THE EMPLOYMENT TRIBUNALS

Claimant: **Maria Dixon**

Respondent: **Gateshead Council**

Heard at: **North Shields** **On:** **24 & 25 April 2018**

Before: **Employment Judge Beever (sitting alone)**

Representation:

Claimant: **Mr Andrew Webster (Counsel)**
Respondent: **Ms Kirti Jeram (Counsel)**

RESERVED JUDGMENT AND REASONS

The claimant's claim for unfair dismissal is not well founded and is dismissed.

REASONS

1. By an ET1 presented on 29 December 2017 the claimant claimed unfair dismissal following the termination of her employment at a disciplinary hearing on 1 September 2017.

The issues

2. At the start of the hearing the tribunal was provided with a List of Issues drafted by the respondent. The claimant agreed with the list. The tribunal agreed with the parties that the tribunal is required to determine an unfair dismissal claim only.

3. The issues for the tribunal, as determined at the outset of the hearing, are:

    (1) Has the respondent established the reason for dismissal of the claimant, and that it was a potentially fair one? The respondent relies on "some other substantial reason" and also "conduct". The claimant

does not accept that either of these reasons was a true reason. The claimant contends that the decision was pre-ordained, in other words, that the decision was pre-determined for other, necessarily unfair, reasons.

(2) If the reason was conduct, then (a) did the employer hold a genuine belief that the claimant had committed an act of misconduct? (b) was that belief held on reasonable grounds, (c) was there a reasonable investigation?

(3) Having regard to the reason shown by the employer, did it act reasonably in treating that reason as sufficient to dismiss the claimant in all the circumstances and in accordance with equity and the substantial merits of the case?

(4) To what extent, if any, did any procedural shortcomings affect the chances of the claimant being dismissed in any event? (*Polkey* rule).

(5) Has the claimant engaged in blameworthy conduct contributing to her dismissal such that it is just to reduce any award of compensation?

4. The tribunal proposed that liability should be dealt with in the first instance, leaving remedy to be approached thereafter as necessary. After hearing the parties' preferences, the tribunal also determined that it would deal with Polkey and contributory fault at this stage and would expect to receive evidence and to hear submissions at this stage on those matters.

The Facts

5. The tribunal heard oral evidence from Steven Horne, the decision maker, Michael Walton, a senior HR advisor and Catherine Donovan, the chair of the appeal panel, for the respondent. The claimant herself also gave oral evidence. All witnesses were cross examined. Each party made closing oral submissions. There was a bundle of documents paginated to page 414 and placed before the tribunal. The claimant provided a further single page, 311C, to which the respondent had no objection.

6. The tribunal made its findings of fact having regard to all of the evidence and did so on a balance of probabilities.

Background

7. The claimant worked as an Employability Officer within the Learning Skills Team of the respondent. The Learning Skills Team employs approximately 150 staff and 75 casual tutors and provides a range of skills training to learners who may not have had traditional education within schools, and commonly those who are vulnerable or disadvantaged. The team was not funded by Council funding but self-funded through learning contracts. The claimant's job was to

develop and deliver employability skills and programmes to young people and adults.

8. The claimant was absent from the workplace for two years as a result of a period of maternity leave of 12 months ending February 2015 and a subsequently agreed career break (with continuity of employment preserved) [296] for a further 12 months to February 2017.

9. The claimant was due to return to work on 23 February 2017. At that time her prospective line manager was Melanie Crosby who in turn reported to Kevin Pearson. Mr Pearson initiated the return to work process on 9 February 2017 [57] to welcome the claimant back and to discuss terms for her return. A deferred date of 9 April 2017 was proposed to take account of accrued time off and subsequently on 13 March 2017 Ms Crosby and the claimant had exchanged emails and had agreed a return to work on 10 April 2017 which permitted Ms Crosby to be present to provide a comprehensive induction. The exchange of emails included the possibility of flexible working. On the 14 March 2017, Ms Crosby proposed detailed induction arrangements and the claimant was content with that, stating "great stuff" in an email to Ms Crosby. [223].The tribunal regards this agreed plan for the claimant's return to work as friendly and professional.

10. Two weeks later, on 28 March 2017, the claimant informed Ms Crosby by email [97] of a problem: that her husband had booked a holiday and "we leave on 10th and return on 22nd" and asked if she could take annual leave. Ms Crosby said no, and provided a detailed explanation [99]. The claimant did not object to the explanation but the next day stated that her husband could not "change the holiday" and now stood to lose the payment of £2,800.

11. Ms Crosby considered the position and took HR advice. The claimant was told that her options were either to return to work or take the leave but which would be categorised as unauthorised and that it might lead to a disciplinary [103]. This was again a considered and explained response by Ms Crosby and the claimant did not complain or challenge this. The tribunal has seen a draft of this email [58] mistakenly incorporated into the disciplinary bundle and which provided a further option that the claimant could resign. It might be inferred that this draft came from HR; it cannot be inferred that the draft came from Ms Crosby not least because she had deleted the further option immediately and prior to sending to the claimant. Ms Crosby did not provide the claimant with a stated option to resign. On 29 March 2017, the claimant stated that she could not afford to lose the money and would therefore have to face any disciplinary.

12. On the same date, the claimant raised concerns about the prospect of having to deal with adult teaching. A meeting was set up for 31 March 2017 to discuss both the annual leave issue and the claimant's anxiety over teaching adults. The meeting was attended by two managers and an HR advisor [63]. The claimant confirmed that it was a holiday booked for 10-22 April and had cost nearly £3,000. The reasons for refusing the claimant's request for leave were again explained and in particular the risk to learning contracts that the

claimant's absence would create. There was detailed discussion of the claimant's anxiety about her prospective teaching.

13. The tribunal considers that the respondent's approach to both of these issues was thoughtful and considered and was properly explained to the claimant. The claimant has stated in her witness statement that "the respondent did not provide any acceptable options" and that "Ms Crosby was deliberately trying to make things difficult for me". The tribunal does not agree with this interpretation and in contrast it finds that the tone and content of the respondent's communications with the claimant up to this point clearly points to an appropriate and professional approach to the matter of the claimant's return to work. It speaks more to the approach of the claimant that she could not obtain the additional leave that she wanted and showed her unwillingness to accept the respondent's position.

14. At some point prior to 10 April 2017, the claimant spoke to HR. She was told that the fact of her taking leave that would be unauthorised would probably be a disciplinary matter but that it probably would be no more serious than a warning. The gist of this is not challenged by the respondent and Mr Horne accepted that a conversation to that effect took place.

15. On Monday 10 April 2017, the claimant did not attend work. She knew –and accepted - that it was unauthorised and that she faced disciplinary action. She had not provided any further explanation or detail including dates about her planned holiday.

16. It transpired that the claimant had travelled to Northumberland to stay at a caravan park for a period of days and thereafter travelled to London by train on Saturday 15 April 2017 prior to flying abroad to Barbados. The respondent did not know that at the time; its knowledge based around the 31 March 2017 meeting and prior emails being that the claimant's husband had booked a holiday leaving on 10 April and it was too much money to lose. On Tuesday 11 April 2017, the claimant had a telephone call with her GP surgery [311C] and a fit note stating anxiety for two weeks was signed [66]. The claimant did not inform the respondent of her ill health or her contact with her GP. The information that it was a telephone appointment has only come to light in the course of this tribunal process. On the claimant's return to the UK, she was due to return to work on 24 April 2017 but she telephoned in sick and then she visited her GP and obtained a fit note on 25 April 2017 [68] again for anxiety this time for a further 4 weeks to 21 May 2017.

17. The respondent was provided with two fit notes by post on or before 27 April 2017 [69], Ms Crosby noting that the earlier note covered the period of the unauthorised leave and honeymoon. The claimant was referred to Occupational Health.

<u>The disciplinary process</u>

18. Mr Horne was approached on 27 April 2017 when he met Mr Pearson and Mr Walton. They informed him of the matters relating to the claimant's absence.

He was also told of a Facebook posting [67] which had been received by the department. The posting was dated 15 April 2017 and on its face it showed the claimant travelling to London on 15 April 2017 and only then starting her honeymoon. This was contrary to the respondent's understanding at the time.

19. Mr Horne commissioned an investigation into whether the claimant had (a) been absent without authorisation, and (b) whether she had provided false information. Pauline Piddington was appointed as investigating officer.

20. Ms Piddington conducted an investigation. Its course followed that of a misconduct investigation. The claimant was invited to an investigatory meeting: the invitation referred to (i) unauthorised leave, which was self-evident, and (ii) "false information" but which the claimant could have had no further understanding about prior to her meeting with Ms Piddington.

21. The claimant had her investigatory interview on 9 June 2017 [72]. She has made no complaint about the conduct of the meeting: Ms Piddington explained the two allegations. The claimant accepted that she was absent with unauthorised leave between 10 -22 April 2017. The claimant explained the detail of her holiday [72]: that her husband booked the honeymoon without telling her and then tried to change it by getting in touch with KLM but he had booked the flight and the hotel separately.

22. The claimant was asked and she confirmed that she, "went off on holiday on the 10 April 2017". She was then specifically asked to explain a Facebook post. The claimant had no prior warning of this specific matter. It upset her that she was now being asked about a posting which contained an image of her with her young son. The posting suggested that the claimant was located in Durham on 15 April 2017 and was on a train and was just "beginning" her honeymoon.

23. Ms Piddington asked the claimant to explain the posting. The answer that the claimant gave was that "it was posted later because there was limited WIFI in Barbados". The claimant admitted that this was an assumption and she did not know it to be true. The more important point was that her response indicated that she knew she was being asked to explain the date and further that an explanation for the apparent inconsistency in the start of her honeymoon was being sought by Ms Piddington.

24. The tribunal accepts that the claimant was anxious as a result of being unexpectedly questioned about the details connected with a photo of her and her young son. However, the claimant was able to give a response which in the tribunal's judgment was intended to show that the honeymoon abroad had begun on 10 April 2017. The effect of the claimant's response was to assert that the photograph was posted several days later as and when limited WIFI in Barbados permitted. The claimant could have said she did not know, or was unable to answer, or could have made clearer that she was making an assumption, but she did not. He also went on to state that the holiday was in fact much more expensive, actually £7,000. No documentation was provided by the claimant. The claimant had been previously asked to provide evidence of when it had been booked [75] but the claimant did not do so.

25. The significance of this exchange on 7 June is this. First, the claimant has maintained a consistent position which gives the respondent the belief that the claimant began a holiday abroad on 10 April 2017 and which was too expensive for her to cancel and that the flight company, KLM, would not refund. That is why she had needed the leave from 10 April 2017. Secondly, the claimant now knew as a result of her meeting with Ms Piddington that the "false information" allegation came from the discovery of the date of the Facebook posting because it did not support the claimant's explanation that her expensive holiday abroad had started on 10 April 2017.

26. Ms Crosby and Mr Pearson were also interviewed. Ms Piddington produced an investigation report: there was a disciplinary case to answer. Mr Horne agreed and he decided that a disciplinary hearing should take place.

27. The allegations remained the same. The invitation to attend a Disciplinary Hearing on 27 July 2017 was sent to the claimant and signed for on 20 July 2017. The claimant later on 26 July when contacted by Ms Piddington to ask if she was attending stated that she had not received the invitation. The hearing was re-arranged to 14 August 2017. Mr Horne had been uncomfortable about the claimant's denial of receipt of these documents and it was part of a confusing picture of events that arose on the back of the claimant's Facebook assertion which was at the very least, as she accepted, an inaccurate assertion.

28. The respondent adjourned the Hearing a second time in response to the claimant's child care difficulties. The rearranged Hearing took place on 1 September 2017. The claimant had been given the relevant documentation including the Piddington report and the notes of the investigatory meeting. The allegations had not changed and the tribunal finds that it remained the case that the claimant understood that the allegation of "false information" related to her assertion that the honeymoon had begun on 10 April 2017, hence the need for annual leave to be sought, and the Facebook post was not consistent with that. The tribunal recognises that the invitation to the Hearing was not specific, e.g. [137; 143; 149] when referring to "false information" but given the investigatory meeting and the disclosure of the investigation documentation the tribunal finds that the claimant understood the two allegations against her.

29. The invitation letter stated, "if the above allegations are proven this may be construed as serious breach of trust and confidence which could give rise to significant irreparable damage to the working relationship. This, while not constituting gross misconduct, may still result in your employment being terminated". Mr Horne in cross examination stated that this was not treated as a conduct case and that if it had been categorised as conduct, it would not have been gross misconduct and the claimant would not have been dismissed.

30. A decision had been taken by HR in conjunction with legal advice that this SOSR analysis was the appropriate way to approach this investigation. The risk of termination of employment was apparent to the claimant in the invitation to the Hearing.

31. The Hearing took place on 1 September 2017 [151]. Ms Piddington presented her report. The claimant made a number of points in the Hearing as recorded in bullet points in the notes at [153]. The claimant said that she had spoken to someone in HR who had thought that the absence was not so serious and "the disciplinary wouldn't amount to much". Mr Horne did not question that view held by the claimant and this is consistent with Mr Horne's understanding as expressed in the later appeal hearing [207] that he accepted that HR might have told the claimant that the disciplinary offence would be "not harsh". The claimant then stated that what she did on her leave was her own business and challenged Mr Horne about that. Mr Horne described this as aggressive and was both "disappointed and shocked" that the claimant was both hostile/aggressive and defensive during the Hearing and was unwilling to provide further information when he was simply attempting to gain an understanding of the claimant's position.

32. The claimant repeated that the Facebook entry was posted "retrospectively" by her husband. This was consistent with her statement at the investigatory meeting. Despite the lapse of time of almost 3 months, the information which the claimant provided Mr Horne was, as she has now accepted, inaccurate and which the tribunal finds was because the claimant maintained the position that her honeymoon abroad had begun on 10 April 2017 and could not be refunded and was too expensive to lose.

33. The claimant was then asked to clarify the situation with her fit notes because they were on any view confusing. An earlier fit note dated 11 April 2017 plainly was suggestive of her not being on her honeymoon from 10 April 2017. It is unclear whether or not the claimant actually stated that she saw two different doctors on the same date on 25 April 2017 although that is how Mr Horne recalls it.

34. However, this exchange then triggered a new disclosure from the claimant. For the first time (as she accepts), she disclosed that there had been two holidays, the first being in the UK from 10 April 2017 and then abroad beginning on 15 April 2017.

35. Mr Horne was questioned at length by Mr Webster about the impact of this. His view at the conclusion of the Disciplinary Hearing was that there was "a lack of straightness" from the claimant and that she had "consistently deceived" the respondent. The manner in which the claimant had responded to the Face book issue right up to the conclusion of the Disciplinary Hearing was, according to Mr Horne, that "with absolute clarity, I concluded that she had lied consistently" and that the fit notes were the catalyst which then undermined her narrative: according to Mr Horne, "I never lost the central point of Facebook which undermined my trust in the claimant" and that Mr Horne concluded that he had (at least until the close of the Disciplinary Hearing) been "deceived". The "narrative" that Mr Horne had seen was that the claimant was between a rock and a hard place, telling us that her honeymoon was too much money and KLM would not refund the flights and "yet this now included 4 days in Northumberland". Mr Horne accepted in cross examination that the claimant had "come clean" but that "she had prior opportunity to come clean many times,

and instead chose to mislead the investigator and me and it was only after the fit notes when I needed an explanation for them that she then said so: she is a senior officer responsible for vulnerable adults and she has perpetuated a lie for too long".

36. On further questioning from Mr Webster, Mr Horne described that there was "a bit of a gasp" in the room and the investigating officer said a word to the effect of "wow", and the claimant said that "if you thought it was one holiday, that's your problem". The tribunal accepts that these words, or to that effect, were used by the claimant as they are consistent with her earlier stance in respect of challenging Mr Horne about his right to know the detail of the claimant's holiday. Of course, to the respondent it was unauthorised leave. An employer is reasonably entitled to ask questions about an employee's unauthorised leave.

37. Mr Horne reflected at the Disciplinary Hearing and in discussion with his HR advisor afterwards on how that affected the claimant's credibility and how Mr Horne felt misled by a senior officer. The claimant well understood the importance of what she was saying. The tribunal accepts Mr Horne's interpretation that, as a senior officer, "it was insulting to the claimant that she didn't understand".

38. Mr Horne concluded on a balance of probabilities that the claimant was guilty on both allegations. He went on to conclude that the unauthorised absence itself would not have justified dismissal. That is significant at least in respect of the tribunal's assessment of the decision making process. Mr Horne was not determined come what may to find a dismissal. His concession that the first count did not itself justify a dismissal is both considered and consistent with his overall conclusion that the claimant's conduct had undermined trust and confidence: in other words, it was not so much what she did but the way that she has gone about explaining or excusing it. The tribunal's assessment is that Mr Horne had in mind not only the fact that the claimant had – in Mr Horne's view – perpetuated a lie to the investigating officer and to Mr Horne about the Facebook post and consequently about the circumstances of the holiday, but also had conducted herself in an unacceptably hostile and aggressive and challenging manner in so doing.

39. The outcome letter is dated 5 September 2017 [157]. It confirms what had been stated verbally to the claimant following deliberations on 1 September 2017. It confirmed that the claimant would be dismissed on notice because of "some other substantial reason" which was explained to the claimant at both at the Disciplinary Hearing itself and in the letter as significant and irreparable damage to the working relationship caused by the claimant's decision to take unauthorised leave despite knowing the implications and then to give misleading responses to the investigation process.

40. Quite properly, Mr Webster put a number of points to Mr Horne which it was contended were suggestive that the respondent had already decided to dismiss the claimant prior to the Disciplinary Hearing. Mr Horne denied that the draft of the HR advice [58; 103] indicated that Ms Crosby wanted the claimant to resign. By 29 August 2017, Ms Crosby had written an email referring to the claimant's

outside-work interests in fitness and suggested it at the least indicated cynicism on Ms Crosby's part. Mr Horne disagreed. Mr Pearson had said on 26 July 2017 [277] that he had hoped for "a positive way forward at the coming interviews". Was this indicative of a hope that the claimant would be dismissed? Mr Horne denied that (in so far as he was in any position to comment at all). Some bullying concerns were raised in Mr Crosby's investigatory interview at [74]. Again, Mr Horne denied the relevance.

41. It seemed to the tribunal that the purpose of this enquiry by Mr Webster was two-fold: (i) to support a submission that the decision had been taken that the clamant should be dismissed in any event and that individuals, including Ms Crosby and/or Mr Pearson were "nudging" the respondent – presumably that must mean Mr Horne – towards a dismissal scenario. The tribunal finds that Mr Horne was either entirely unaware of or found no relevance to these allegations or contentions to his decision making: (ii) to promote a submission that in some way the enquiry into who/why the Facebook posting was obtained was inadequate. Mr Horne understood the submission and did not accept that there was any need to enquire behind the Facebook posting. The claimant accepted that the Facebook posting was genuine. The claimant was asked for her explanation (on more than one occasion). The claimant did not request Ms Piddington or Mr Horne to investigate how it was disclosed.

42. The claimant appealed on 15 September 2017 [161]. Her appeal was heard by an 8-stong committee Panel of Councillors. The chair was Cllr Donovan. The notes of the Appeal Hearing on 24 November 2017 reflect a lengthy meeting at which the decision to dismiss was upheld. The appeal panel had agreed with Mr Horne's conclusion that the claimant had provided false evidence.

The Law

43. In relation to unfair dismissal, section 98(1) and (2) of the Employment Rights Act 1996 sets out the potentially fair reasons for dismissal. Section 98(1) (b) states that a reason falls within this subsection, inter alia, if it is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Section 98(2) states that a reason falls within this subsection, inter alia, if it relates to conduct.

44. For the purpose of section 98(1) and 98(2) the burden of proof is on the respondent. What matters is whether the respondent has established the operative reason for the dismissal as operating in the mind of the decision maker. Abernethy v Mott [1974] IRLR 213.

45. When determining an SOSR dismissal, having regard to the statutory test of s.98(1), the tribunal must be satisfied that the reason was both genuine and substantial enough such that it could justify dismissal. An SOSR contention based on loss of trust and confidence entitles the tribunal to have regard to the whole circumstances surrounding an alleged loss of trust and confidence. Mr Webster rightly reminds the tribunal to exercise caution: SOSR is not to be

resorted to too readily and is not to be a convenient label to stick on any situation when an employer feels let down by its employee. Leach v The Office of Communications [2012] IRLR 839, and see para 40: invoking loss of trust and confidence is not a solvent of obligations and it is necessary to identify why it had become impossible for the respondent to continue to employ the claimant.

46. Section 98(4) then sets out what needs to be considered in order to determine whether or not the decision is fair. It states "determination of the question whether dismissal is fair or unfair…. (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".

47. When determining the fairness of dismissals in a conduct context, according to the Employment Appeal Tribunal in British Home Stores v Birchell [1980] ICR 303, the tribunal must consider a three-fold test: (i) the employer must show that he believed that the employee was guilty of misconduct, (ii) that he had in his mind reasonable grounds upon which to sustain that belief, (iii) that at the stage at which the employer formed that belief he had carried out as much investigation into the matter as was reasonable in the circumstances.

48. Mr Webster referred to Strouthos v London Underground [2004] IRLR 636 which re-affirms the point that an employee should know the allegations that she faces and the result should only be based on those matters properly put to the employee. In Merseyrail v Taylor UKEAT/0162/07, the tribunal should not go behind a genuine medical certificate in the absence of contradictory information and should not disregard such information when looking at an employee's reason for being absent from the workplace. In Trico-Folberth v Devonshire [1989] IRLR 396, where a tribunal investigates whether the employer could have dismissed fairly for another reason the tribunal must look carefully whether in practice this particular employer would have dismissed. This might have particular relevance here because Mr Webster submits the kernel of Mr Horne's decision to dismiss was a paradigm example of a conduct issue and the respondent has conducted a disciplinary process on the express basis that the acts if proven do not constitute gross misconduct.

49. For the purpose of section 98(4) the burden of proof is neutral in applying section 98(4). The tribunal reminds itself that it does not stand in the shoes of the employer and decide what it would have done if it were the employer. Rather the tribunal has to ask whether the decision to dismiss fell within the range of reasonable responses open to the employer judged against the objective standards of a hypothetical and reasonable employer. The case of Sainsbury's Supermarket Ltd v Hitt [2002] EW CA Civ 1588 makes it clear that the range of reasonable responses that applies to all aspects of the dismissal decision. The tribunal is required to consider whether dismissal fell within the range of reasonable responses see Iceland Frozen Foods v Jones [1983] ICR. Here the question of whether an employer has acted reasonably in dismissing

will depend upon the range of responses of reasonable employers. Some might dismiss others might not.

50. Turning to deductions from compensation, the Polkey principle established that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Thornett v Scope [2007] ICR 236 affirmed the obligation on an employment tribunal to consider what the future may hold regarding an employee's ongoing employment.

51. Secondly, section 122(2) ERA provides that where the tribunal finds that any conduct of a claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the tribunal must reduce that amount accordingly. Section 123(6) ERA provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable. Before any such deduction, a tribunal most make three findings (in accordance with Nelson v BBC (no2) [1979] IRLR 346): (i) that there was conduct which was culpable or blameworthy; (ii) that the dismissal was contributed to some extent at least by the claimant's culpable or blameworthy action, (iii) that it is just and equitable to reduce the assessment of the claimant's loss to a specified extent.

Discussion

52. Has the respondent established the reason for dismissal? Mr Horne was the decision maker and it is the facts (or beliefs) known to him at the time of the dismissal that will be determine the issue.

53. The claimant contends that there was a pre-ordained decision to dismiss. Mr Horne was asked about a number of occasions where employees of the respondent may have made a comment or used words to suggest an antipathy towards the claimant. In addition, it was put to Mr Walton that these occasions would, "feed into a picture of someone who is a pain, absent for 2 years, deskilled, and that the respondent wanted to get the right result, i.e., by gently nudging her out?"

54. The tribunal is not persuaded by this evidence. Firstly, the occasions cited may well suggest frustration at times about the situation but neither the words themselves nor any evident sentiment expressed by them come close to supporting an inference that any employee of the respondent let alone a group of them wanted to "get shot" of the claimant. Secondly, the objective actions of the respondent in welcoming the claimant back to work, offering comprehensive and supportive induction and expressing a willingness to consider flexible working are inconsistent with the adverse inferences that the claimant would wish the tribunal to draw. Thirdly, the respondent did provide the claimant with

careful and considered explanations when it proved necessary to deny the claimant's requests. Fourthly, Mr Walton had not brought the information to Mr Horne's attention because Mr Walton himself had "just ignored it" as it was not relevant. Fifthly, and critically, much of it was not known to Mr Horne in any event. Even where he knew of it (or had he been told of it) he did not or (as the tribunal finds, as a result of considering his evidence to this tribunal) he did not regard it as material. Sixthly, in order to support this submission, it is necessary for the tribunal to reject Mr Horne's evidence that he went into the Disciplinary Hearing with an open mind. He gave evidence to this tribunal in a professional manner. The tribunal unhesitatingly concludes that Mr Horne made his own mind up having properly taken advice from Mr Walton and was not unduly influenced by the views of colleagues and that when he went into the Disciplinary Hearing he did so with an open mind.

55. Mr Horne told the tribunal that he dismissed the claimant for the reasons stated at the Disciplinary Hearing and in the outcome letter. The tribunal accepts his evidence.

56. The reason that Mr Horne dismissed the claimant was because of significant and irreparable damage to the working relationship. In analysing the reason for dismissal, the tribunal is alive to the importance of separating the question of the reason for dismissal from the reasonableness of dismissing. This is an important distinction especially so in terms of an alleged SOSR dismissal. In the present case it is about analysing the (alleged) fact of a breakdown in relationship not the reasonableness of a dismissal flowing from it (which is a subsequent question).

57. The tribunal finds that Mr Horne genuinely held the view that the relationship of trust had broken down with the claimant not solely because the claimant had taken leave of absence knowing the consequences but also because of her conduct thereafter which identified that the claimant had perpetuated a lie and deceived and had done so in a "shocking" aggressive manner: that she had only "come clean" after explanations sought over the confusing GP fit notes had triggered a new "narrative" to use Mr Horne's words.

58. The tribunal is also alive to the dangers that a misuse of the SOSR process might lead to a dilution of the obligations of an employer to establish misconduct at the level of gross misconduct in order to justify dismissal. It is in that context that the tribunal reminds itself of the words of the statute in s.98 (1) (b): has the respondent established that there was a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held? The answer to that question is yes. The claimant was a senior officer involved in a positon of responsibility with vulnerable adults and Mr Horne had no confidence in her future reliability or willingness to carry out instructions as a result of the lies and the deception and the shocking and aggressive manner of her response.

59. Did the respondent act reasonably in treating that reason as sufficient to dismiss the claimant? As in all unfair dismissal claims, no less in respect of SOSR dismissals, the tribunal reminds itself that the fairness of the dismissal depends upon asking itself whether the decision to dismiss fell within the range of reasonable responses that a reasonable employer might adopt.

60. The respondent followed an appropriate disciplinary procedure, inviting the claimant to both an investigatory meeting and a Disciplinary Hearing (having adjourned two previous hearings) and conducted them in a manner in which the claimant fully understood what the respondent was investigating and had a reasonable opportunity to explain herself. The respondent was fully entitled to conclude that the way in which the claimant had responded was "shocking and disappointing". The fact that the respondent reached a genuine belief that the claimant had engaged in consistently deceiving her employer in her responses meant that she had been dishonest. Mr Horne knew that the claimant was a senior officer. Mr Horne had discussed with Mr Walton and had considered whether a lesser sanction was appropriate. He rejected a potential FWW in the face of his conclusion that the claimant could not be trusted.

61. These considerations lead the tribunal to conclude that the decision to dismiss for SOSR was within a range of reasonable responses. The claimant's claim for unfair dismissal must fail.

62. In the light of the tribunal's findings, it is not necessary to deal further with the respondent's alternative case on conduct as the reason for dismissal and upon the principles affecting reduction in compensation namely Polkey and contributory fault. The tribunal does so for the sake of completeness and in the event that the tribunal is wrong in respect of its finding on the SOSR dismissal.

63. There are difficulties with an alternative dismissal with conduct as the reason. First, the respondent's express position was that if this had been a conduct case, it would not have amounted to gross misconduct and the claimant would not have been dismissed. Secondly, both Mr Horne and in turn Ms Jeram in her submissions sought to suggest that this was in fact "cumulative" misconduct as envisaged at [181] at clause 5.4.2 of the Policy which permits dismissal for "cumulative misconduct". However, this is a misinterpretation of the Policy the plain meaning of which is to apply to cases of misconduct which when added to previous established misconduct most commonly the subject of prior disciplinary warnings would justify dismissal. The present case has 2 allegations but these are not properly described as "cumulative" within the meaning of the Policy. Given these features the tribunal concludes that a dismissal for gross misconduct would have been an unfair dismissal.

64. Turning to the matter of deductions from compensation: the tribunal went on to consider whether the respondent would or might have dismissed the claimant even in the absence of any alleged unfairness. The question that the tribunal had to answer would be this: what would have happened had the respondent

carried out a fair process. The tribunal reminded itself that it should not be deterred for considering this point by the fact that it involved some element of speculation. However, the tribunal declines to make any finding. The tribunal cannot sensibly unravel what would have been the likely circumstnaces and thus the likely outcome in the event that in some way the decision making process had been conducted in a different manner. In effect, the SOSR was substantially fair and no compelling procedural defects have been identified and in relation to an alternative conduct dismissal the respondent is somewhat hampered by its own acknowledgement that it would not have dismissed for gross misconduct.

65. Finally the respondent contends that any award should be reduced by reason of contributory fault. The conduct relied upon by the respondent was "the misleading of the employer by asserting and maintaining that she had gone on one holiday and that had been booked without her knowledge and that she had maintained a lie about the Facebook entry".

66. Is this conduct which can properly be described as culpable or blameworthy as envisaged by Nelson no.2 and by s. 122(2) and s.123 (6) ERA? The tribunal concludes that the answer to this question is yes. The tribunal concludes that the claimant had, in the words of Mr Horne, "perpetuated a lie", and was only drawn to provide an explanation at the very end of the Disciplinary Hearing only when triggered by the confusion arising from the GP fit notes. The claimant's conduct exacerbated by her apparent attitude that her employer had no right to know about what she was doing during her admittedly unauthorised leave was reckless and showed an indifference to her employer's interests.

67. Did it contribute to the dismissal? Again, the answer is yes. It was a central part of Mr Horne's thinking. To what extent if any would it be just and equitable to reduce any Basic or Compensatory award by reason of the claimant's contributory conduct? The tribunal considers that the conduct was central to Mr Horne's decision and was a key feature of the investigatory process and the tribunal considers that the claimant has to accept the majority of the responsibility. Although it is not necessary for the purposes of this decision, given the tribunal's primary finding of a fair dismissal, the tribunal goes on to conclude that if the dismissal had been unfair either notwithstanding the reason of SOSR or the reason of conduct, any Basic Award and any Compensatory Award otherwise payable to the claimant ought to be reduced by 66%.

EMPLOYMENT JUDGE BEEVER

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

.....9 May 2018 .....

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