



EMPLOYMENT TRIBUNALS

Claimant: Ms B Wilson

Respondent: Maria Mallaband Care Group Limited

Heard at: Leeds

On: 9-12 April 2019

Before: Employment Judge Maidment

Members: Ms L Fawcett

Mr M Brewer

Representation

Claimant: Mr K McNerney, Counsel

Respondent: Mr H Hayre, Solicitor

JUDGMENT having been sent to the parties on 12 April 2019 and written reasons having been requested by the Respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The issues

1. The Claimant was employed by the Respondent as its financial controller until she was dismissed with effect from 15 December 2017. The Respondent maintains that her dismissal was for reasons related to conduct or, in the alternative, for some other substantial reason such as to justify dismissal. Reliance was placed on matters including the Claimant's unsatisfactory management of staff, her preferential treatment of a subordinate, Mr Chris Jagger and the Claimant having consumed alcohol during a lunch break. The Claimant maintains that her dismissal was unfair and relies, in particular, on those matters set out at paragraph 43 of her grounds of complaint.
2. The Claimant also brings a complaint of direct sex discrimination. The aspects of less favourable treatment she complains of are set out at

paragraph 57 of her grounds of complaint, but the Claimant had since also submitted further and better particulars of the incidents complained of.

3. At the commencement of the hearing the Tribunal identified with the parties that the Claimant's complaints were appropriately distilled into 5 separate categories. Firstly, she was complaining that she had been penalised for alleged failings in her carrying out her work responsibilities, which were in fact not her responsibilities, but the responsibilities of others. This included criticisms of her about staff levels and lack of support from 9 June 2017 until the termination of her employment where she relied upon the Finance Director, Peter Fagan, as an appropriate comparator. Criticism levelled at her regarding concerns about the performance of the annual audit were, she contended, criticisms which ought to have been levelled at her subordinate manager, Mr Hussein Mohamed, who she maintains, therefore, was more favourably treated. Secondly, the Claimant maintains that the Respondent criticised her for not carrying out management processes when the Respondent itself did not follow its own internal management processes. For instance, the Claimant had not in fact been appraised by her own line manager, Mr Fagan. Nevertheless, she was criticised for failing to carry out appraisals of her staff. Thirdly, the Claimant relies on the Respondent's approach to the consumption of alcohol in working hours suggesting less favourable treatment in comparison to Mr Fagan, who, it was said, could have had the same allegations levelled against him. Fourthly, the Claimant alleges less favourable treatment in the disciplinary process adopted and sanction, comparing herself to Mr Chris Jagger who had similar allegations made against him but was told there was no case to answer. Fifthly, the Claimant maintains that she was less favourably treated by the Respondent's use of her relationship with Mr Chris Jagger as a reason to dismiss her, with Mr Jagger relied upon in this context as an appropriate male comparator.

Evidence

4. The Tribunal had before it an agreed bundle of documents. Having identified the issues with the parties the Tribunal took some time to privately read into the witness statements exchanged between the parties and relevant documentation referred to. This meant that when each witness came to give his/her evidence he/she could do so by simply confirming the contents of his/her statements and then, subject to any brief supplementary questions, be open to be cross-examined on such statements. By agreement between the parties, the Claimant gave evidence first. She also relied on the witness statement evidence of Mr Chris Jagger, former Credit Control Manager in circumstances where the Respondent confirmed its acceptance of his evidence and that it did not wish to cross-examine him up on it. On behalf of the Respondent, the Tribunal then heard from Mr Robert Lake, Regional Head of HR, Vicki Rhodes, Peripatetic HR Manager and Jenny Delic, HR director.
5. Having considered all the relevant evidence, the Tribunal makes the findings of fact as follows.

Facts

6. The Claimant was employed by the Respondent as its financial controller from 2008. Initially she reported to Chris Ball as finance director, but in 2009 he became managing director and the Claimant thereafter reported to the new finance director, Peter Fagan.
7. The Respondent grew in size significantly over the period of the Claimant's employment. Separate teams were established managed respectively by a payroll manager, management accountant, sales ledger manager, purchase ledger manager and credit control manager. These new heads of department reported to the Claimant. Around late 2016 the Claimant commenced a personal relationship with the credit control manager, Mr Chris Jagger.
8. Mr Jagger appears to have been a somewhat controversial and divisive figure. Certainly, he had a very poor working relationship with Debbie Clark, who managed the sales ledger function. The uncontested evidence of the Claimant is that Ms Clark was a poor manager of people which resulted in high turnover of staff beneath her. Against a background of concerns about her performance, in 2017 Ms Clark was appointed to a newly created role of accounts manager which, unlike the other team management positions, carried with it no line management responsibility. Beverley Hepper was recruited into the role of sales ledger manager.
9. In June 2017 the Claimant informed Mr Ball of her personal relationship with Mr Jagger. The Claimant said that she was not worried about telling him as the chief executive's son, it was well known, was in a relationship with a more junior employee.
10. The Claimant had never previously been subject to any form of disciplinary action or performance management. On 9 June 2017 she was asked to attend a meeting conducted by Mr Ball, but with Mr Fagan and Ms Delic, HR director, also in attendance. The Claimant was not immediately provided with a note of the meeting, but one was produced on 28 June by Ms Delic following the Claimant's request.
11. The note reflects that this meeting was intended as an informal discussion, the main issue being the perception created in the office arising out of the Claimant's relationship Mr Jagger. Mr Ball referred, amongst other things, to the question of why Mr Jagger was being involved in the recruitment of the new sales ledger manager and that the Claimant was allowing a perception to develop that Mr Jagger was in charge of the office. Steps then to be taken by the Claimant included her needing to take control and "*get back to doing her job properly*". Turnover of office staff also, it was said, needed to reduce as soon as possible. The Claimant was shocked and upset by the criticisms and broke down at the meeting. Nevertheless, she said that she took the criticisms on board and sought to take the steps which Mr Ball had said were necessary. Mr Ball, at the meeting, referred to "*formal actions*" having to take place if the issues continued. There was to be a review in the next three months and, if there was no change, it was said "*some decisions will need to be taken.*"

12. No review in fact took place. The Claimant maintains that she had a subsequent conversation with Ms Delic during which Ms Delic said that she had been monitoring the situation and things seemed to have improved. Ms Delic's ultimate position in giving her evidence was that she could not recall saying that. However, she did not contradict the Claimant's account of this conversation at the Claimant's later appeal meeting, which Ms Delic chaired. On balance the Claimant's account, corroborated also by a note she took shortly after the discussion, is likely to be accurate.
13. Nothing further was then said to the Claimant about her performance issues. Ms Delic, however, described issues with the finance department coming up at board meetings with a concern that it was in something of a chaotic state, particularly due to staff turnover and a lack of continuity and stability resulting from that.
14. The Claimant and Mr Jagger were absent on holiday between 13 - 24 November 2017. During this period, Mr Lake, regional head of HR, was informed of a number of complaints received by Mr Ball about them and Mr Ball asked him to carry out an investigation. He understood that the complaints came from managers in the finance department but no specifics were given to him by Mr Ball. His understanding was there was an unhappiness about how they were being managed and the level of support provided by the Claimant.
15. The Tribunal has not had the benefit of hearing from Mr Ball. Ms Delic was informed shortly after Mr Lake of the need to investigate the Claimant. Her understanding was that Mr Ball would have picked up information from managers in conversations he had with them as he went about his work given that he was an individual still very much in touch with what was going on in the business day-to-day at all levels. He was described as an individual who was approachable despite his senior status. Mr Lake proceeded to interview the heads of department and certainly he made no reference to them to any particular complaint having been raised by any of them to Mr Ball or otherwise.
16. Jenni Glenesk, purchase ledger manager, described her biggest issue as not having enough staff. She complained about payment runs being pulled at the last minute and being told that the Respondent could not always afford to make payments due to suppliers. When asked what support she received from the Claimant, she said that she got on with the Claimant but "*nothing seems to happen or get done. Things don't change.*" She said that she had not received any induction.
17. Christine Quarmby, payroll manager, said that if she needed anything she just went to Mr Fagan and not the Claimant as "*it doesn't get done.*" She gave an example of not having had some form of 'sign in' when she got a new starter. She referred to Chris Jagger speaking to the Claimant "*like nothing*" and "*really abruptly*". She said that monthly catch-ups did not take place. When asked if she felt she was being supported, she responded: "*probably not*". She referred to there being a clash between Debbie Clark and Mr Jagger describing Ms Clark as hating Mr Jagger's guts.

18. Beverley Hepper, sales ledger manager, said the relationship between Mr Jagger and the Claimant "*started making things unprofessional*". She described an instance of the Claimant slamming down a pile of papers in front of her. When asked if she thought the Claimant was approachable she described her as being a "*lovely lady*", but after certain instances she did not feel she could go to her.
19. Ms Clark described things going downhill since taking on Acer and then not being allowed to take any more staff on. She complained of an instance (when she had been in her previous role) of Mr Jagger going straight to the Claimant instead of her. When asked if the Claimant was still her line manager and how much support and guidance she had received she responded: "*If I said no, that would be too harsh...*". She subsequently referred to there being "*no support*". She said that she didn't think the Claimant and Mr Fagan appreciated how much work there was to do.
20. Hussein Mohamed ('Mo'), management accountant, referred to a culture of bullying and victimisation. He said he had had no induction when he started. He described clashes between Debbie Clark, the Claimant and Mr Jagger. He described Mr Jagger as not very cooperative and very aggressive, with the Claimant just letting him behave that way. He said that when the auditors came in, he did all the work and went to see Mr Fagan to say this was unacceptable. He went on that Mr Fagan asked him to report directly to him, but a year later the Claimant said she had no idea that he reported to Mr Fagan. He went on to repeat again that he did all the work when the auditors came in and described Mr Fagan's behaviour as very dismissive. He felt that Mr Fagan covered for the Claimant. He then said that when the Claimant went home at lunchtime to walk her dog "*she comes back and smells of alcohol*". When asked then if she had slurred her words or whether there was anything of note in her behaviour, he responded that the Claimant was "*a lot nicer. Not a 100%. She often doesn't remember the next day if she has agreed to something.*" He said he was surprised if Mr Fagan hadn't smelt this. He referred to a recruitment manager, Eleanor Armstrong, also having noticed the smell of alcohol. Ms Armstrong was then interviewed by Mr Lake who referred to that allegation. Ms Armstrong responded that there were a couple of occasions where she thought that the Claimant smelled of alcohol. She went on that: "*She didn't seem 100% all there.*" She was unable to give dates or times.
21. On 21 November Mr Fagan received an email from David Young of Grant Thornton, the Respondent's auditors, (some time after the audit visit) which referred to a conversation that they had the previous day and set out points drawn from the audit team about the Claimant. These included the Claimant not always providing information quickly. It was commented that the Claimant appeared to pass a lot of responsibility to Mo and that the audit team felt like this gave him too much to do. The Claimant was described as seeming quite distant from the audit process. It was commented that there appeared to be a number of areas in the nominal ledger that should/could have been tidied up during the year and hadn't been. Mr Young's email was forwarded to Mr Lake.

22. On 27 November Mr Lake telephoned the Claimant and Mr Jagger prior to their arrival in the office to tell them they were being suspended. He explained that concerns had been raised regarding their conduct and these needed to be looked at in more detail. An investigation meeting was arranged with each of them later that day offsite.
23. When the Claimant attended her investigation meeting, Mr Lake explained the allegations as being a continued failure to appropriately manage and support the head office finance team, continued failure to manage issues previously highlighted caused by her personal relationship with Mr Jagger and, as a result, a serious breach of trust and confidence. During the meeting, the Claimant said that appraisals and performance reviews were not something that had been done within finance or put in place. She said that she hadn't had one herself when she started. She, however, had meetings with individuals regarding their performance. When asked about Beverley Hepper's induction, the Claimant said that it had been agreed with Mr Fagan that Debbie Clark was to do that. When put to her that emails didn't get answered, the Claimant asked for examples. The instance which Ms Hepper had raised of the Claimant slamming papers down in front of her on a desk was given by Mr Lake. The Claimant said that was not her style. The Claimant didn't agree that things raised with her didn't get sorted. As regards Ms Clark's job description, the Claimant said that Mr Fagan wanted Ms Clark to do it herself. As regards Christine Quarmby, Mr Lake raised an instance of a subordinate of hers going directly to the Claimant asking for a pay rise and Ms Quarmby saying that the Claimant just forwarded the email back to her instead of dealing with it. The Claimant said that, in fact, there had been a meeting between Ms Quarmby, Mr Fagan and herself on the issue. Mr Lake raised the issue of Mr Jagger being involved in the interview for the sales ledger position which the Claimant said had been dealt with at the June meeting described above.
24. When questioned about the induction of Jenni Glenesk, the Claimant referred to Jenny wanting to sit down with another colleague to do the induction in that way.
25. As regards the audit, the Claimant described this as being the management accountant's responsibility and that Mo's predecessor had done it before him. She said that she had never not helped. She recalled an occasion where she was supposed to sit down with Mr Fagan and pull a schedule off to provide information, but couldn't due to time constraints.
26. The Claimant denied ever having a drink other than on one business lunch with Mr Fagan.
27. Mr Lake then prepared an investigation summary report dated 29 November recommending that the matter be taken to the next stage of the process i.e. to a disciplinary hearing. In a conclusion, he said that it was evident that the team felt very much the same way, that no support was there and that the team had not been managed effectively. He said it appeared that there was no trust towards the Claimant from the department heads and also that their perception of Mr Jagger, due to the Claimant's personal relationship with him, was that he got anything he wanted.

28. It was determined that the disciplinary hearing would be chaired by Ms Vicki Rhodes, peripatetic HR manager. The Claimant was invited to the hearing and provided with the notes of interviews of the heads of department as well as the Claimant's own investigation interview notes. She did not, however, receive the email sent by Grant Thornton. The Claimant was by this stage taking legal advice and, on the basis of that advice, maintained she was not prepared to attend the hearing without more detail of the allegations against her. The Claimant was told in response that the hearing would still go ahead. The Claimant did not attend or provide any written representations.
29. Ms Rhodes therefore considered all the evidence before her and came to a decision to terminate the Claimant's employment which was confirmed by letter of 15 December 2017. Ms Rhodes confirmed to the Tribunal that her letter accurately set out the reasons for her decision.
30. Firstly, the Claimant was determined to have failed to carry out appraisals and inductions leading to staff feeling unsupported. The Claimant was found to not have actioned requests from her management team.
31. Further, as regards Ms Clark's concerns, there was felt to have been a lack of support. This included Ms Clark being asked to write her own job description. The Claimant had failed to support her in this.
32. As regards Ms Quarmby's concerns, the way in which the Claimant dealt with the pay request from one of her team was held against her. It was considered that Ms Quarmby felt she had to go directly to Mr Fagan to get things done.
33. Ms Rhodes then dealt with the issues surrounding the audit. She described the auditor's comments as "*most concerning and extremely alarming*". It was clear, from her evidence, that this issue was regarded as one of the primary reasons for her decision to terminate the Claimant's employment. The Claimant was felt not to have had sufficient input into the audit and had not reacted to requests made by the auditors.
34. For Ms Rhodes, all of these matters came within the umbrella of the allegation of a continued failure to appropriately manage and support the heads of department. The second allegation she upheld related to the Claimant allowing Mr Jagger to speak to her inappropriately in front of staff. This was found to have led to a lack of trust and confidence in the Claimant.
35. The third allegation Ms Rhodes regarded as proven was that the Claimant had been drinking and attended work smelling of alcohol and appearing not to be "*100% all there*". This was said to call into question the Claimant's suitability as a manager. It was noted during this Tribunal hearing that the Respondent's policy in respect of alcohol addressed the issue of an employee being under the influence of alcohol. Ms Rhodes' understanding was that there was an effective 'zero tolerance' policy against drinking during working hours. Mr Lake, however, did not understand the policy in those terms. Nor did Ms Delic, who heard the Claimant's appeal.

36. Ms Rhodes explained that she looked at the allegations held against the Claimant as a whole and dismissed her for the totality of the conduct which she said had called into question the Claimant's suitability as a manager and led to a lack of trust and confidence in her abilities. The Claimant was given the right to appeal.
37. At a separate disciplinary hearing, Mr Jagger was faced with allegations of bullying colleagues and acting in an insubordinate/inappropriate manner towards the Claimant. Whilst Mr Jagger was issued with an 'area of concern' rather than any form of disciplinary warning, it was not clear from the outcome letter sent to him whether and if so which allegations against him had been upheld. On his querying her decision, Ms Rhodes subsequently told him that the allegations had been concluded to be unfounded. That was also Ms Delic's belief. However, Ms Rhodes told the Tribunal that in fact she had considered that Mr Jagger had been at fault in the way he had treated the Claimant, hence the issue of the 'area of concern'. She reached her decision regarding the level of sanction to be imposed because she felt that Mr Jagger had shown remorse and that his behaviour could be turned around. Further, he was not in such a senior position as the Claimant and Ms Rhodes did not believe that the working relationship between him and the members of the finance department had broken down.
38. The Claimant sent a letter of appeal setting out in some detail her criticisms of the dismissal decision on 22 December 2017. She subsequently attended an appeal hearing before Ms Delic on 15 January 2018. The Claimant was accompanied by a union representative. Ms Delic reviewed the various documentation. During the hearing she realised that the Claimant had not received the Grant Thornton email and this was provided to the Claimant at this stage. Ms Delic proceeded on the basis that she understood the written grounds of appeal and she did not wish to go through the Claimant's letter line by line. Indeed, she considered that the purpose of the hearing was not to rehear the disciplinary case but to conduct a review of the reasonableness of Ms Rhodes's decision.
39. Following the hearing she obtained some further information from Mr Fagan regarding the audit and the length of time the audit process had taken to be completed. She also reviewed the Claimant's email inbox to ascertain how many emails she typically received unrelated to work.
40. Having considered the evidence and what had been said during the hearing, she wrote to the Claimant on 19 January with her decision rejecting the appeal. As well as upholding Ms Rhodes' conclusions, Ms Delic concluded further that the Claimant's non-attendance at the disciplinary meeting illustrated a lack of regard for the process and her failure to understand her failings as a financial controller of an expanding company. She also noted that she had found over 200 emails on a weekly basis in the Claimant's inbox unrelated to work which it was felt must have consumed a significant amount of the Claimant's time. She recorded that the allegations individually may not have resulted in dismissal, but when joined together they built a picture of the Claimant as a manager who had failed to adopt a professional approach and who had let her private life interfere with her day-to-day performance.

Applicable law

41. In a claim of unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to conduct under Section 98(2)(b) of the Employment Rights Act 1996 (“ERA”). This is the primary reason relied upon by the Respondent. Capability is another potentially fair reason (Section 98(2)(a)) and a dismissal may still be fair if for some other substantial reason which could justify dismissal. The ‘reason’ for a dismissal is the set of facts known to the employer or beliefs held by him, which caused him to dismiss the employee – see **Abernethy v Mott, Hay and Anderson 1974 ICR 323**.
42. If the Respondent shows a potentially fair reason for dismissal, the Tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the ERA, which provides:-
- “ [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) – depends upon 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 shall be determined in accordance with equity and the substantial merits of the case”.*
43. Classically in cases of misconduct a Tribunal will determine whether the employer genuinely believed in the employee’s guilt of misconduct and whether it had reasonable grounds after reasonable investigation for such belief. The burden of proof is neutral in this regard.
44. The Tribunal must not substitute its own view as to what sanction it would have imposed in particular circumstances. The Tribunal has to determine whether the employer’s decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.
45. A dismissal, however, may be unfair if there has been a breach of procedure which the Tribunal considers is sufficient to render the decision to dismiss unreasonable. The Tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.
46. If there is such a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to what degree of likelihood the employee would still have been dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed then such reduction may be made to any compensatory award.

The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

47. In addition, the Tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the Claimant and its contribution to his dismissal – ERA Section 123(6).
48. Under Section 122(2) of the ERA any basic award may also be reduced when it is just and equitable to do so on the ground of any kind of conduct on the employee's part that occurred prior to the dismissal.
49. The Claimant complains of direct sex discrimination. In the Equality Act 2010 direct discrimination is defined in Section 13(1) which provides: *“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”*
50. Section 23 provides that on a comparison of cases for the purpose of Section 13 *“there must be no material difference between the circumstances relating to each case”*.
51. The Act deals with the burden of proof at Section 136(2) as follows:-
- “(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred.*
- (3) But subsection (2) does not apply if A shows that A did not contravene the provisions”*.
52. In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation (particularly on the Tribunal's scope for inferring discrimination) albeit with the caveat that this is not a substitute for the statutory language. The Tribunal also takes note of the case of **Madarassy v Nomura International Plc [2007] ICR 867**.
53. It is permissible for the Tribunal to consider the explanations of the Respondent at the stage of deciding whether a prima facie case is made out (see also **Laing v Manchester CC IRLR 748**). Langstaff J in **Birmingham CC v Millwood 2012 EqLR 910** commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof. At this second stage the employer must show on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of the protected characteristic. At this stage the Tribunal is simply concerned with the reason the employer acted as it did.
54. The Tribunal refers to the case of **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** for guidance as to how the

Tribunal should apply what is effectively a two stage test. The Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37** also made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

55. Applying the legal principles to the facts, the Tribunal reaches the following conclusions.

Conclusions

56. Dealing firstly with the Claimant's complaint of unfair dismissal, it is for the Respondent to show the reason for dismissal and that it was a potentially fair reason. Primary reliance is placed on conduct with some other substantial reason such as to justify dismissal pleaded in the alternative. Clearly, there are a number of alleged actions or inactions on the part of the Claimant of quite a different character which have contributed to a greater or lesser extent to her removal from the Respondent. The issue of consumption of alcohol is perhaps most obviously conduct related, but the bulk of the remaining allegations are more open to interpretation. They have been classified as aspects of misconduct by the Respondent, in part, because of how it differentiates between misconduct and capability in its own procedures. However, conduct denotes an act which is willful and deliberate such as a refusal to comply with an instruction. A failure born out of a lack of care or appreciation is more readily classified as an issue of capability. In terms of identifying the principal reason for dismissal in this case, the Tribunal considers that the Claimant was dismissed arising out of a belief in her lack of satisfactory performance as a financial controller, a matter of capability. The June 2017 meeting focuses on the Claimant needing to do her job properly and exert greater management control. The allegations arising in November are broadly of a similar nature with the background of a perception of a chaotic department and the suggestion that, whilst the Claimant may have been able to manage a smaller department, the rapid expansion of the business has effectively meant that the size of the task has been perceived to have outgrown the Claimant's capabilities. Some other substantial reason ought not to be used as a means of disguising the underlying reason for a breakdown of trust and confidence. This is not a case where the Claimant has been dismissed because her colleagues and subordinates would no longer work with her. Rather, the view has been taken by the Respondent that the Claimant's performance failings have led to a situation where her employment is no longer tenable.
57. The Tribunal considers, however, this to be a labelling issue rather than a rejection of the Respondent's reason – the same underlying facts are relied upon as the reason for dismissal. The Respondent has therefore shown a potentially fair reason for dismissal.
58. The Tribunal next considers whether the Respondent's conclusions on the Claimant's fault/capability have been arrived at on reasonable grounds after reasonable investigation.

59. The Respondent came to a valid conclusion that the Claimant had not carried out appraisals of her staff in circumstances where they ought to have been formally appraised. The Claimant did not deny this. However, in considering the Claimant's fault, the Respondent failed to investigate the context of that failure in terms of there being no evidence that appraisals had ever been done for any member of staff within the finance department over the Claimant's nine years of employment, during the bulk of which she had been under the supervision of Mr Fagan as finance director. Mr Fagan was never spoken to on this issue. There is no evidence of the introduction of appraisal processes, of any appraisal process obligating or requiring them to be carried out, of any monitoring by human resources of compliance or any raising of a failing as a concern with the Claimant or chasing her up in terms of completing an appraisal. The culture within the Respondent appears to be one of stricter compliance with procedures in its care homes, given the statutory regulation in place, but of significantly more flexibility at head office. It appears that the carrying out of appraisals was relatively new to head office, albeit the Tribunal again has seen no evidence of when they started to be put in place in other head office departments.
60. Whilst not making its way into Ms Rhodes' written reasons for dismissal, the Claimant was criticised regarding the delay of payments being made to suppliers and the difficulty/embarrassment this caused finance staff. There is no suggestion that it was not concluded that the Claimant was at fault in this regard, but again, without speaking to Mr Fagan, no decision maker in this case could reasonably conclude whether or not the Claimant was simply following and communicating instructions to delay payments for reasons of cashflow.
61. The Claimant was found culpable in failing to carry out inductions. The Tribunal does not consider such conclusion to be reasonably based. Those in the finance department were exchanging emails with human resources regarding the preparation of an induction checklist which was suitable for staff working in finance as opposed to the form of checklist used for care home staff. There had been some to-ing and fro-ing and delay in the preparation of a revised checklist, some of this down to human resources. It had only recently, in terms of the date of the Claimant's dismissal, been finalised. There was no enquiry as to Peter Fagan's involvement and attitude in this regard in circumstances where the Claimant's case was that he was quite relaxed. Also, the Respondent's consideration was effectively around the failure to implement a rather bland factual checklist to be ticked off in terms of the provision of certain policies and communication of certain practices. It had very little to do with the new starter's actual performance in his or her job. There is also no evidence of any new starters who were not taken through the checklist since its introduction. By the time the checklist was in a position to be rolled out in finance, certainly all of the Claimant's direct reports were in place. There was no examination by the Respondent of the quality of the induction into the business which any recent starters had, in circumstances where the complaints from the heads of department were quite vague and in some cases did disclose that some informal arrangement had been put in place.

62. Another general theme, where the Claimant was found to be culpable, was her failure to action requests by her subordinates. She was found not to have responded to emails. However, there was no investigation into which emails she had failed to respond to and/or why. The Claimant was presented with no examples and none of the decision makers in this process ever had any examples before them. No dates were given. The allegations remained, at all times, vague and generalised and the Respondent could not reasonably conclude from a number of almost throwaway and casual remarks of the heads of department that the Claimant was guilty of some form of misconduct or poor performance.
63. Staff turnover has been held against the Claimant, but there was no evidential basis for any conclusion that the Claimant was responsible for this rather than, for example, the heads of department themselves in respect of their subordinate staff wishing to leave. One of the gripes raised by the heads of department appeared to be regarding a lack of speedy recruitment of replacements. The Claimant's evidence is that she had to go to Mr Fagan for authorisation for recruitment. This was never contested. The Tribunal has not heard from Mr Fagan. There is no lack of credibility (as is suggested) in the Claimant's assertion that she did not have permission to recruit within a defined budget without reference to Mr Fagan. Again, the rapid expansion of the company might suggest that this was still a business where the directors had significant day-to-day involvement and oversight. That certainly seemed to apply to Mr Ball. Again, the Respondent did not seek to speak to Mr Fagan on the point and its conclusion was not reasonably arrived at.
64. As regards Ms Clark's criticisms of the Claimant, it was held against the Claimant that she had not reverted to Ms Clark to inform her of a decision taken that there could indeed be further recruitment. As a freestanding lack of support/communication, this appears very minor indeed. Further, whilst the Respondent did not seek to understand when this had occurred, it must have occurred some significant time previously and very likely before June 2017, given that Ms Clark had then moved into a role with no line management responsibility. Ms Clark's complaints regarding her having to prepare her job description were upheld, but again there was no attempt to understand from Mr Fagan what he had directed should have occurred despite the Claimant raising this. The Respondent's conclusion that, in any event, the Claimant had not supported Ms Clark in this task is again vague and unspecific such as to be meaningless.
65. The concerns of Ms Quarmby were held against the Claimant, but with the only specific example being a member of staff bypassing Ms Quarmby and requesting a pay rise. The Tribunal does not understand how the Claimant can be deemed to have acted inappropriately in not dealing with the subordinate, but instead referring the matter back to Ms Quarmby, which is where the matter should have rested in the first place. Again, there was no reasonable attempt by the Respondent to understand whether Mr Fagan had been involved in a subsequent discussion on this point as the Claimant raised.

66. The allegations raised by Grant Thornton were regarded by Ms Rhodes as the most serious. However, she came to a conclusion regarding the Claimant's fault without speaking to Mr Fagan in circumstances where she had no real understanding of the audit process or how responsibilities were allocated. There was no attempt to understand the context of any delays in provision of information to Grant Thornton and the majority of issues of concerns raised by them were of an extremely vague nature. On the facts and as an external organisation, they were not in a position to determine that Mo was being asked to do too much or the Claimant ought to have been more involved in circumstances where they had no idea of how the Respondent had determined the audit should be managed within the finance department. Nor did Ms Rhodes. The Claimant was blamed for discrepancies in the nominal ledger without any analysis of what those were and with no understanding on any decision maker's part as to their significance. The Grant Thornton email had been prompted clearly by a conversation with Mr Fagan, but no one ever ascertained what the nature of that conversation was. There was no reasonable basis for concluding that the Claimant was at fault in terms of audit.
67. The next allegation related to the Claimant allowing Mr Jagger to speak to the Claimant inappropriately. This appears to be a matter of allowing a perception amongst others to occur. Mr Jagger, it is noted, was not found to be guilty of bullying employees - if the Claimant had effectively allowed that sort of behaviour to occur, it would have been potentially a serious matter. Mr Jagger's own behaviour was not on balance disregarded given the issue of an 'area of concern', but it was certainly treated as a low-level issue of poor conduct which is unlikely to have been a conclusion if there had been any serious form of insubordination or abuse directed to the Claimant, which the Claimant might then be said to have ignored. The Respondent could reasonably conclude that there had been an instance where the Claimant had allowed perceptions to develop that Mr Jagger could get away with things - the Claimant in June accepted that there were issues to address. However, the allegation remained vague in terms of events after June where there was little more said to have occurred than a continuance of what had been observed prior to June.
68. The final allegation is in respect of the consumption of and being under the influence of alcohol. The Claimant could not reasonably be regarded as guilty of misconduct for simply having an alcoholic drink at lunchtime. The Respondent's policies do not provide for that. Ms Rhodes nevertheless appeared to think that this was enough to constitute misconduct. Insofar as a decision was based upon the Claimant being under the influence of alcohol, Ms Rhodes had the evidence of two people who had thought that they had on unspecified occasions smelled alcohol on her breath and a vague and unexplored assertion that she had not appeared to be 100% - it is indeed curious that both witnesses came up with this identical form of words. Against this evidence, it was not reasonable to conclude that the Claimant had been under the influence of drink at work. There was no shouting or falling over or erratic behaviour or evidence of impact on the Claimant's performance. This allegation ought never reasonably to have been pursued against the Claimant as a disciplinary charge.

69. It can be said, stepping back, that a collection of rather vague and unspecific allegations were brought forward against the Claimant where Mr Lake had been sent by Mr Ball on somewhat of a fishing expedition to gather concerns from the Claimant's subordinates. He conducted unfocused investigation meetings where the heads of department were significantly led to open up on any concerns they might have had about the Claimant. Such concerns were largely accepted and taken at face value without any attempt to analyse what they actually amounted to and whether they were well-founded.
70. The only conclusions of culpable lack of performance/conduct which could reasonably be arrived at related to not undertaking appraisals and the Claimant at some point having allowed a perception to develop that Mr Jagger could get away with things. Of course, the Claimant was not dismissed for those two charges, but for the totality of the allegations upheld against her, the vast majority and most important of which were upheld not on reasonable grounds and not after a reasonable investigation. They would not on their own have resulted in a sanction of dismissal within a band of reasonable responses and nor did the Respondent seek to argue that case. The Claimant was unfairly dismissed.
71. Furthermore, this is not a case where the Tribunal can say that, if the defects in the process had been rectified, the Claimant would have been fairly dismissed in any event or with any degree of certainty or after any particular period of delay. In fact, there is a significant chance that further investigation would have led to a greater understanding of the Claimant's involvement and authority in the management of the finance function. The Tribunal cannot speculate as to how, in particular, Mr Fagan would have responded to the many queries which ought reasonably to have been raised with him. Nor can the Tribunal conclude that the Claimant by her actions prior to her dismissal has acted in a blameworthy manner which has contributed to her dismissal and ought to be reflected in a reduction in her compensation. Again, the issue of the failure to conduct appraisals and to stamp down on Mr Jagger at an earlier stage are relatively minor matters which would not have led to dismissal and, as regards the other allegations, the evidence is straightforwardly not there to allow the Tribunal to come to a conclusion as to culpability on the balance of probabilities.
72. There is no basis for any uplift in compensation to reflect any unreasonable failure to adhere to the ACAS Code of Conduct on Disciplinary and Grievance Procedures.
73. The Tribunal then turns to the Claimant's allegations of unlawful discrimination.
74. The first strand of allegations relate to the Claimant being blamed for defects which in reality lay at the door equally or predominantly of Mr Fagan. Mr McNerney pointed to the Respondent's unreasonableness in the process which led to her dismissal and the inadequacies of the decision makers pointing to this being far removed from what one would expect in terms of normal process. Of course, the Tribunal has no understanding of what normal process might be for and within the Respondent's business, only

what has occurred in the Claimant's case. Fundamentally, the Tribunal has found no facts from which it could reasonably conclude that the Claimant was taken to task for these failings because she is a woman. Mr Fagan is not an appropriate comparator. He was not accused of management failings and in fact, to an extent, was one of the Claimant's accusers. In any event, the Tribunal concludes that the Respondent's reason for pursuing disciplinary issues with the Claimant was its belief, genuinely held, that the Claimant was not up to the job of financial controller in what had become a much larger business. As regards the audit, the Claimant again cannot rely on Mo as a comparator. Again, there were no suggestions that he had failed in his job. The finger had been pointed at the Claimant. She was the person under investigation. Again, fundamentally, the Respondent pursued a case against the Claimant because it perceived she was failing in her role, not because she is a woman.

75. The allegation of discrimination in respect of the criticisms of the Claimant not undertaking appraisals again relies on Mr Fagan being also to blame. For the same reasons already stated, the comparison with Mr Fagan is misconceived and the Respondent's reasons for pursuing a disciplinary case in this respect have already been recognised by the Tribunal.
76. The allegation of alcohol misuse was pursued because heads of department raised that as a concern. There was no allegation that Mr Fagan had been in breach of an alcohol ban and the Claimant's reference to him drinking was to some time in the past and in the context of a business event. Again, it was the Claimant's conduct and performance which was under the microscope and that is why this was an allegation added to those to be pursued against her, unrelated to her sex.
77. The final strand of the discrimination complaint relates to Mr Jagger and the issue of the Claimant's personal relationship with him. It is clear to the Tribunal that the Respondent was not ill disposed towards the Claimant because she was in a relationship with Mr Jagger. The evidence is of the Respondent tolerating personal relationships at work and the absence of any issue being raised from June to November 2017 does not indicate that the Respondent was fundamentally averse to them being in a relationship.
78. The issue for the Respondent was genuinely that the Claimant had allowed her personal relationship to interfere with her work performance. There is no basis for concluding that a male financial controller in a relationship with a female subordinate would have been treated any differently. The Respondent did genuinely regard the Claimant as having failed to stamp down on Mr Jagger which had created a negative perception amongst the team – this was indeed a perception expressed to the Respondent by the heads of department.
79. Nor can the Claimant maintain an allegation of less favourable treatment in respect of the leniency with which Mr Jagger was dealt with in his own disciplinary case. Their cases were not at all comparable. Obviously, there was a disparity in terms of their seniority and the expectations upon them. Furthermore, the Claimant had a raft of allegations genuinely, albeit unreasonably, upheld against her as opposed to the more limited scope of

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the findings adverse to Mr Jagger. Again, the issues the Claimant faced were regarded as justifying a dismissal because of the Respondent's view of her as performing inadequately in her role, not because of her sex.

80. The Claimant's complaints of direct sex discrimination must all fail and are dismissed.

Employment Judge Maidment

Date 5 June 2019

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