still be suffering even years later.

67. The claimant was fully aware, she had been employed for 28 years with the respondent, that notes must be added to Oasis, on **every** occasion/interaction when contact was made with any service user. These notes should detail the context and detail of the interaction and should be sufficient to enable any colleague to pick up the case in times of absence/holiday. The claimant agreed throughout the entire process and ET that she knew this and had been sufficiently trained to allow her to do so. Due to the length of service, she also should have been aware of the potential serious, and at times extreme, consequences that may happen when there is a failure to add notes

to a service users case note. This failure to accept and take responsibility for the seriousness of her actions is evidenced in the claimant's submissions that state that there had been no damage to the respondent's reputation in these cases. This only highlights the fact that the respondent clearly understood, that by failing to add notes, this may cause damage to the respondent and their ongoing good reputation.

68. The submission claims that the decision is out with the bands of reasonable responses made by a reasonable employer. The respondent vehemently disagrees with this assertion. The respondent conducted a fair full and thorough investigation and had not only a belief but evidence to support their findings and, in fact, the claimant admitted on several occasions that she had not added notes to the case for Y and claimed that she had added notes to X but forgot to save them, which was subsequently found to be **impossible** after further investigation by the disciplining officer and evidence from the IT provider.

69. The claimant, at the discipline and appeal hearing, showed no understanding of how serious this failure to follow policy and process was and we believe that the actions of dismissing this employee was in line with the reasonable responses of a reasonable employer in dealing with a case of gross misconduct.

70. The submission goes on to state that there is no detail in the respondent's disciplinary policy to cover not adding notes to a service users case note as a reason for a gross misconduct charge. This is clearly incorrect, in fact the claimant's submissions highlight the area of the policy that does cover such acts of gross misconduct "misconduct at work or away from work of such a serious nature as to bring into disrepute either the employee's position or SAWA", the policy also states that the list of offences mentioned **is not** exhaustive.

71. Regarding the comments over remedy, the claimant's submission states that the claimant was not cross examined over her schedule, this in the main was due to the tribunal ordering a new schedule to be produced by Mr Bathgate, the claimant's representative, which had to be sent to the respondent's representative by 21st November 2018. Unfortunately, this did not happen.

72. In conclusion, the submission deals with contribution. We have dealt with this matter in the Respondents' submission and would like to reiterate; the respondent believes that the claimant was 100% responsible for her actions in not adding notes to X and Y case files on the Oasis system and she was fully trained and aware that she must do this on **every** occasion that she interacted with a service user.

Respondent's Expenses Claim

73. The respondent is a registered charity and relies totally on public funding to support its day to day operations in supporting vulnerable women in South Ayrshire. The Board Members and Management team face a constant struggle to be able to fund this service as over the past few years this funding, especially from the local authority, has been cut year on year. They also supplement their funds by holding local events seeking the support of the general public, this helps them obtain additional funds which assists them in maintaining the service.

74. In this case, the respondent believes that they have followed a fair and proper process throughout and feel that it would be unjust for them to have to meet the costs of defending this action, thus depleting their reserve funds even further. The claimant was totally responsible for her actions that led to the disciplinary action being instigated against her, as has been shown by the evidence heard at the tribunal and at the earlier disciplinary and appeal hearings.

75. The claimant stated that she never meant to harm SAWA! However, she is prepared to make this claim for substantial compensation against them despite the fact that she has repeatedly agreed that the SAWA process used at the disciplinary and appeal hearings were fair and that she admitted that she had not entered notes on the system when she knew she must do this.

76. The respondent would therefore respectfully ask that the tribunal, if they are with them, to award their expenses against the claimant in this case. These expenses amount to £7,295.24, invoices are attached.

Claimant's submission

1. Susan McGinn initiated an application before the Employment Tribunal in respect of her dismissal by South Ayrshire Women's Aid on 3 April 2018. The claimant had been employed by the respondents for a period of 27 years and was employed as a Support Worker.

2. The invitation to the claimant to attend the disciplinary hearing which ultimately led for her dismissal (pages 107-108 of the bundle) detailed that the allegations that she needed to respond to were as follows:-

> "That you discussed personal issues with Y on a number of occasions in breach of South Ayrshire Women's Aid Code of Conduct point 4.12;
>
> That you failed to support Y by issuing a letter to South Ayrshire Council in support of her Housing Association;
>
> (i) That you failed to record this on Oasis therefore breaching the SSSC Code of Practice point 6.2;

(ii) That you failed to inform management with regards to the letter therefore breaching SSSC Code of Practice point 2.5;

(iii) That you failed to properly assist X, over helping her to obtain a fridge/freezer and cash granted to her;

(iv) That you failed to record this on Oasis therefore breaching the SSSC Code of Practice point 6.2;

(v) That you failed to fully inform management with regard to this matter therefore breaching SSSC Code of Practice point 2."

3. Following the disciplinary hearing an outcome letter was sent to the Claimant dated 3 April 2018 (pages 141-143).

4. The letter made it clear that the claimant admitted that she had not provided a letter to Y and that she did not upload details of the request for the letter on to the Respondent's Case Management System known as Oasis. It also found that the Claimant had failed to enter onto Oasis any notes regarding the assistance that she was giving to Y. In conclusion, the dismissing officer Patricia McLellan found that the Claimant was guilty of gross misconduct by failing in her duty to adhere to the procedures of both Ayrshire Women's Aid and the SSSC. She goes on to state that the Claimant failed on a number of occasions to update these two Service Users' notes in line with these Policies and by her actions the Claimant had caused the disciplining officer to lose the required trust and confidence in her continuing to be employed by South Ayrshire Women's Aid and therefore she was summarily dismissed.

5. In seeking to validate the dismissal as being fair the Respondents asserted that by her actions the Claimant potentially damaged the

good reputation among Service Users, Partners and Funders of South Ayrshire Women's Aid.

6. The Respondents have a Disciplinary Policy. This is contained at pages 30 through to 36 of the bundle. At page 30 the Respondents list examples of offences which might constitute gross misconduct. One of those examples is "misconduct at work or away from work of such a serious nature as to bring into disrepute either the employee's position or SAWA". Gross misconduct is generically described as being misconduct of such a serious and fundamental nature that it breaches the contractual relationship between the employee and SAWA. On page 31 under the heading of Serious Misconduct, certain examples are provided including "Failure to observe SAWA's procedure".

7. During the course of the Tribunal proceedings it was submitted on behalf of the Claimant that the crux of her case related to the sanction of dismissal being imposed. In particular, having regard to the terms of Section 98(4) it was asserted on behalf of the Claimant that the sanction of dismissal fell outwith the band of reasonable responses.

8. The law in this area is very well settled. The principles underpinning the Section 98(4) test have been looked at many times over the years and in looking at the fairness of a dismissal the correct approach for a Tribunal to adopt is:

    (i) The starting point should always the words of Section 98(4) themselves;

    (ii) In applying the Section a Tribunal must consider the reasonableness of the employer's conduct not simply whether it considers the dismissal to be fair;

    (iii) In judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(iv) In many (though not all) cases there is a band of reasonable responses to the employer's conduct within which one employer might reasonably take one view and another quite reasonably take another;

(v) The function of the Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band of reasonable responses the dismissal is fair; if the dismissal falls outside the band of reasonable responses it is unfair.

9. Put short, the Claimant's submission was that the conduct complained of did not amount to gross misconduct and having regard to the Claimant's clear disciplinary record and length of service the sanction of dismissal fell outwith the band of reasonable responses. Examining that in little more detail it is accepted that exactly what type of behaviour amounts to gross misconduct is difficult categorise and will depend on the facts of the individual case. However, a few general principles do apply, namely that the act must fundamentally undermine the employment contract or in other words, it must be repudiatory conduct by the employee going to the root of the conduct.

10. Moreover, the conduct must be a deliberate and wilful contradiction of the contractual terms or indeed amount to gross negligence. It is further accepted that although there are some types of misconduct that may be universally seen as gross misconduct, such as theft or violence, others may vary according to the nature of the organisation and what it does. It is submitted that if an employer views certain behaviour as very serious and capable of amounting to gross misconduct because of the nature of the business but that behaviour might not be viewed in the same way elsewhere, it is particularly

important to include it in the disciplinary rules so that employees are aware of the fact. It is further submitted that a failure to list certain types of behaviour as gross misconduct may mean that the employer cannot rely on them to dismiss summarily.

11. Applying these principles to the present case, the evidence before the Tribunal did not support any finding that the reputation of the Respondents had in any way been affected by anything that the Claimant was guilty of. In particular, there was no evidence that the conduct had brought into disrepute either the Claimant's position or South Ayrshire Women's Aid. This was conceded by the Respondents witnesses.

12. It was accepted by the Claimant that she had failed to enter details of her interactions with her service users on the Oasis system. It was further accepted by her that, in terms of the SSSC Policy (page 65), that a support worker required to "maintain a clear, accurate and up-to-date records in line with procedures relating to my work". However, the particular allegations of misconduct need to be examined against a background of the Respondents underlying purpose of supporting women who experience domestic abuse. Neither of the service users were at the material time the subject of domestic abuse. In relation to Service User X, the claimant was assisting her being given a fridge/freezer and arranging for that to be delivered to her new property. In relation to Service User Y, it was established that at the material time she was not exposed to any abuse, although she had been in the past and that the purpose in her seeking a move was on account of antisocial behaviour by a neighbour. The provision of a letter may or may not have assisted the Service User in her quest for a new property. In the submission of the Claimant, neither of the maters that she was undertaking for each of these Service Users could be described as acute. Neither was at risk or in danger. The Claimant's failure in respect of the provision of the letter and also the difficulties encountered by client Y

in securing the delivery of her fridge/freezer came to light when the Claimant went on holiday. She had not been able to make progress with arrangements for delivery of the fridge/freezer because the Service User had not advised her of her address. In all sectors and areas of employment difficulties can arise when employees go on holiday. In light of this, any failure on the part of the Claimant cannot be described as a serious and fundamental breach of the contractual relationship.

13. Clearly, it is important that accurate notes are taken so that proper assistance can be given to Service Users but in the particular nature of the support that was given to the Service Users X and Y, at the material time, any failure to note the assistance that was being given was not going to expose either of them to domestic abuse which is the underlying purpose of the Respondent's organisation.

14. Allied to this, there is no detail within the Disciplinary Policy stating that failure to note records per se amounts to gross misconduct. Any failure in the assistance given to the Service Users is not aligned to the generic examples of gross misconduct in the Respondents Disciplinary Policy.

15. Accordingly, in discharging its function as an industrial jury, the Tribunal has to consider whether in all the circumstances and having regard to equity and the merits of the case whether any other reasonable employer faced with this set of circumstances would have chosen to dismiss.

16. The Claimant invites the Tribunal to answer that question in the negative and to find that the sanction of dismissal fell outwith the band of reasonable responses.

17. In terms of remedy the Claimant seeks compensation. A Schedule of Loss was submitted at the Tribunal and a revised Schedule is appended hereto. It is important to highlight, at this stage, that the

Claimant was not cross-examined at all in respect of her evidence in connection with what happened following her dismissal in respect of her securing employment. In these circumstances, it is submitted that the Tribunal can accept her evidence as it was given in a straightforward and credible manner. The Claimant suffered a stress related illness because of her dismissal and only recently has been able to get back into looking for employment. In these circumstances, it is submitted that the Claimant has wholly mitigated her loss and that the Tribunal should make an award in respect of loss of earnings from the date of dismissal up to the Tribunal and beyond for a period of 6 months.

18. The issue of contribution also requires to be addressed. It is open to the Tribunal to reduce an award of compensation if it finds that the Claimant has been guilty of blameworthy conduct. It is submitted that none of the evidence before the Tribunal supports a finding that the Claimant was either grossly negligent or wilful. She failed to comply with the requirements of the SSSC in recording her interaction with the Service Users. There is no evidence before the Tribunal which supports any finding that this was done deliberately. In light of this, at its highest her omission can be described as negligent. In light of this, in the submission of the Claimant, any reduction in the award of compensation should be modest of the order of between 10% and 15% from the Compensatory Award.

RESPONSE TO THE RESPONDENT'S SUBMISSIONS

19. Firstly, as detailed at the Tribunal Hearing, the Claimant does not take issue with the process that was conducted other than in respect of the provision of the report from the Respondent's IT providers. This was not given to the Claimant until the Appeal Hearing. Any response that the Claimant has given in relation to the noting of her interaction with the service users during the internal process should be considered against a background of her not knowing what that report

says. In effect the Claimant was not given an opportunity to digest and respond to that report.

20. The Claimant's position throughout the internal process was that she admitted that she had failed to detail what she was proposing to undertake for the service users X and Y. She did say in the internal process that she had thought she had written notes. In her evidence to the Tribunal she spoke about writing notes in a book or notepad from which she transposed those notes onto Oasis. There was no "untruthfulness" on the part of the Claimant.

21. The Respondents appear to be conflating the failure to add the appropriate notes to Oasis with a breach of duty of trust and confidence. That is not the case that the Claimant was invited to meet. The allegations set out in the invitation to the disciplinary hearing were issues of conduct on her part as detailed above. At no stage was it suggested that the Respondents had lost trust and confidence in the Claimant prior to the outcome of the disciplinary hearing. This is a misconduct dismissal. The Claimant is entitled to know the case against her. In that regard we refer to the case of *Michael Strouthos –v- London Underground Limited* [2004] IRLR 636, a copy of which is appended to these Submissions.

22. The undercurrent in the Submissions by the Respondent's agent is that there is another strand to the Claimant's dismissal, namely that of the Claimant's "untruthfulness". There is no suggestion in either the invitation to the disciplinary hearing, the outcome of that disciplinary hearing and indeed the appeal hearing that the Claimant is alleged to have been untruthful. The Claimant admitted throughout the process that she had failed to note Oasis. She also admitted in the disciplinary process that she appreciated the seriousness of the situation. (Page 123). The question was put to her by the disciplining officer "Can you see that by your actions in failing to adhere to both SAWA Policies and equally as serious not adhering to the SSSC

Code of Practice could have very serious consequences for SAWA as an organisation?" Answer: "It was not intentional to do it. It is serious but not intentional". This refutes the Respondent's suggestion that the Claimant did not appreciate the seriousness of the situation. The issue is one of proportionality. There is no evidence that the Respondent's reputation is in any way being affected by anything that the Clamant did or omitted to do. The evidence does not support the Claimant at all being untruthful. The effect on the service users of any of the Claimant's shortcomings was not material.

23. There is also reference within the Respondent's Submissions to an issue with the Claimant's performance. Again, that was not part of the case that the Claimant had to meet. The dismissal is predicated on acts of misconduct.

24. For the reasons already articulated in the Submissions on behalf of the Claimant, any issue of misconduct was not gross misconduct and therefore the sanction of dismissal fell outwith the band of reasonable responses.

25. The question of expenses should be reserved until such time as the Tribunal has provided its Judgment on whether the Claimant was unfairly dismissed or not. It is premature to make an application for expenses before the Tribunal has decided on the merits of the case. In the submission of the Claimant, parties should be invited to make further Submissions in the event that the Tribunal finds that the Claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the case, or that the case had no reasonable prospect of success. Then parties should be invited to make Submissions in relation to whether an award of costs is appropriate.

135. Further Correspondence with the representatives

Deliberation and Determination

136. In reaching its decision the Tribunal was mindful that it is not for it to substitute its view for that of the employer. The respondent's submission is that the decision to dismiss the claimant came within the band or range of reasonable responses open to an employer, acting reasonably in the circumstances. In support there is reference in their submission to *BHS (*see above) and *Iceland Frozen Foods*, (again see above).

137. It was not suggested for the claimant that there was a procedural failure warranting consideration of a Polkey reduction, (again see above).

138. Mr Bathgate was very clear that, as he put it in his written submission, the crux of this case was about the sanction of dismissal which was imposed.

139. It is not in dispute that the claimant was dismissed for a reason, namely conduct which is one of the applicable reasons in terms of section 98(2) of the 1996 Act. However, a tribunal in reaching its decision also has to have regard to section 98(4) of that Act.

140. The Tribunal must consider the reasonableness of the employer's decision, which in this case, was to dismiss the claimant. While, as indicated, a tribunal must not substitute its decision when considering the reasonableness of the employer's decision and while one employer might take one view and another a different view, the Tribunal in the particular case which it is determining must decide if, in the particular circumstances, the decision to dismiss fell within the band or range of reasonable responses open to a reasonable employer. If the dismissal falls within that band then the dismissal is fair and, if not, then it is unfair.

141. Here, what is argued for the claimant is that the conduct which was admitted was not sufficiently serious to amount to gross misconduct and, having regard to the claimant's long and previously unblemished service, was outwith the band of reasonable responses.

142. It was also emphasized that any repudiatory conduct of the employee must go to the root of the contract and must be deliberate and wilful or amount to gross negligence.

143. The Tribunal noted all that was explained by the respondent's witnesses in reaching the decision, first, to dismiss the claimant summarily for gross misconduct and, second, to refuse her appeal against dismissal.

144. There was no evidence before this Tribunal that the respondent's reputation was adversely affected by the claimant's failure to record notes on Oasis nor by the fact that, in the case of Y she failed to provide the letter of support which had been sought and which was later provided to Y.

145. In the case of X, while the claimant was on holiday this meant that the respondent's other support staff could not assist X in ensuring that the fridge/freezer due to be delivered to her new home could be delivered on the actual day when she was moving house. The respondent did not seek to suggest that there was any such reputational damage as a result.

146. While the Tribunal noted all that was said about the Oasis recording system and it was accepted that the claimant had received adequate training on it, there was no process in place for a handover of work prior to the claimant going on holiday. Had there been then, presumably, one of the other support workers would have been briefed on the ongoing matters for X and Y.

147. The Tribunal also noted that the respondent does not hold any paper files for service users. The claimant explained that she would make handwritten notes when meeting or speaking to a service user on the telephone and these notes would then form the basis of the information that was subsequently uploaded by her onto Oasis.

148. Of course, in the cases of X and Y such notes were not made hence, when other staff looked on Oasis in the claimant's absence on leave, they could not find any such information given it had not been saved by the claimant as notes on Oasis about these two service users.

149. The Tribunal considered that Mr Bathgate was correct in his submission that there is no detail in the respondent's Disciplinary Policy about failure to record notes onto Oasis amounting to an act(s) of gross misconduct.

150. The Tribunal has to determine whether, in all the circumstances, and having regard to equity and the substantial merits of the case, would any other reasonable employer in such a situation have decided to dismiss its employee.

151. After careful consideration the Tribunal concluded that it could not find that such an employer would have done. The Tribunal concluded that the sanction of dismissal imposed here by the respondent on the claimant fell outwith the band or reasonable responses open to a reasonable employer, acting reasonably in the circumstances. It did so, having noted that there was no evidence before it, that an alternative to dismissal was considered either at the disciplinary hearing or at the appeal hearing. Mrs Miller was very direct in her reply that she did not take into account the band or range of responses, despite this being raised as one of the grounds of appeal by the claimant. There was no indication that she looked into whether an alternative sanction to dismissal could or should or might have been imposed.

152. The Tribunal further noted the submission that the claimant was entitled to know the case against her. The issue of the breach of trust and confidence as explained by Ms McLellan as to why she concluded that she had lost such trust and confidence in the claimant is not foreshadowed in the documents sent to the claimant in advance of the disciplinary hearing.

153. The Tribunal formed the impression that both Ms McLellan and Mrs Miller viewed the claimant as being untruthful yet this was not suggested to the claimant as being an issue prior to the disciplinary and/or the appeal hearing. The Tribunal noted the reference to *Strouthos* (see above) in this context made by Mr Bathgate.

154. The Tribunal understood that throughout the disciplinary process the claimant accepted that she failed to make notes on the Oasis system and that this was

a serious issue. However, it was not deliberate on her part. For whatever unexplained reason(s), she failed to make notes on Oasis for X and Y as she should have done.

155. The Tribunal also noted, that if the respondent had an issue with the claimant's performance then that was not part of the disciplinary process undertaken by the respondent.

156. If that was the respondent's position then it would have been open to them to add it into the issues that formed their disciplinary investigation and formal disciplinary hearing and appeal. They did not do so.

157. In reaching its determination and having regard to all these matters, the Tribunal concluded that the decision to dismiss the claimant taken by the respondent was outwith the band of reasonable responses open to an employer in terms of section 98(4) of the 1996 Act.

158. As already indicated, the remedy sought here is compensation.

159. However, the Tribunal then has to assess the issue of contributory fault or conduct in making an award of compensation, (see below). In doing so, the Tribunal was alert to the findings already made that the claimant accepted throughout the process that she failed to record information about X and Y onto the Oasis system. She did not offer any explanation for her failure to do so. This failure happened on more than one occasion and two service users were affected. Against this, the Tribunal has already noted that the respondent did not have any handover process for employees to cover situations such as an individual going on holiday with ongoing matters to be dealt with in that person's absence. Also, the respondent relies entirely on its computerized (Oasis) system and there is no paper/file copy held of notes made by support workers from calls or meetings held by them with service users. Inevitably, this leads to the situation that occurred here where the claimant was absent on authorized leave and enquiries/complaints were made by X and Y which the respondent's other staff could not action satisfactorily in the claimant's absence.

160. This was further complicated by the fact that the respondent is unable to access individual members of staff's individual email accounts where some information about X and the cash award was held being emails and letters to her from a member of staff of the Buttle Trust.

161. Section 122 (2) of the 1996 Act states:

> "Where the tribunal considers that any conduct of the complainant before the dismissal or where the dismissal was with notice which was 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.

162. Section 123(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 it just and equitable having regard to that finding"

163. In *Nelson v The British Broadcasting Corporation (No 2)* 1980 ICR 110 it was said:

> "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 or foolish or bloody-minded or merely unreasonable in all the circumstances. In order for a deduction to be made under section 123(6) of the Act, a causal link between the employee's conduct and the dismissal must be shown to exist."

164. In *Hollier v Plysu Ltd [1983]* IRLR 260 contribution, it is suggested should be assessed broadly and should generally be within the following categories:

Wholly to blame 100%

Largely to blame 75%

Employer and employee equally to blame 50%

Employee slightly to blame 25%

165. Mr Bathgate suggested that any contributory conduct should be limited to between 10 and 15%.

166. The claimant accepted that she was at fault in failing to record information about X and Y onto the Oasis system. She did not seek to offer any explanation for her failure to do so.

167. The Tribunal found that the claimant was largely to blame in that she knew she was required to set out and save on to the Oasis system the information provided to her by X and Y. Her failure to do so meant that, in her absence, her colleagues were unable to have access to full information that would have assisted them in resolving the enquiries/complaints from X and Y. Against this, is her lengthy and unblemished record with the respondent. The respondent's failure to use a handover when an employee such as the claimant went on leave, coupled with their having no paper files onto which the claimant's handwritten notes could have been held, resulted in there being very limited information available to them about X and Y while the claimant was on leave.

168. The Tribunal concluded that, as the claimant was largely to blame, it should assess contributory conduct at 75%.

169. There was no reason for the Tribunal not to apply this to both the compensatory award and to the basic award and so they are both reduced accordingly.

170. In relation to the period for a compensatory award, the claimant was signed off as unfit to work due to acute stress following her dismissal and, in these circumstances, the Tribunal concluded that an award from the date of dismissal to the date of the hearing should be made. This is to include the pension loss sought.

171. In relation to future loss, the claimant always intended to retire in the early summer of 2019. An award for future loss is sought to 5 May 2019 but the claimant's entitlement is capped at a period of one year in relation to her net loss from date of dismissal to 3 April 2019 which is the anniversary of her dismissal.

172. Since the claimant was in receipt of Job Seeker's Allowance the Monetary Award exceeds the Compensatory Award. The recoupment is reduced in accordance with the reduction in the compensatory award in terms of regulation 4 of the recoupment regulations.

173. The claimant is entitled to a basic award of £13597.50 which is reduced by 75% to £3,399.38. This is in relation to the Tribunal's decision that the claimant contributed to her dismissal and did so to the extent of 75%, (see above).

174. She is entitled to a compensatory award which is calculated based on her net monthly pay of £1475 x 12 is £17,700 which divided by 52 gives a weekly net figure of £340.38. For the period from dismissal to date of this judgment is 36 weeks so that amounts to £340.38 x 36 = £12,253.68.

175. In addition, there is pension loss of £117.84 per month which is £117.84 x 12 = £1,414.08 divided by 52 is £27.19 per week.

176. For 36 weeks that is £27.19 x 36 = £978.84 and that sum added to £12,253.68 is a sub total of £13,232.52 from which 75% is deducted ((£13,232,52 - £9,924.39) giving past loss of £3,308.13.

177. In relation to future loss that is limited to the balance of the one year which is a period of 16 weeks. Net salary loss is £340.38 x 16 = £5,446.08.

178. In addition, there is the ongoing weekly pension loss of £27.19 x 16 is £435.04 and that figure added to £3,446.08 is £5,881.12 from which 75% is deducted (£4,410.84) which gives future loss of £1,470.28.

179. The 75% deduction also applies to loss of statutory rights so is £350 less 75% amounts to £87.50.

180. The total compensatory award is therefore past loss of £3,308.13 plus future loss of £1,470.28 plus the loss of statutory rights of £87.50 so a sub total of £4,865.91.

181. The prescribed element is the period from dismissal to the date of the tribunal's judgment which is a period of 36 weeks and so is £12,253.68 which is reduced by 75% in accordance with the reduction in the compensatory award. That is the sum of £9190.26 which gives a net amount of £3,063.42.

182. The monetary award (which is the basic award of £33,399.38 plus the compensatory award of £4,865.91) is therefore £8,265.29.

183. The monetary award exceeds the prescribed element by £5,201.87 (being £8,265.29 less £3,063.42).

184. The award which the respondent is to pay to the claimant is as follows:

Basic Award (after 75% reduction)	**£3,399.38**
Compensatory Award (after 75% reduction)	**£4,865.91**
Monetary Award (B.A.+ C.A)	**£8,265.29**
Prescribed Element (after 75% reduction)	**£3,063.42**

Employment Judge: F Jane Garvie
Date of Judgment: 14 December 2018
Entered in register: 17 December 2018
and copied to parties