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# EMPLOYMENT TRIBUNALS

## *Claimant*

Miss N Verma

## *Respondents*

The Carlton Tower Limited

**AND**

**Heard at:** London Central

**On:** 5 and 6 March 2019

**Before:** Employment Judge Walker

## **Representation**

**For the Claimant:** In person  
**First Respondent:** Did not attend

## **REASONS**

1. The Claimant claimed unfair dismissal arising out of the termination of her employment in June 2018.

### **Evidence**

2. The Tribunal had witness statement evidence from the Claimant and from Mr Stewart. Both attended and gave evidence. Mr Stewart was a former employee of the Respondent and the person whose initial grievance triggered the Respondent's concerns. The Respondent did not submit any witness statements and did not attend. The Respondent had prepared a bundle of documents as had the Claimant. The Respondent's bundle contained more information and documents than the Claimant's and I used the Respondent's bundle with the addition of two documents from the Claimant's bundle which I could not locate in the Respondent's bundle, being a statement by Mr Asif and an email from payroll.

3. Because the Respondent did not attend, the primary source of information I have used in reaching my Judgment was the information in the documents, although some of the oral evidence has been useful.

## Background

4. I have noted the Respondent did not attend this hearing. The Respondent sent written submissions which explained that the Respondent had opted to submit written representation for these proceedings rather than attend, predominantly due to the low value of the Claimant's claim versus the cost of attending with Counsel and witnesses.

5. The Respondent's submissions started with an application for a strike out and referred to the fact that the Respondent had sent the Employment Tribunal an email application to strike out the Claimant's claims on 3 January 2019. Not having received a response, the Respondent then sent a further email on 14 January 2019. The Tribunal eventually asked the Claimant's solicitor for comments and finally got a response from them indicating that the Claimant had suffered some personal trauma as a result of dismissal and suggesting that the hearing should be postponed for a while. The Tribunal asked the parties to do their best to be ready for the hearing date and, in practice, both parties produced bundles of documents. The application was made on the basis that the Claimant had failed to comply with Tribunal orders for case management. While this can form a basis for striking out, the Tribunal will not normally strike out a case where there is a real possibility there can be a fair hearing and it is more likely to make unless orders than order a strike out. As it is, the bundles are before me and the case is in a state where a fair hearing is possible. In the circumstances, and bearing in mind the overriding objective, I reject the application for a strike out.

6. The hearing then proceeded as indeed the Respondent's written submission clearly envisaged might happen. The rest of the Respondent's submission addressed the unfair dismissal claim setting out the background, details of the investigation and the disciplinary hearing, the appeal hearing and making general submissions. I have taken all of this into account.

## Issues

7. The issues which I identified were as follows:

7.1 What was the reason for the dismissal? The Respondent says it was conduct and that was a potentially fair reason;

7.2 If the reason was conduct, I then have to consider s.98(4) of the Employment Rights Act 1996 and specifically the Burchell test. That means I have to ask the following questions:

7.2.1 Did the Respondent's dismissing officer, Mr Skinner have a genuine belief that the Claimant was guilty of the misconduct in question?

7.2.2 Did the dismissing officer have reasonable grounds for that belief?

7.2.3 At the time the Respondent formed that belief had the Respondent carried out as much investigation as was reasonable?

7.3 Additionally, I have to consider whether there any other flaws in the procedure which were sufficiently serious as to render the dismissal unfair and was dismissal within the band of reasonable responses?

## **Facts**

8. The Claimant commenced work for the Respondent on 9 May 2016 as an HR advisor.

9. In 2017 the Claimant began a relationship with another employee of the Respondent, Mr Stewart. Although I was not provided with copies of any policies, I understand from the documents that there was a conflict of interest policy which highlighted the fact that relationships between staff could give rise to a conflict of interest. I do not need to go into the background. It is sufficient to say that after this became known, the Respondent accepted that the Claimant and Mr Stewart did disclose their relationship to the Respondent both verbally and by completing the necessary form and the Respondent admits that when they did so, it did not consider that relationship to be a problem.

10. It is important to note that the Claimant worked in the HR team and one of her duties was shared with another employee, and was to check the payroll each month. When there is an additional allowance of any sort it was her job to ensure that the background paperwork had been sorted. If there had been additional allowances and she had not asked questions she would not have been doing her job.

11. Subsequently, in 2018 Mr Stewart raised a grievance about his pay. Much of the grievance background is clear from the documents. However, Mr Stewart did give me some further background. Mr Stewart's initial responsibilities had been for the maintenance and any engineering and other work carried out either by his team or by outside contractors on the Carlton Tower Hotels. Later, the Respondent had added to those responsibilities, the same duties in respect of the Lowndes Hotel. When that happened, Mr Stewart had been given an extra allowance to cover the additional work. Thereafter, the Respondent acquired two extra buildings which had been previously been managed by a different company and these were absorbed into the overall business. At that point, Mr Stewart found himself in a position where he had yet more responsibilities. The additional buildings were not hotels but apartments which were treated as part of the hotel establishment in that they were maintained and some services provided. Mr Stewart was asked by David Nicholson to take responsibility for them, initially on a short-term basis for a few months till the end of the year. At that time, he questioned the position but agreed to do the work. Mr Stewart then raised the matter at the end of the year, but was asked to carry on until the end of the financial year. In or about March 2018 Mr Stewart raised concerns again about the fact he was being asked to continue the work. The additional responsibilities led Mr Stewart to consider there was a reasonable basis for a pay increase.

12. The top management team consisted of a committee called the Planning Committee and another called the Executive Committee. The most senior managers were members of the Planning Committee and the next level of managers were on the Executive Committee. Mr Stewart was on the Executive Committee.

13. The two people most closely involved in the management of the additional buildings, apart from Mr Stewart, were David Nicholson and Ian Richardson, both of whom were senior to Mr Stewart.

14. As I have noted, Mr Stewart considered the extra responsibility merited a pay increase. That had happened previously, when he was asked to take on the Lowndes hotel. He therefore asked on various occasions whether in fact he should have received an extra pay allowance for this work. He also spoke about it with other senior managers. He knew, as a result of talking to them about it, that some other managers had not received a pay rise for the extra work. At one point went to see Anne Whelan, who was head of HR. When he went to see Ann Whelan about the matter, he put it to her that he thought that Mr Nicholson and Mr Richardson would have received something additional. Ms Whelan did not answer his question, but his clear impression from her behavior, which he described as her leaning back in her chair with a smirk on her face, was that David Nicholson and Ian Richardson had in fact received extra pay. This prompted him to write to Ann Whelan on 13 April 2018 with a complaint in which he said amongst other things “unless I am very much mistaken, both David Nicholson and Ian Richardson will be being paid for their new duties ... and so they should!!”

15. I have no doubt that Mr Stewart’s explanation is correct because the documents confirm it. The investigation which was launched into Mr Stewart’s grievance was carried out by an outside company. Mr Brendan Wincott was the investigator. Mr Wincott met Luc Dellafosse, who was the general manager of CTL (one of the new buildings in issue) and according to the notes he had been in post for about six months by 24 May 2018 when he met with Mr Wincott. This indicates that he began his role towards the end of November 2017. He says that when he started he was told about Mr Stewart’s on-going issue with completing tasks over at Chelsea House and CTP but was told that there was no extra pay for this and this he said was what he was advised Mr Stewart. The question of additional pay for his role in connection with the extra buildings was clearly a long standing concern on the part of Mr Stewart.

16. The grievance notes also show that Mr Stewart, when interviewed about his grievance by Mr Wincott, gave the same explanation about his meeting with Ann Whelan and about her reaction when he enquired whether David Nicholson and Ian Richardson were both being paid for their additional responsibilities in respect of Chelsea House and CTP.

17. Mr Wincott interviewed Ann Whelan on 24 May at 4pm. When asked about the pay rises for the two senior managers, she explained that this came in a

memo from Dubai. Miss Whelan said she did not know the reason for them and she put the memo into a locked place.

18. In the course of the meeting, Mr Wincott told Miss Whelan that it seemed Mr Stewart was aware of those two managers' earnings and questioned how secure the information was. Miss Whelan said it was securely locked away but, in the course of discussion (not recorded in the grievance notes), it became apparent that the Claimant was Mr Stewart's girlfriend and worked for Miss Whelan.

19. Mr Wincott asked Miss Whelan how possible it was that the Claimant had leaked information to Mr Stewart. He was told it was possible but there was no evidence. The end of the notes refers to Mr Wincott reporting to Dubai and that he would mention it in his report but no documents of that nature were in the bundle.

20. At this stage, the bundle shows that that the only comment Mr Stewart had made which suggested he knew anything was his reference to the fact that unless he was very much mistaken both Mr Nicholson and Mr Richardson would be paid for their extra duties. There was no reference to exact sums of money or indeed any amounts of salary other than Mr Stewart's own salary.

21. The notes of the meeting between Mr Stewart and Mr Wincott showed that Mr Stewart explained that as other people had probably received extra money he wanted some too. He was asked who had been paid extra and he said that he did not know for sure, but he suspected that Mr Richardson would have had more money as he was originally the General Manager for Lowndes but now he was also the Operations Manager for Chelsea House and CTP. He also suggested that Mr Nicholson would have received more as he now oversees the finance there. He was asked if anyone else had taken on responsibility and he named two other managers, one of whom was responsible for Security and an HR Manager who had also taken on extra responsibility. Mr Stewart knew that one had not had any extra pay and Mr Stewart was aware he was not happy about it.

22. When asked what extra value that Mr Stewart placed on his added responsibility, he said around £5,000/£6,000 which was exactly the same amount of money he had earlier explained he had received as a pay rise when he took on the maintenance of the Lowndes Hotel.

23. The outcome letter was dated 2 June 2018. This dismissed Mr Stewart's grievance. It concluded that no-one had received a pay rise because of their additional responsibilities for Chelsea House or CTP. This was strange, since Mr Wincott was aware from a meeting he held with Mr Nicholson, who was the vice president of finance for the Respondent, that Mr Richardson had received a £12,000 pay rise and Mr Nicholson had received an additional sum of £18,000. Mr Nicholson explained that Mr Richardson took on responsibility for the operations of Chelsea House and CTP (i.e. the extra two buildings in question) and took on direct reports which was exactly the issue being investigated. Mr Nicholson's rise may not have been related to the additional two buildings directly

as he said this was because he became a director. As I have noted the outcome letter said that no-one had a pay rise because of their additional responsibility.

24. On Monday 18 June 2015 Mr Wincott interviewed the Claimant. At the beginning of the investigation meeting he did not explain the reason for their meeting but he did ask about HR access to information and she explained the HR system and her responsibility to check payroll. After this, Mr Wincott suggested she had leaked salary information regarding Mr Nicholson and Mr Richardson to Mr Stewart.

25. The meeting notes were never approved by the Claimant. She was not sent them with a view to their being checked. The notes say the meeting started at 1pm and it ended at 4:05pm but they also show a break between 2:15 and 3:45pm, so that the notes cover a period of one hour and thirty five minutes. I am told that Mr Wincott took notes in shorthand and therefore the notes which have been produced to the Tribunal are his typed version of those notes. They run to a little over three pages. It is quite clear that they cannot be verbatim notes as there is simply too little in them to cover that length of time. Frequently they include expressions such as "explained" and "confirmed" indicating that there was more said than was noted. However, they are set out with the identity of the person speaking and on occasions, what seems to be a direct quote.

26. The Claimant says that she was repeatedly questioned as to whether she had given information to Mr Stewart. The question was put to her in three ways. She was asked whether she had given exact salaries to Mr Stewart. She was asked if she had given ball park information. She was asked whether she had given any information. Her responses to each question were that she had not given that information, so she said she had not given exact information, that she had not given ball park details or indeed any information.

27. However, the notes record Mr Wincott saying, "confirmed more details, and specifically asked NV if she had divulged confidential to Abie Stewart, her partner". He shows the response being "confirmed definitely not, not exact salary".

28. The notes show that Mr Wincott continued explaining that as part of his investigations, it is apparent that [Mr Stewart] is aware of David and Ian's salaries, and he identified HR as the source of this information. BW explained that when he looked at the HR department, only one person would appear to have motive for this.

29. The Claimant's reply is noted as "stressed that she hasn't told Abie their salary, definitely not their exact salary".

30. The interview continued with Mr Wincott pressing the Claimant and asking all sorts of questions about whether Mr Stewart knew her password and whether he might have seen payroll information when she was checking it off. On all occasions the Claimant said this was not possible. The notes show Mr Wincott said "explain all the facts thus far point towards NV being the source of a leak of

the salary information". Her response was noted as "explained that she wouldn't discuss anyone's salary, especially not exact salary".

31. It then shows that Mr Wincott clarified what NV meant by reference to exact salary, and did she discuss vague salaries? Her response said no, she does not discuss anyone's salaries, but of course her and Abie chat about work. She was then asked about what sort of discussions and her response was they chatted about things and when asked what sort of things, NV went on to explain that she might have referred to her astonishment of what some people earn but she did not really ever remember saying this to Abie and definitely not an exact salary.

32. The Claimant's evidence, which I accept, was that she was astounded being asked about the salary. She had no idea that Mr Stewart had made a grievance. He had not told her that he had done that because he thought it was proper not for he to know about it. She could not understand the position as she understood from Mr Wincott that Mr Stewart had identified her as having told him the exact salaries for Mr Nicholson and Mr Richardson, which had never happened.

33. It is important to note that the notes were never sent to the Claimant for approval. At no time did she accept they were accurate. However, it is clear that while they were potentially summaries of some of some of the discussions that were held, they were misleading and in fact were read later as being verbatim responses to specific questions. This led to considerable confusion on the part of some of the Respondent's management team.

34. There was a break and then when they reconvened, Ann Whelan joined the meeting. Mr Wincott indicated that they done some further checks and the Fourth HR system did not contain the information which had apparently been leaked, so it could have only come from the payroll email, meaning it could only be from the Claimant or David. He said Kasim (from payroll) had confirmed that the Claimant queried David and Ian's increase in pay so this all pointed to the Claimant as being the source of the leak and therefore she was to be suspended pending an investigation in to the matter and, if applicable, a disciplinary hearing.

35. On 20 June a letter was sent inviting the Claimant to a disciplinary hearing which was to take place on 22 June at 2pm. The letter was sent by recorded delivery, first class post and email and I understand she received 24 hours' notice of the hearing. That is an extremely short period of time and gave her little opportunity to ask for any other information. The charges put to her were first that she had disclosed confidential payroll information concerning employees at the hotel to an unauthorised person (namely Abie Stewart, chief engineer) without authorisation to do so. The second charge was dropped very quickly and I do not need to go into it.

36. The Claimant was given investigation minutes from her meeting with Mr Wincott, the suspension form, an email sent from a payroll clerk to her on 27 November 2017 confirming attached report containing payroll information and the witness statement from Mr Asif, payroll manager.

37. Notes were taken of the disciplinary meeting which was conducted by Mr Skinner, director of operations with Wendy Curlett of Guardian Support, the organisation that Mr Wincott belonged to, as the equivalent of HR support and notetaker.

38. The allegation of disclosure of confidential payroll information was pursued and the Claimant, began by saying that she had asked for the notes from Mr Stewart's investigation and these had not been provided. She had been sent quotes by email but these could have been taken out of context. I was not provided with the quotes that were sent to the Claimant and they were not in the bundle.

39. The Claimant explained her job responsibility. It is important to note that both she and David Morrison were responsible for checking the payroll. Whoever did the checking had to check the draft payroll documentation and identify any anomalies. They had to ensure there was back up paperwork by calling payroll and asking them about it. The payroll information amounted to some 72 pages. It took her at least a couple of hours to check and once it was checked she would file it on her desktop. It was her job to ensure that if there were any changes, the payroll team had sufficient information to verify they were correct.

40. Mr Skinner referred to the notes and said: "Looking at your notes, I have noted on 4 separate occasions you advised that you definitely did not disclosed information but then say, "not exact salary". What do you mean by that?"

41. As I have noted, this question shows that Mr Skinner assumed the investigation notes were verbatim, which they were not. The Claimant explained this was missing context as she was constantly being told that Abie had been told exact salaries and she was stating that she had never given exact salaries. It is clear that the Claimant was endeavouring to explain that she was responding to the precise question that was put to her. Mr Skinner asked who had access to the information on payroll and the Claimant told him who would have it. She explained she did not check the PPA's, which I understand are a form recording personal change of status of some sort, but she would query them and would make sure payroll had the backup paperwork.

42. As the meeting progressed, Mr Skinner noted the fact that there was an email in November where the Claimant was questioning the payment for DN. She asked whose writing was on that email and Mr Skinner said he believed it was Mr Nicholson's writing, stating that she called the payroll manager about his extra pay. There is no explanation as to how Mr Nicholson knew that or when he wrote on the email concerned. The item in question was simply an email sending the Claimant the payroll documentation, which she would need to do her job. Mr Nicholson had written on it without explaining who told him what he had written.

43. The meeting went on with Mr Skinner making it clear that he understood that Mr Stewart knew the two additional payments which had been paid. The minutes record him saying "the reason I am asking is that I wanted to ask as in your investigation minutes BW (i.e. Mr Wincott) explains that Abie is aware of



salaries and he identified HR as a source of information, hence why I ask how many queries do you specifically check, IR and DN as it is apparent Abie knows information”.

44. When the Claimant replied that Mr Stewart should be investigated, Mr Skinner continued, “we have statements that you have queried those payments as Abie has given direct reference to those payments”. The Claimant pointed out that all she saw would be just payments for the relevant month, to which Mr Skinner said, “I think all of us can calculate when the figures at the end of March what the annual salary equate to”.

45. The Claimant pointed out that she did not think the matter had been properly investigated and said she thought it should have been clarified with Abie where he got the information from. After some discussion Mr Skinner said, “the reason is that it seems a coincidence that you are in a relationship, you have access to this information, that you have queried payments and he has made the comments”.

46. The Claimant explained that she did not feel it has been investigated correctly. She said “I do not know how I have been implicated in this investigation. The investigation is not credible and is all based on assumption”.

47. By a letter dated 26 June 2018, the Claimant was dismissed for gross misconduct. The letter referred to the investigation meeting at first and particular noted:

“At your investigation meeting you were asked the direct question regarding whether you had divulged confidential information pertaining to salary to Abie. It was noted that your response on four occasions was that you have not divulged “exact salary”, therefore I questioned you further on this as this would indicate that some information was divulged that would give a belief that additional payments were made.

You advised that both yourself and Abie would engage in general “chit chat” stating that you felt that Maids and Porters within the hotel are the hardest working yet only receive minimum wage and how you believe the Tronc system is not fair. You maintain that you had never given any specifics of salary.

Additionally, it was noted that at your investigation meeting you conveyed that you had expressed astonishment in relation to how much managers were paid and you were questioned on this on how this could be expressed without giving further information. Your response was that you were never specific but you had made comments on how managers earn a lot. Again, reiterating that it was just general “chit chat”.

48. The letter recorded the fact that at the conclusion of the meeting the Claimant had asked for three points to be addressed, being who put her name forward as a possible source, when was payroll checking done in February as she believed she was on holiday and a review of the context of Abie’s comments.

49. Mr Skinner then said he checked with payroll and they confirmed it was indeed David Morrison who checked February's payroll list but they were adamant that at some point the Claimant had queried and discussions were had with her regarding the payments made to Mr Richardson and Mr Nicholson. This could have happened in November 2017. Additionally, it was recorded that she had access to the information as it was sent to her subsequent to February's report.

50. Mr Skinner said he had also spoken to David, i.e. David Morrison, and he advised he had not divulged any information or had any conversation with Abie regarding salary or payments made. Mr Skinner could not see a motive for Mr Morrison to have done so. There was, however, no documentation recording any such discussion and no record of any witness statements, minutes or notes, taken by Mr Skinner, or anyone else, about these enquiries.

51. Mr Skinner concluded that having reviewed the comments made by Mr Stewart he believed they had been made with some knowledge of the payments being made to individuals. He accepted there was no concrete evidence that would categorically prove that the Claimant divulged the information but looking at the level of accessibility of the information and the fact that she had stated she did discuss work matters and she queried payments that were specifically referred to by Abie, "it is my reasonable belief that there is no other way such information could have come in to his possession". The Claimant was summarily dismissed.

52. The Claimant was told about the appeal process and she did indeed appeal. The first ground of her appeal was the failure to investigate thoroughly. She also referred to new evidence and pointed out Mr Stewart had given her written permission for his grievance notes and summary to be used and she had a copy of that and she suggested the company obtained the same. She pointed out that the notes clearly state how he came to believe that other members of staff were being paid in relation to CTP House and Chelsea House. Nowhere in the minutes does it suggest anything else. Having been in a relationship with Mr Stewart was not motive or reason for any warning whatsoever. She also asked whether the Respondent had taken in to account her impeccable work history, references and dedication to the business.

53. The Claimant was asked to attend an appeal hearing on 11 July 2018. Mr Harding would chair the meeting with somebody from Guardian Support to take notes and support. The Claimant responded indicating that she would like nothing more than a fair and unbiased hearing but she did not believe it was going to happen and she did not want to attend, rather she wanted the appeal to be conducted in writing. She expressly pointed out that a quick email to Abie or a separate interview with him during the investigation could have rectified this rather than Guardian HR pulling out sentences out of context to suit their version of events.

54. Mr Harding therefore sent a list of questions to the Claimant which she answered.

55. The appeal outcome explained that Mr Wincott had already heard Mr Stewart's grievance and he did not think that he need to speak further with him. In addition, Mr Wincott was satisfied, by process of elimination that the information had, on the balance of probability come from the Claimant. Also, Miss Wincott told Mr Harding that he would not place too much weight on what Mr Stewart said in any event given the close personal relationship he shared with the Claimant. Mr Harding said, "I note you yourself confirmed that Abie would not push you under a bus and thus infer he would seek to protect you at any cost. It was therefore deemed unnecessary by Mr Wincott to further interview Abie and that it why he was not spoken to separately".

56. In relation to Mr Kasim's statement, Mr Harding appears to have considered that that was not to be ignored because of the incorrect reference to the payroll check but rather it raised a question suggesting the Claimant had contacted payroll about the salaries, even though she did not conduct the payroll checks. As regards the November email from payroll, he thought it was relevant to demonstrate awareness of any additional payments that Ian and David received.

57. In relation to new evidence again Mr Harding had spoken to Mr Wincott and he said he that he was assured that Mr Wincott did interview Ann Whelan as part of his investigations and Mr Wincott assured Mr Harding that Ann categorically denied she released information to Abie and if anything, he found Ann would have no motive to share it. Having spent time with Ann face to face he would be extremely surprised if she gave anything away with a facial expression.

58. In particular, Mr Harding relied again on the investigation notes and he says "where you repeatedly stated that you did not tell Abie "exact salaries", which infers to me that whilst you may not have told him exact salaries, he was aware through you that an additional amount was being paid to Ian and David, which was still confidential information, and that you told him more than you should have done".

59. With regard to Abie's explanation that the information came from Ann's facial expression he found it most unlikely and he asked himself how likely is Abie to confess that the information came from you based on your comment he would not push you under a bus. He decided not to overturn the decision.

## **Submissions**

### Respondent's submissions

60. In relation to the unfair dismissal claim, the Respondent's submissions refer to various facts, mostly contained in the documents. In a summary, the Respondent argued that the reason for the dismissal was gross misconduct which was a potentially fair reason. The Respondent says it had carried out a thorough investigation into the alleged misconduct and came to its findings based on the balance of probability that the Claimant was culpable of the conduct alleged. The Respondent considered that there were very few employees who

could have provided the information and Mr Stewart had correctly identified only two employees out of over four hundred and fifty-one employees receiving additional payments. In the light of the Claimant's submissions regarding the discussion she and Mr Stewart had regarding work matters, her assertion that Mr Stewart would not have admitted to the Respondent even if she had given the information, they had found on the balance of probability that it was the Claimant who have provided the confidential information.

The Claimant's submissions

61. The Claimant made submissions regarding a number of problems with the process and the evidence. She pointed out that the original minutes were taken in shorthand and although it would be difficult to read them in that form without a shorthand expert, they were not provided. In any event the meeting lasted for something approaching three hours and the minutes provided could not reflect the amount of time taken even allowing for the interval.

62. There was no evidence from Mr Stewart that he was told by the Claimant about any confidential information rather Mr Stewart gave a different explanation as to how he concluded that the salaries of the two individuals concerned had likely increased.

63. Mr Stewart had never been asked to explain and the failure to investigate the position with him meant the Respondent was unable to understand how it was he had reached the conclusion he had. In practice Mr Stewart had not told the Claimant about his grievance and she had no idea about it.

64. When Mr Wincott interviewed the Claimant, he did not tell her the reason for the interview and when he did, he expressly asked her about whether she had disclosed the exact salaries, prompting her response. The notes were inaccurate and that they appeared to be precise comments when in practice there was a great deal of extra conversation and the reference to exact salaries was a response to a precise question. There was no evidence that the Claimant did actively provide any information.

65. Mr Asif's evidence was clearly incorrect because the Claimant did not do the payroll check for the month in question. In practice the payroll information which the Claimant received provided details of changes and, while she had enough information to identify if there was an addition allowance payment, she would not see a change such as a salary increase. It is not clear whether the sums paid to the two senior managers were additional allowances or pay rises because the only reference to them is in Mir Nicholson's response to Mr Wincott to which he talks about pay rises. None of the documentation has been produced at any time to show what information the Claimant actually had access to. There was no explanation for the email with the handwriting from David Nicholson. He had simply written on an email from payroll person to the Claimant which was sent in the normal course of events indicating that his position had been queried without explaining who had told him or when or why. There is no date on his note. Importantly it was the Claimant's duty to check payroll and this is what she did when she went through the payroll.

66. Ann Whelan's statement says there was no evidence that pointed to the Claimant. Mr Stewart's grievance outcome letter said no one was getting paid extra and finally in the investigation Mr Wincott lied when he said to the Claimant that he knew that Mr Stewart knew exact salaries. Mr Stewart had never said he knew exact salaries or indeed referred to any figures for other people's salaries. For these reasons, it was submitted that the process was flawed.

67. Additionally, the Claimant said she did not believe her dismissal was due to her conduct in any way. She did not think they had any genuine or reasonable belief in her guilt and that the investigation was not reasonable.

### The Law

68. S.98 (1) of the Employment Rights Act 1996 provides that it is for the 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 a to justify the dismissal of an employee holding the position which the employee held.

69. Section 98(2) sets out a list of potentially fair reasons and conduct is one of them.

70. Section 98 (4) of the Employment Rights Act 1996 provides that 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 employers 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.

71. The test which is usually applied is laid down in the case of **British Home Stores Limited v Burchell [1978] IRLR 379** in which it set out that first of all there must be established by the employer the fact that belief: that the employer did believe it. Secondly that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

72. The case of **Foley v Post Office [2000] ICR 1283** affirmed that this approach was good law.

73. The case of **J Sainsbury Plc v Hitt [2003] ICR 111** clarified one point, saying the range of reasonable responses test or, to put it another way, they need to apply the objectives standards of the reasonable employer applies as much to the question whether the investigation in to the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reasons.

### Conclusions

74. The first question I have to consider is what was the reason for dismissal. The Respondent says it was conduct and they were referred to the events which made them conclude that the Claimant had disclosed confidential information to another employee, namely salary information about two other employees.

75. While the Claimant disagrees with this, I have no doubt from the documents, that that was the reason for the dismissal and that is a potentially fair reason because it is a conduct related reason.

76. S.98(4) of the Employment Rights Act 1996 requires me to consider the three questions, which are usually referred to as the Burchell test, which I have recited above. I have therefore taken each question in term.

### Did the Respondent's dismissing officer, Mr Skinner, have a genuine belief that the Claimant was guilty of the misconduct in question.

77. Mr Skinner did not give evidence. I had no ability to ask him any questions about his belief and there was no witness statement from him. I am therefore unable to say whether he did or did not have such a belief. In the letter that he wrote about dismissal he clearly referred at some length to it but, in circumstances where no evidence is given, it is impossible to reach a conclusion that the dismissing officer did have such belief.

### Did Mr Skinner have reasonable grounds for that belief?

78. Mr Skinner did not have reasonable grounds for any belief he might have had, that the Claimant had been guilty of such misconduct. In the first instance, there was no evidence that Mr Stewart had ever received any confidential information.

79. The Respondent submits that Mr Stewart had correctly identified only two employees out of over four hundred and fifty-one employees receiving additional payments. That is not a relevant analysis. No-one familiar with the Respondent's organisation could have thought that. Most of the staff making up the four hundred and fifty-one employees would have been staff doing functional jobs which were not affected by the new buildings. Mr Stewart was one of just a few senior managers whose work was significantly affected by the extra buildings and correspondent responsibilities. It was known to the Respondent's senior

managers that Mr Stewart believed he should get an increase to reflect those responsibilities. Out of about five employees affected at the senior level, Mr Stewart knew that he and one other manager had not had an increase. His guess related to two out of three senior managers and in fact he referred to the only two on the Planning Committee, being the most senior management group. There was nothing inherently suspicious about that as the Respondent has attempted to suggest.

80. The Respondent's senior management knew that Mr Stewart had argued for more money for himself for some time and that one reason for this was that more money had been awarded to him in the past for additional responsibilities.

81. The background history showed very clearly that this had been a matter which Mr Stewart had been pursuing for months and the fact that he had done so had been acknowledged by people including Luc Dellafosse. There was no evidence that Mr Stewart ever had any specific information and certainly no evidence that the Claimant had ever given him any information.

At the time Mr Skinner formed his belief, had the Respondent carried out as much investigation as was reasonable?

82. The Respondent had not carried out as much investigation as was reasonable. While an investigation does not have to be perfect, it should be reasonable and this investigation was not. It amounted to little more than an interview with the Claimant at which she was pressurised by being told inaccurate information. Limited additional information was obtained and reliance was placed on emails without any interview showing the context was properly explored.

83. Although Mr Wincott had interviewed Mr Stewart in relation to his own grievance, he had not interviewed him in relation to alleged misconduct. Had anyone clearly put the position to Mr Stewart he would have been able to repeat the background in sufficient detail for the dismissing officer to have seen this was a pattern of concern on the part of Mr Stewart and nothing more. The individuals whom he identified were the two senior people most closely involved with the two properties who were most likely to have been treated to some additional allowance as a result of their responsibilities.

84. It was clear that Mr Asif had been wrong in his statement when he said that he could confirm the payroll checks were normal and he could recall speaking to the Claimant in February regarding extra pay. The context of his statements was clearly the payroll check. There was no interview with Mr Asif, just an email. When it became clear that the Claimant did not carry out the payroll check, assumptions were made about what Mr Asif's statement might mean but it was not checked.

85. Ms Whelan was not interviewed about the assertion that she had a meeting with Mr Stewart at which he questioned the senior managers' salaries.

86. Mr Nicholson had written on an email that the Claimant had queried his salary, but no-one knew where this information came from.

Were there any other flaws which rendered the dismissal unfair?

87. The Claimant was not given the interview notes of the grievance interview with Mr Stewart prior to her disciplinary hearing. She was given some extracts, but I have not been provided with those and in any event, that was not sufficient or appropriate where the context was a disciplinary hearing with a charge being levelled of gross misconduct.

88. It is a matter of considerable concern if an investigating officer puts an issue to a member of staff which is simply incorrect. I accept the Claimant's evidence that Mr Wincott repeatedly suggested that Mr Stewart had exact salary information. Nowhere is there an indication Mr Wincott knew that Mr Stewart had any such salary information. To suggest to the Claimant that he had, was untrue. Employment law requires an employer to act in good faith and an agent of an employee should do so as well. It was wholly wrong to put to the Claimant, as if it were accurate information, assumptions which the employer had not verified.

89. Serious problems arose because Mr Wincott produced minutes which were never approved by the Claimant. He failed to make a note on his minutes that these were not verbatim, but rather were summaries. In practice he caused some confusion because the answers which the Claimant appeared to have given were simply not those she had actually given. The questions recorded as put to her were not the questions which had been asked.

90. It is clear from the facts that I have recorded that at both the disciplinary hearing and the appeal, the erroneous minutes led the Respondent's managers to think the Claimant had given some information away to Mr Stewart, which is why they thought she expressly referred to "not exact salary". This was simply not the case.

91. The Claimant had been asked whether she had given exact salary information, and then asked about ball park information or any information. She responded to each question to the effect that she had not given such information away and to record it in the manner in question was inaccurate and misleading. The Claimant tried to explain that in the disciplinary hearing, but it seems the point was not understood as it should have been, because of the absence of clarification on the minutes themselves.

92. The Respondent's dismissing officer, Mr Skinner, to the extent he looked at the payroll information, did not share what he looked at with the Claimant. Considerable assumptions were made as to the extrapolation of information she would have undertaken.

93. The Respondent's managers seem to have assumed that Mr Wincott had some basis for concluding that Mr Stewart had some more detailed information upon which he based his assertions about the salaries. However, it appears



there was nothing more than a suspicion on the part of Mr Stewart, and that was all.

94. It was not suggested that if there were any flaws, the appeal hearing could have corrected them, but I have considered this in the absence of the Respondent and I am satisfied that it did not, the erroneous minutes tainted the appeal, leading the appeal officer to assume the Claimant had made some sort of partial admission, which she had not.

95. In all the circumstances the Claimant's dismissal is both substantively and procedurally unfair.

### **Remedy**

96. Having reached the conclusion that the dismissal was unfair, I then proceeded to consider remedy with the Claimant. The Claimant had sought compensation only. She had mitigated her loss. However, she had an initial loss followed by a period of continuing loss and as a result of that I had to assess the compensation she was due. Additionally, she had incurred expenses in her effort to find alternative employment. Taking everything in to account I calculated that her compensation was as follows.

#### Basic award

For two complete years of employment at £508 per year = £1,016.

#### Compensatory award

Having assessed the detailed losses, I calculated this at £4,791.77

97. I should say that the Respondent's submissions included an application that any compensation awarded to the Claimant should be reduced to zero by reason of a Polkey reduction. I rejected that. There was no contribution towards the dismissal.

#### Costs Application

98. Additionally, the Respondent applied for its costs. The essence of this argument was that the Respondent had offered, on a without prejudice save as to costs basis, the amount it calculated as the Claimant's full losses based on information it had pertained from the Claimant.

99. The offer ignored the fact that the Respondent maintained it had a proper basis for dismissing the Claimant. The Claimant was unable to clear her name unless she came to the Tribunal and obtained finding in her favour. The Claimant explained, and I accept, that she works in a relatively small industry being the highest end hotels in Central London. I accept her evidence that this is a particularly sensitive market and that if there were to be any suggestion that

she had a proper dismissal for misconduct on her record, this would have a long term and serious impact on her future career. In the circumstances unless the Respondent was willing to accept that the dismissal was unfair openly and without question, the Claimant had no alternative but to follow the full process through the Tribunal. In those circumstances any award of the Respondent's costs would be inappropriate. Additionally, the amount awarded to the Claimant exceeded the amount offered by the Respondent.

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Employment Judge Walker

Dated: 9 May 2019

Reasons sent to the parties on:

13 May 2019

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For the Tribunal Office