EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	AND	**Respondent**
Mr P Butler		Honest Employment Law Practice Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 4, 5, 6 and 7 February 2019

EMPLOYMENT JUDGE Dimbylow

Representation
For the claimant: Dr M Ahmad, Counsel
For the respondent: Mr K Milford, Employment Law Consultant

JUDGMENT having been sent to the parties on 13 February 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim. This is a claim by Mr Paul Butler (the claimant) against his former employer Honest Employment Law Practice Limited (the respondent). The claim form was presented on 16 December 2017, following early conciliation through ACAS, the dates on their certificate being 6 and 21 November 2017. In it, the claimant complained of unfair dismissal. The response form was lodged on 2 February 2018 and the claim was resisted. The hearing date was fixed by notice dated 5 January 2018 to take place on 5 and 6 April 2018; and at the same time the tribunal gave directions for the just disposal of the case. The case came before Employment Judge Perry on 5 April 2018. The case did not proceed that day and Judge Perry made an order which was sent to the parties confirming that the claimant was allowed to amend his claim to bring a claim for wrongful dismissal in relation to his notice pay. Furthermore, the respondent was given leave to amend its response and to include a counterclaim, if so advised. Some additional directions were given for the just disposal of the case, and significantly, the time estimate was increased from 2 to 4 days, and the hearing was relisted

on 12, 13, 15 and 16 November 2018. The respondent did amend its response form and included a counterclaim, and this was presented to the tribunal on 1 June 2018. Later, on 15 June 2018, the respondent lodged on behalf of the parties: an agreed list of issues, an agreed chronology and a note of agreed and disputed facts. Unfortunately, when the case came before Employment Judge Broughton on 12 November 2018, Dr Ahmad had been admitted to hospital the day before and the claimant sought a postponement. The respondent consented to the application and it was relisted on the 4 days that I have heard it.

2.1 The issues. These were helpfully agreed between the parties in exhibit C1, and expanded on and agreed at the start of the hearing:

1 Claimant's claims

(i) The claimant brings a claim of unfair dismissal pursuant to s.111 Employment Rights Act 1996 ("ERA" - the "Unfair Dismissal Claim") and in addition a claim for notice pay (the "Notice Pay Claim").

2 The Unfair Dismissal Claim

(ii) The claimant alleges that he was unfairly dismissed on 14 August 2017.

(iii) The respondent admitted that the claimant was dismissed on 14 August 2017 and contended that such dismissal was fair by reason of gross conduct and/or a mixture of conduct and capability and that it acted reasonably in treating these reasons as sufficient for dismissing the claimant. At the start of the hearing Mr Wilford explained that the respondent was now only relying on conduct as the reason for dismissal.

(iv) What was the reason for the claimant's dismissal on 14 August 2017?

(v) Was the reason for the claimant's dismissal a potentially fair reason, in accordance with s98(2) ERA?

(vi) If there was a potentially fair reason, did the respondent act reasonably in the circumstances in treating the claimant's alleged conduct as a sufficient reason to dismiss in accordance with s.98(4) ERA?

(vii) Did the decision to dismiss fall within the range of reasonable responses that a reasonable employer in those circumstances might have adopted?

(viii) In particular, if the potentially fair reason was conduct, at the time of the dismissal:

(a) Did the respondent believe the claimant to be guilty of misconduct?

(b) Did the respondent have reasonable grounds for believing that the claimant was guilty of that misconduct?

(c) At the time the respondent held that belief, had it carried out as much investigation as was reasonable? *(BHS v Burchell)*

(ix) Should there be any reduction to any compensation on the grounds of *Polkey* or contributory fault?

3 Notice Pay Claim

(x) The claimant claims that he is entitled to be paid his notice pay for what was agreed to be his notice period of 6 weeks.

(xi) Did the claimant commit a fundamental breach of his contract of employment entitling the respondent to terminate his employment without notice or payment in lieu thereof?

4 Respondent' s counterclaim

(xii) Has the respondent established that the claimant has breached his contract of employment causing the respondent to suffer loss as a result, and if so, do I make an award of damages against him?

3.1 The law relating to dismissal. The relevant provisions, in relation to the fairness of any dismissal, arise out of the ERA and are the following (s.98):

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, 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 as to justify the dismissal of an employee holding the position which the employee held.

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

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(ba) is retirement of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

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

3.2 Thus, there is an initial burden of proof upon the respondent in a claim for unfair dismissal to establish a potentially fair reason for dismissal pursuant to s.98 (1) and (2). Conduct is a potentially fair reason. The burden of proof is upon the balance of probabilities. Should the respondent establish a potentially fair reason, then the test on overall fairness is neutral; there is no burden of proof on either side. Overall fairness is determined having regard to the requirements of s.98 (4). This would include the tribunal examining the investigation, disciplinary and appeal processes. I had regard to the ACAS Code of Practice. The issue of what would have happened if a fair procedure had been followed also fell to be considered, as did contributory conduct by the claimant.

3.3 The tribunal has received judicial guidance on how to apply the law relating to unfair dismissal claims. The tribunal must determine whether the claimant was fairly dismissed in all the circumstances, by reason of his conduct, taking into account the size and administrative resources of the respondent. Guidance on the statutory test as to whether a dismissal for misconduct is fair, or not, is contained in a number of cases and in particular:

(i) British Home Stores v Burchell [1978] IRLR 379

(ii) Iceland Frozen Foods v Jones [1982] IRLR 439

(iii) Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23

In short, the test to be applied is this:

(i) Did the respondent (through dismissing officer Mr Townsend and appeal officer Mr Wilford) genuinely believe in the facts found?

(ii) Did the respondent (through those officers) have reasonable grounds upon which to sustain that belief?

(iii) Had the respondent carried out a reasonable investigation giving rise to those reasonable grounds and belief at the stage upon which the belief was formed?

(iv) Thereafter, was the decision to dismiss within the band of reasonable responses open to the respondent, in all the circumstances of the case?

3.4 As to contributory conduct, the ERA sets out the law in relation to the basic award at sections 118 to 122, and the compensatory award at sections 123 and 124. Both awards can be reduced because of contributory conduct. The basic award includes, at s.122(2):

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

And s.123(6):

"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

3.5 If I held the dismissal to be unfair, I was asked to determine whether or not the claimant contributed to his dismissal insofar as it might affect the basic award and any compensatory award and if so to what extent. The test applied is as set out in the case of Nelson v BBC (No.2) [1979] IRLR 346. These factors must be satisfied if I am to find contributory conduct:

1 The relevant action must be culpable or blameworthy.

2 It must have actually caused or contributed to the dismissal.

3 It must be just and equitable to reduce the award by the proportion specified.

Culpable or blameworthy conduct could include conduct which was "perverse or foolish", "bloody-minded" or merely "unreasonable in all the circumstances". This has to be dependent upon the facts of the case. Wide forms of conduct are envisaged. I have approached the subject with a completely open mind. I know from Nelson that the conduct in question does not have to amount to a breach of contract or a tort and can be given a broad interpretation.

3.6 Also, the principle arising out of the case of Polkey v AE Dayton Services Ltd [1988] ICR 142, HL fell to be considered; but I do not propose to say much about the law on it here, save that if I were to find the dismissal procedurally unfair, I may go on to decide what would have happened if a fair procedure had been followed, make a percentage assessment of any chance that the claimant would have lost his employment, and in appropriate circumstances make a reduction in the amount of any compensation awarded.

4. The claimant's breach of contract claim and the respondent's counterclaim. The contractual jurisdiction of the Employment Tribunal is set out in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. The claimant is entitled to bring a claim for damages for breach of contract over the respondent's failure to give notice or payment in lieu thereof. The same legislation provides for the counterclaim. There is a cap on both claim and counterclaim at £25,000.00. The burden of proof is upon the respondent to establish liability, by demonstrating on the balance of probabilities, that there has been a breach of contract by the claimant, such as to enable it not to have to give notice or payment in lieu thereof and to establish the counterclaim.

5. The evidence. I received oral evidence from the following witnesses:

For the respondent:

Mr David Louis Townsend
Mr Kevin Barras Wilford
Mr Richard James Bowden

And the claimant gave evidence in his own cause.

I also received a number of documents which I marked as exhibits as follows:

C1 Agreed list of issues
C2 Agreed chronology

C3 List of agreed facts and disputed facts
C4 Claimant's skeleton argument
C5 Claimant's witness statement
C6 Claimant's closing submissions
C7 Copy case report: Adesokan v Sainsbury's supermarkets Ltd [2017] EWCA Civ 22

R1 Agreed bundle of documents (417 pages)
R2 Bundle of respondent' s witness statements

6. The tribunal's findings of fact**.** I make my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts.

7. The claimant was born on 20 February 1974 and is now 44 years of age. Before joining the respondent, he spent 12 years at a computer software company progressing to the role of commercial manager with managerial responsibility for sales, purchasing and bookkeeping. He gained a NEBOSH diploma in May 2010, and this allowed him to apply for graduate membership of IOSH and this was granted in August 2010. He commenced work with the respondent on 4 April 2011 and the effective date of termination was on 14 August 2017 when he was told orally that he was dismissed, the decision being confirmed later by letter of 17 August (237-238 of the bundle).

8. The claimant was employed as a Health and Safety Consultant, and it was his 1st job in this, his new field of work. The claimant was paid a gross salary of £37,500.00 per annum, which netted down to £2,349.44 per month. He was in the respondent's pension scheme, which was a defined contribution scheme with the respondent paying in £26.35 per month. Since his dismissal he has started work again on a self-employed basis, working as a consultant. The claimant explained that it had been difficult for him to find full-time work due to the reason given for his dismissal as gross misconduct. He did not receive any state benefits, and recoupment of benefits does not apply. The claimant's amended schedule of loss as at 11 November 2018 (31 a-b) sets out the extent of the amount claimed, which the claimant limited to that date in terms of the compensatory award. He also claimed the sum of £3,377.10 for 6 weeks' notice pay. Helpfully, the respondent agreed the basic award, subject to liability, and also the figures for gross and net earnings. The respondent's counterclaim was valued at £72,000.00 subject to the cap.

9. The respondent is a company which provides advice on HR, employment law and health and safety ("H & S") matters. Mr Townsend's background is that he was an IT consultant working for a well-known brand name, then latterly for a

business doing much the same as the respondent undertakes now. Mr Townsend did not like the way things were going and decided to set up his own business. Mr Townsend is the managing director, and his wife is also a director. Mrs Townsend is also the company secretary. Mr Townsend owns 99% of the shares and Mrs Townsend 1%. At the time of the claimant's dismissal there were 9 employees including Mr Townsend. 7 employees were HR advisers or consultants, the claimant being the only H & S adviser directly employed. During early 2017 Mr Townsend considered that the claimant was working to full capacity and he decided to engage the services of 2 freelance H & S consultants, Adele and Ivan. They had subcontractor status. Since the claimant's dismissal Mr Townsend has taken on 2 more H & S consultants, also on subcontractor status, they being Mr Bowden and Ms Andrea Bysh. The financial year of the respondent ends on 31 August. For the year to 31 August 2016 the income of the business was in the region of £500-£600,000; the year to 31 August 2017 in the region of £600-£650,000 and for the year to 31 August 2018 about £670,000. For HR advice Mr Townsend relied upon his internal HR team, but he went outside for help on legal matters such as tribunal claims. The respondent's case is that the claimant was fairly dismissed by reason of his conduct and this was essentially in 2 parts as described in his letter of dismissal (page 237-8) and I quote part of it:

"1. Serious negligence in the performance of your duties as health and safety consultant

- failure to provide adequate and appropriate documentation that identifies, hazards and risks for clients
- failure to carry out risk assessments on a pregnant employee [of the respondent]
- failure to keep [the respondent] legally compliant for the purposes of health and safety legislation
- subsequent plagiarism of documents you were not qualified to send

2. Failure to act on reasonable request/requests from your manager

In view of the seriousness of the matter the outcome of the disciplinary meeting is to terminate your employment for gross misconduct, without any notice.

It is my belief that your actions have caused a complete breakdown in trust and confidence, not to mention the potential damage to the reputation of [the respondent]."

10. I relate the employment history to that point. The claimant's job included risk assessments. He adopted what he called a "simple approach" based on guidance issued by the HSE and the examples provided by it. For my purposes, the claimant's employment with the respondent was uneventful until 18 March 2017. By that time the claimant had about 65 clients with a very wide range of business practices and hazards. He visited most of them 2 or 3 times a year and

the average annual fee was approximately £1,000 per client. It was agreed that during the time of his employment he completed in excess of 400 H & S policies, 3,500 risk assessments and some 400 H & S audits. I find that his role was 100% client facing. During his time with the respondent his value as an employee was marked by the fact that his salary increased from £25,000 per annum to £37,500. On 18 March 2017 the claimant received an email (48) from Mr Townsend. This was the 1st time the claimant had received an email from him on a Saturday and he was rather concerned about it. Stated briefly, Mr Townsend was analysing the costs deriving from H & S, indicating that they needed to go up "a few gears" and wanting to assist the claimant in achieving acceptable targets which were: "frankly way off at the moment."

11. The 2 men met a few days later and Mr Townsend raised some "concerns" which he set out in a further email to the claimant dated 24 March 2017 (49-51). He confirmed that he had appointed a subcontractor to do H & S work, Ms Adele Partridge. He also stated that: "there needs to be a vast improvement and the bare minimum of 6K per month to recover the situation." On 14 July 2017 Ms Partridge sent an email to Mr Townsend in which she raised concerns over the way the claimant was working and pointing out that she advised clients differently to the claimant. Mr Townsend then sent an email to the claimant on 17 July 2017 (61) asking for documentation from 2 recent clients to be sent to Adele so that they could look to working towards a consistent approach. The claimant replied shortly thereafter; sent the information and made some comments about risk assessments (62). Another subcontractor Mr Ivan Davies had been engaged and Mr Townsend was looking for he and the 3 others to get together. At 23.25pm on 17 July 2017 Mr Davies sent an email to Mr Townsend criticising the claimant's documents (64) and 50 minutes later he sent another one doing the same (65). Mr Townsend then sent an email on 18 July 2017 to the claimant copying in the other 2 (66) referring to the critical comments of the other 2 and expressing his extreme concern that the respondent could be liable if the claimant's documents were to be scrutinised by the HSE. The claimant replied a few minutes later pointing out that his documents were inspected by the HSE (67). After some further communications Mr Townsend sent an email to the claimant at 11.43am on 20 July 2017 (72). Mr Townsend wanted the claimant's work checked and denied that there was a "stitch up" or "witch-hunt". On 21 July 2017 Mr Davies sent an email to Mr Townsend and Ms Partridge (75) indicating that there was: "no ground for a working relationship" with the claimant.

12. A meeting between the 4 took place on 27 July 2017 and the agenda for it is at page 76. The meeting didn't go well, and Adele stormed out after 30 minutes following a difference of opinion with the claimant over a risk assessment for a pregnant employee. 28 July 2017 Mr Townsend sent an email to the claimant which included this: "This is a mess and I feel that there is a complete breakdown of trust and confidence in you and the work you have produced……"

13. The claimant was on holiday at the time, and I could not see why it was sent then. Mr Townsend directed that there would be an investigation meeting to be held at 2pm on 7 August 2017. The claimant replied on 4 August 2017 (85-89) but only handed this over in the meeting. Mr Townsend instructed Mr Bowden to comment on some of the claimant's documents, and Mr Bowden replied on 7 August 2017 at 00.06am. He is a specialist H & S officer. At that time, he worked for Solihull MBC and had his own consultancy business. He was critical of the claimant, although the claimant did not see the documents reportedly sent to Mr Bowden, nor did there appear to be any letter of instruction to him.

14. The meeting was brought forward to 10:30am by Mr Townsend. He would not read the claimant's letter before the meeting, wanting to do so as they went along. It was plain to me that there was a poor or strained atmosphere in the meeting. The claimant was defensive, having taken legal advice and telling Mr Townsend that he had done so. However, Mr Townsend interrupted the claimant when answering a question: "Don't get too smug about it……" Later, the claimant accused Mr Townsend of being "aggressive". Mr Townsend accused the claimant of being "awkward and obstructive". It was a lengthy and wide-ranging meeting. Mr Townsend accused the claimant of lying to him (116). There was a curious exchange as follows (124):

PB Am I not allowed to be given the allegations
DT Yes you will… But this is an investigation to work out if there is an allegation

During the meeting Mr Townsend took the claimant by surprise by producing Mr Bowden's report. The claimant asked Mr Townsend about Mr Bowden and Mr Townsend said: "I don't have to answer your questions" (134). Shortly afterwards, Mr Townsend said: "Okay-I think that is enough-alright-I have no choice as a result of this that as of now I am suspending you." The meeting ended shortly afterwards, having lasted 1 hour and 22 minutes.

15. The suspension was confirmed by letter (137-8) which was undated; but I find was to have been dated 7 August 2018, and included this for reasons:

- "Negligence and/or serious negligence in the performance of your duties as Health and Safety consultant
  - Failure to provide adequate and appropriate documentation that identifies, hazardous and risks the clients
  - Failure to carry out risk assessments on a pregnant employee [of the respondent]
  - Failure to keep [the respondent] legally compliant the purposes of health and safety legislation
- Failure to act on reasonable request/requests from your manager"

Thereafter, Mr Townsend sought further help from Mr Bowden (139) on 7 August 2017 at 22:48. Mr Bowden replied at 23.53 (140). Mr Townsend also sought

advice from Mr Brian Whittall (another H & S advisor) who replied on 8 August 2017 (143-4). Mr Townsend wrote to the claimant on 9 August 2017 (146-7) inviting him to a disciplinary meeting: "The purpose of the meeting is to consider allegations of misconduct and/or gross misconduct against you. The allegations relate to:

- Negligence and/serious negligence in the performance of your duties as health and safety consultant
  - Failure to provide adequate and appropriate documentation that identifies, hazards and risks the clients
  - Failure to carry out risk assessments on a pregnant employee [of the respondent]
  - Failure to keep [the respondent] legally compliant for the purposes of health and safety legislation
  - Failure to provide our clients with enough information to sufficiently protect them from risk
- Failure to act on reasonable requests from your Managing Director"

Mr Townsend said he was enclosing a "summary" from the investigation meeting but there was no such enclosure. At the same time, he was sent a list and copies of documents (148-191). The claimant asked for 2 witnesses and other information (194).

16. The disciplinary meeting took place on 14 August 2017. Notes are taken, there being 2 versions, one taken as a transcript from a recording. Again, the atmosphere was not easy in the meeting which lasted from 10am to 12:45pm. The claimant was told the outcome, and as I noted earlier, he had a letter confirming the outcome. Mr Townsend did not accept the claimant's explanations that had been put forward.

17. The claimant appealed by letter dated 23 August 2017 (240). He set out 5 grounds of appeal:

1. [The respondent] breached your own disciplinary procedure by refusing me my right to call witnesses.
2. The allegations in your disciplinary meeting letter dated 9th August were not put to me at the disciplinary meeting. I was therefore not allowed a chance to respond to the allegations.
3. You insisted on referring to an undisclosed document on at least two occasions during the meeting.
4. One of the grounds for dismissal is a new accusation and I therefore had no opportunity to consider or respond to the allegation.
5. No reasonable tribunal looking at the evidence fairly and dispassionately could have concluded: –
   a) That the allegations were made out
   b) That the allegations were sufficient to warrant summary dismissal

18. The appeal took place on 8 September 2017. Mr Wilford took the appeal; the claimant was present and there was a notetaker being Ms Carol Farrow. I was able to see notes of the meeting (258-278). Mr Wilford qualified as a solicitor in 1979. He is now a non-practising solicitor; but he told me that his business arrangements were subject to scrutiny by the SRA. He does work for the respondent, generating fees of some £20,000 per annum. Surprisingly, there was no letter of instruction to Mr Wilford from Mr Townsend or anyone else at the respondent. Mr Wilford explained to me that he had met Mr Townsend to discuss the appeal and was given "a box of papers" about it. Strangely, at the end of the meeting, Mr Wilford raised 2 matters that had not been referred to at all in the disciplinary meeting, one of which concerned "Alivini" (277). I found that Mr Townsend had sent Mr Wilford some further damaging information about the claimant; but did not share this information with the claimant. Mr Wilford described the appeal more as a review, taking into account the claimant's grounds of appeal. It was not a rehearing. The appeal was rejected; and the outcome letter was dated 3 October 2017 (252-6).

19. The submissions. Dr Ahmad went first. He invited me to read his closing submissions in conjunction with his skeleton argument, and I did so. He took me to the relevant part of his case law. There is no need for me to repeat here what Dr Ahmad set out in writing. In relation to Polkey, he submitted that the respondent's procedure had been hopeless and therefore there should be no deduction at all. Furthermore, the respondent would not have terminated the claimant's employment at a later stage, the claimant being willing to engage and move on, putting right and apologising for as much as may have been wrong. The breakdown in the relationship was caused only by the respondent's unreasonable behaviour in breaching trust and confidence, as evidenced by Mr Townsend's email of 28 July 2017 (83). In terms of contribution, there was none, the claimant not having contributed to the way proceedings developed; he had cooperated to the full; and complied with all the requirements of Mr Townsend. He submitted that the respondent had failed to establish any breach of contract by the claimant and nothing which would trigger the counterclaim. The damages claimed by the respondent were remote; and the respondent had failed to prove any losses were attributable to any conduct on the part of the claimant.

20. I then heard submissions from Mr Wilford on behalf of the respondent, who addressed me orally. He submitted that whilst there was a substantial bundle of 417 pages and over 50 pages of witness statement evidence, I should find that this was a "simple case" for me to analyse. He denied that there was any collusion between he and Mr Townsend just because he was rewarded for work done for the respondent. He submitted this was an unfair criticism of him. Similarly, it was unfair to say that Mr Bowden colluded. The whole matter started off when Mr Townsend was concerned about H & S profitability and wanted to widen the team. Mr Townsend's witness statement tells the story of how concerns were raised about the claimant's work through Adele, Ivan and others.

Mr Townsend tried to talk to the claimant through the investigation and disciplinary processes. He asked me to find that: the claimant did not give adequate explanations, indulged in obfuscation and avoidance, admissions were made, failed to carry out instructions given to him by Mr Townsend in not passing work to Ivan, and not completing a spreadsheet as requested. Mr Townsend had no alternative but to raise the issues and resolve them as it would have been negligent to himself, his business and clients if he did not do so. Mr Townsend and been faced with "horrendous" circumstances, as the claimant had been engaged 6 years and had 65 clients. The claimant's conduct caused the respondent to draft in H & S consultants to review all of the claimant's work. It would be incomprehensible if it was found that Mr Townsend did not hold a genuine belief in the facts about the potential damage to the respondent's reputation. Mr Townsend found serious wrongdoing, the claimant admitted it and the were no material procedural failings. If there were any, then there should be a 100% reduction in compensation. Furthermore, given the issues that had arisen, there could be no future relationship and the contract of employment would have ended anyway. In view of the matters found out by Mr Townsend later, when the contract had ended, and taking into account the things that the claimant said in response to the investigation and disciplinary procedure, I should find that he contributed by 100% to what happened, resulting in no award of compensation. As to the counterclaim, there was potential liability because the claimant's files had to be reviewed. Liability arose at the end of the contract; but it was not quantifiable at the time. Whilst Mr Townsend had been unable to identify what the breach of contract relied on by the respondent was during his evidence; Mr Wilford submitted it was a breach of the implied term of mutual trust and confidence. There was no breach of any express contractual term. He asked me to find that if there was gross misconduct for the unfair dismissal claim, then there was a duty to consider the same applied to the contract claims so that no notice monies were payable, and the counterclaim succeeded.

21. Dr Ahmad spoke briefly in rebuttal and reminded Mr Wilford that the claimant never used the word "colluded" in respect of any of the respondent's witnesses; and Mr Wilford accepted that point. He also underlined the fact that until submissions the respondent had not identified the breach of contract relied upon.

22. My conclusions and reasons. I now apply the law to the facts. I deal with the claim for unfair dismissal first. I conclude that the respondent has established, on the balance of probabilities, a potentially fair reason for dismissal in the form of the claimant's conduct. It was the principal reason under section 98 (2) (b) ERA. The detail is set out in the dismissal letter dated 17 August 2017. Then I considered overall fairness and applied the test I have identified above. I concluded that Mr Townsend held a genuine belief in the facts found. However, that belief was not held on reasonable grounds, and it did not follow a reasonable investigation.

23. I considered the ACAS Code of Practice on Disciplinary and Grievance procedures and the guidance to it. I found that there were serious failings in the procedure. Both the procedure and the guidance provided by ACAS indicate that when establishing the facts of the case: "In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing." This was not followed. Mr Townsend conducted both the investigation and the disciplinary procedure; and made the dismissal decision. He engaged an external provider for the appeal. I find it was entirely practicable for Mr Townsend to have found someone else to have done the investigation or the disciplinary process and he could have done the other. He had the financial and other resources available to him; and of course, one of the principal areas of the respondent's business is in giving employment advice. Mr Townsend presented as a witness as someone with a closed mind. He made no attempt to resolve the issues informally. The ACAS guide is quite specific when discussing investigating cases and contains this:

"When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against."

24. At every turn, I found and concluded that Mr Townsend was looking for evidence implicating the claimant. He showed no interest in taking steps towards considering exculpatory evidence, for example, not allowing the claimant to have the 2 witnesses involved that he requested. Mr Townsend made his position plain on 28 July 2017 when he said that there had been a complete breakdown of trust and confidence. He had made up his mind in advance of the disciplinary meeting, and I find that he would not be deflected from the course of conduct which he embarked upon and which culminated in the claimant's dismissal. Mr Townsend had accused the claimant of falsification of documents, fraud, gross negligence and gross misconduct. These are potentially career destroying things to assert about an employee. In the circumstances, they needed greater sensitivity and independence at both the investigation and disciplinary stages. Mr Townsend was clearly angry and upset and this got in the way of any sense of impartiality and independence during the investigation and disciplinary stages.

25. The 2nd of failure was in the provision of insufficient information about the alleged misconduct or poor performance to enable the claimant to prepare an answer to the case at the disciplinary meeting. The claimant complained at the time that he did not understand the detail of the allegations and this was never properly addressed by Mr Townsend. The claimant was sent a list of documents, and a broad account of the issues to be considered; but there was no analysis of them to assist the claimant to understand with any precision the reasoning behind the steps proposed. It was not transparent to me. I can understand how,

and I find as a fact, the claimant felt at a disadvantage when going into the disciplinary meeting. Because he did not understand fully the allegations against him, he was not in a position to defend himself properly. A key feature of such a meeting is that the claimant should be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. This was not done in that some of the documents were anonymized, and Mr Townsend refused to countenance the calling of witnesses who may have been able to give relevant evidence. Given the information provided to the claimant, it was a reasonable request that he made; and it was unreasonably refused. Even if the claimant had received more information I conclude the dismissal was still going to happen as Mr Townsend had made his mind up it would do.

26. The claimant was not given the opportunity to question the witnesses who had made statements or reports which were critical of him. This is an important feature of the case given the severity of the allegations. Mr Townsend did not use the disciplinary hearing to establish all the facts because the witnesses were not available to the claimant and he was not allowed to have witnesses present when his application was rejected. It would have been very easy to have adjourned the hearing to enable these things to take place. The disciplinary officer should be polite and not get involved in arguments. Unfortunately, Mr Townsend did that. I do however accept that the claimant did not help himself by reacting in a similar way at times. However, the tone of the discussion was set by Mr Townsend and it was unhelpful to say the least. One of the reasons why Mr Townsend became argumentative, in part, was because of the fact that he wanted the claimant to answer closed questions, requiring a "yes or no" answer, whereas the claimant wanted to speak freely, to explain the facts from his point of view.

27. The appeal was an opportunity for the respondent to rectify any mistakes in the dismissal process. Unfortunately, the appeal process showed an element of the closed mind again (255), with reference to plagiarism and a new allegation with no opportunity for the claimant to consider it or respond. Mr Wilford said this: "Your point …..may be an arguable one but I don't believe it is fundamental or even necessarily material in the decision reached by [the respondent]. For this reason, I cannot accept your Appeal point 4." With regard to the issue of Mr Townsend refusing to call witnesses Mr Wilford said (252):

"In the 1st place, I believe that calling witnesses from outside Clients to corroborate or justify your actions, would have been both very embarrassing for the clients themselves and for [the respondent], in the position in which [the respondent] found itself with your previous work. Indeed, were Dave Townsend to have done this, I think it could have placed him/[the respondent] in a totally invidious position, since, if, following your disciplinary hearing you had been dismissed (as you were), I believe it is probable that this could have created real suspicion and bad will with these Clients."

28. The approach adopted by Mr Wilford ignored the ACAS guidance, which underlines the importance of exculpatory material, and the use of witnesses, especially in such a serious matrix of complaints, which were career threatening. Whether consciously or unconsciously, the appeal officer Mr Wilford has mirrored the failings of the dismissing officer Mr Townsend. Mr Wilford's reasoning was not entirely transparent. He could have allowed the appeal in part or sought further information. Since the adjournment of the hearing last year, the respondent has gathered further information, including from the claimant's potential witnesses. However, this has not helped me with my understanding of the case and appeared to be an exercise aimed at discrediting the claimant.

29. I find that the claimant was unfairly dismissed at this stage of the analysis. I do not therefore need to go to the last part of the test, involving the range of reasonable responses in relation to the sanction of dismissal. Had I been required to so then I would have determined that dismissal was not within the range of reasonable responses. Mr Townsend's thinking was not transparent and there was considerable overlap between misconduct and capability. All of these things contributed to my conclusion the outcome of dismissal was a foregone conclusion. I gave consideration to the definition of gross misconduct, not only because it was a term used by the respondent when determining the sanction, but it is also relevant in the breach of contract claim and the counterclaim. I am conscious of the potential error on my part of falling into the trap of "substitution"; but I did not have to go that far in my analysis, given the point where I found the dismissal unfair.

30. I needed to consider the differing concepts of misconduct and gross misconduct. The case of Sandwell & West Birmingham Hospitals NHS Trust **v** Westwood UKEAT/0032/09/LA) provided helpful analysis of the concepts. In particular, paragraphs 107 to 113, as follows:

> 107. We have looked at the criticisms made by Ms Morgan individually and have concluded that, taken by themselves, none of them amounts to the error of substitution by the Employment Tribunal of its own view for that of the Trust. We have also considered them collectively to see whether, taken as a whole, they have more critical mass. We have concluded that they do not make out a cumulative case of substitution. We are fortified in that view by looking at their context. We think that Mr Johnston is correct that, in essence, not much was in dispute in this case. Really the question is not whether the Employment Tribunal stayed on the right side of the line (and we have concluded that it did) but whether placing the patient outside the hospital on a trolley was gross misconduct and whether the Trust's finding to that effect is open to challenge. Accordingly, we turn to the issue of gross misconduct.
>
> 108. Whilst recognising that the Employment Tribunal had accepted that the authority of **Stoker v Lancashire County Council** [1992] IRLR 75 should not be applied in a mechanistic way, we do not regard it as a particularly illuminating authority so far as the instant appeal is concerned. It is a case concerned with the contractual right to an internal appeal. No doubt some of its logic might be transferrable to this case but the issue here is whether the fact that the Trust had a belief that the Respondent had been

guilty of gross misconduct is dispositive, in the sense that all that can be asked is whether that belief was within the band of reasonable responses? Ms Morgan submits that is all that can be asked and that the Trust was entitled to regard failure to adhere to Trust policy as gross misconduct. Failure to adhere to Trust policy had been stipulated as gross misconduct in the Trust's disciplinary code and once the Trust concluded that its policy had been breached, it was entitled to conclude that breach amounted to gross misconduct. Accordingly it was an error of law for the Employment Tribunal to constrain gross misconduct to deliberate wrong doing or gross negligence. If what the Respondent had done amounted to a breach of Trust policy, then the Trust had stipulated that amounted to gross misconduct and that was an end of the matter; the Employment Tribunal could not look behind it.

109. We do not accept that submission. It is not clear to us what the breach of Trust policy actually was. The conduct complained of was taking the patient outside. Assuming that is a breach of Trust policy, it still remains to be asked – how serious a breach is that? Is it so serious that it amounts to gross misconduct? In our judgment that is not a question always confined simply to the reasonableness of the employer's belief. We think two things need to be distinguished. Firstly the conduct alleged must be capable of amounting to gross misconduct. Secondly the employer must have a reasonable belief that the employee has committed such misconduct. In many cases the first will not arise. For example, many misconduct cases involve the theft of goods or money. That gives rise to no issue so far as the character of the misconduct is concerned. Stealing is gross misconduct. What is usually in issue in such cases is the reasonableness of the belief that the employee has committed the theft.

110. In this case it is the other way round. There is no dispute as to the commission of the act alleged to constitute misconduct. What is at issue is the character of the act. The character of the misconduct should not be determined solely by, or confined to, the employer's own analysis, subject only to reasonableness. In our judgment the question as to what is gross misconduct must be a mixed question of law and fact and that will be so when the question falls to be considered in the context of the reasonableness of the sanction in unfair dismissal or in the context of breach of contract. What then is the direction as to law that the employer should give itself and the employment tribunal apply when considering the employer's decision making?

111. Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee: see **Wilson v Racher** [1974] ICR 428, CA per Edmund Davies LJ at page 432 (citing Harman LJ in **Pepper v Webb** [1969] 1 WLR 514 at 517):

> **"Now what will justify an instant dismissal? - something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract"**

and at page 433 where he cites Russell LJ in **Pepper** (page 518) that the conduct "must be taken as conduct repudiatory of the contract justifying summary dismissal." In the disobedience case of **Laws v London Chronicle (indicator Newspapers) Ltd** [1959] 1 WLR 698 at page 710 Evershed MR said:

> **"the disobedience must at least have the quality that it is 'wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions."**

So the conduct must be a deliberate and wilful contradiction of the contractual terms.

112. Alternatively it must amount to very considerable negligence, historically summarised as "gross negligence". A relatively modern example of "gross negligence", as considered in relation to "gross misconduct", is to be found in **Dietman v LB Brent** [1987] ICR 737 at page 759.

113. Consequently we think that the Employment Tribunal was quite correct to direct itself at paragraph 27.1.4(b) (see page 18 of the bundle) that "gross misconduct" involves either deliberate wrongdoing or gross negligence. Having given a correct self direction in terms of law, thereafter it fell to the Employment Tribunal to consider both the character of the conduct and whether it was reasonable for the Trust to regard the conduct as having the character of gross misconduct on the facts. The decision reached in that paragraph, whilst accepting that her conduct was "a failure of professional judgment" and a "serious one" and "fell short of the high standards demanded of a nurse", concluded that it could not be reasonably characterised as deliberate wrongdoing or gross negligence. In our judgment that was a decision open to the Employment Tribunal to make on the facts.

31. I also looked at the case of Dietman v Brent LBC (op.cit.) the facts of which involved the death of a child in the care of a council following injuries inflicted by the mother's cohabitee who was convicted of manslaughter. The claimant social worker was dismissed after an enquiry found gross misconduct because of errors, omissions and faults in her duties. The claimant was successful on appeal. Hodgson J dealt with gross misconduct at pages 749 to 752 and I quote part of the judgment from page 750:

"Whilst I do not doubt that gross negligence can amount, in law, to gross misconduct…….I have equally no doubt that it cannot amount to gross misconduct under this contract. I should add that I have carefully considered the panel's report and their findings of fact and I have no doubt whatsoever that the last thing the panel would have found (had it been any part of their perceived task to make findings of a disciplinary nature) was that the plaintiff had been guilty of any deliberate or intentional wrongdoing. See "A Child in Trust," at page 28:

"What the public nature of our enquiry has done is to demonstrate that social workers, warts and all, are caring, professional people who do not have horns and tails, and are not murderers (as they have been monstrously described in some writings we have seen) but are dedicated workers who sometimes get things wrong, even wildly wrong".

I have not the slightest doubt that the plaintiff's conceded failure to achieve, in respect of Jasmine, the standard required by her grade and experience did not amount to gross misconduct within the terms of this contract."

32. I checked whether the Sandwell case had been followed in a positive way; it had been; and I found a helpful analysis of the authorities on gross misconduct in the case of Burdett v Aviva Employment Services Ltd [2014] UK EAT 0439, before Her Honour Judge Eady and paragraphs 29 to 32 were very instructive, where it includes reference to Sandwell:

"29. What is meant by "*gross misconduct*" – a concept in some ways more important in the context of a wrongful dismissal claim – has been considered in a number of cases. Most recently, the Supreme Court in **Chhabra v West London Mental Health NHS Trust** [2014] ICR 194 reiterated that it should be conduct which would involve a repudiatory breach of contract (that is, conduct undermining the trust and confidence which is inherent in the particular contract of employment such that the employer should no longer be required to retain the employee in his employment, see **Wilson v Racher** [1974] ICR 428, CA and **Neary v Dean of Westminster** [1999] IRLR 288, approved by the Court of Appeal in **Dunn v AAH Ltd** [2010] IRLR 709, CA). In **Chhabra**, it was found that the conduct would need to be so serious as to potentially make any further relationship and trust between the employer

and employee impossible. It is common ground before me that the conduct in issue would need to amount to either deliberate wrongdoing or gross negligence (see **Sandwell & West Birmingham Hospitals NHS Trust v Westwood** UKEAT/0032/09/LA).

30. The characterisation of an act as "gross misconduct" is thus not simply a matter of choice for the employer. Without falling into the substitution mindset warned against by Mummery LJ in **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220, it will be for the Employment Tribunal to assess whether the conduct in question was such as to be capable of amounting to gross misconduct (see **Eastland Homes Partnership Ltd v Cunningham** UKEAT/0272/13/MC per HHJ Hand QC at paragraph 37). Failure to do so can give rise to an error of law: the Employment Tribunal will have failed to determine whether it was within the range of reasonable responses to treat the conduct as sufficient reason for dismissing the employee summarily.

31. The reason for a dismissal will be determined subjectively: what was in the mind of the employer at the time the decision was taken. Whether the dismissal for that reason was fair, however, imports a degree of objectivity, albeit to be tested against the standard of the reasonable employer and allowing that there is a margin of appreciation – a range of reasonable responses – rather than any absolute standard. So if an employer dismisses for a reason characterised as gross misconduct, the Employment Tribunal will need to determine whether there were reasonable grounds for the belief that the employee was indeed guilty of the conduct in question and that such conduct was capable of amounting to gross misconduct (implying an element of culpability on the part of the employee). Assuming reasonable grounds for the belief that the employee committed the act in issue, the Tribunal will thus still need to consider whether there were reasonable grounds for concluding that she had done so wilfully or in a grossly negligent way.

32. Even if the Employment Tribunal has concluded that the employer was entitled to regard an employee as having committed an act of gross misconduct (i.e. a reasonable investigation having been carried out, there were reasonable grounds for that belief), that will not be determinative of the question of fairness. The Tribunal will still need to consider whether it was within the range of reasonable responses to dismiss that employee for that conduct. The answer in most cases might be that it was, but that cannot simply be assumed. The Tribunal's task in this regard was considered by a different division of this Court (Langstaff P presiding) in **Brito-Babapulle v Ealing NHS Trust** UKEAT0358/12/1406, as follows:

> *"38. The logical jump from gross misconduct to the proposition that dismissal must then inevitably fall within the range of reasonable responses gives no room for considering whether, though the misconduct is gross and dismissal almost inevitable, mitigating factors may be such that dismissal is not reasonable. […]*
>
> *39. […] What is set out at paragraph 13 ["Once gross misconduct is found, dismissal must always fall within the range of reasonable responses …"] is set out as a stark proposition of law. It is an argument of cause and consequence which admits of no exception. It rather suggests that gross misconduct, often a contractual test, is determinative of the question whether a dismissal is unfair, which is not a contractual test but is dependent upon the separate consideration which is called for under s.98 of the Employment Rights Act 1996.*
>
> *40. It is not sufficient to point to the fact that the employer considered the mitigation and rejected it […], because a tribunal cannot abdicate its function to that of the employer. It is the Tribunal's task to assess whether the employer's behaviour is reasonable or unreasonable having regard to the reason for dismissal. It is the whole of the circumstances that it must*

> *consider with regard to equity and the substantial merits of the case. But this general assessment necessarily includes a consideration of those matters that might mitigate. […]"*

33. I find the alleged conduct of the claimant complained of by the respondent is documented, but not well analysed and not explained in a clear way. The factors relied on by the respondent are set out in the letter of dismissal. I concluded the respondent had failed to show there was a breach of any relevant policy, procedure or contract. Mr Townsend held a genuine but unreasonable belief that the claimant had committed misconduct. He was going to dismiss the claimant, come what may, and the disciplinary procedure was a formality. Drawing from the guidance in the case law, the character of the misconduct is not confined to the respondent's own analysis, subject only to reasonableness (paragraph 110 of Sandwell). It is a question of law and fact. Gross misconduct can either be deliberate wrongdoing or gross negligence. My job is to consider both the character of the conduct and whether it was reasonable of the respondent to regard the conduct as having the character of gross misconduct on the facts. In his analysis, Mr Townsend (and on appeal Mr Wilford) concluded that there was no room for any discretion or impose a lesser penalty than dismissal because the facts pointed to gross misconduct. I conclude the character of the conduct complained of was not established as deliberate wrongdoing or gross negligence. Mr Townsend and Mr Wilford were mistaken to come to that conclusion. Their thinking was not transparent to me and led me to the conclusion that dismissal was always going to be the outcome.

34. When I considered all of the evidence before Mr Townsend, I concluded that the sanction of dismissal was outside the range of reasonable responses open to him on the facts of the case; but the dismissal was already unfair at that stage. That being so, I concluded the claimant was unfairly dismissed and his claim for unfair dismissal succeeded. I made my decision having regard to equity and the substantial merits of the case. I took into account the size and administrative resources of the respondent.

35. As Mr Wilford submitted, if there was gross misconduct then there would be a breach of mutual trust and confidence entitling the respondent to terminate the contract without notice or payment in lieu thereof, causing the wrongful dismissal claim to fail. However, given my finding that the facts do not amount to gross misconduct or conduct which would enable the respondent to have dismissed the claimant fairly, I find the respondent has failed to establish on the balance of probabilities that it was entitled to dismiss summarily without notice or payment in lieu thereof. I concluded there was no repudiatory conduct by the claimant which was a deliberate and/or a wilful contradiction of the contractual terms that would entitle the respondent to justify summary dismissal. The claim for damages for breach of contract over notice is well-founded and succeeds. The parties agreed that the claimant was entitled to 6 weeks payment in lieu of notice.

36. I then turn to the question of contributory conduct. I concluded that the claimant did not cause or contribute to his dismissal. I thought very hard about this, and the respondent's submission that the claimant had disregarded instructions. These were the issues of presenting work to Ivan and preparing a spreadsheet. The claimant had taken legal advice and told Mr Townsend that such advice was that he did not have to obey the instruction of sending the work to Ivan. That was not helpful advice and certainly raised the temperature during the disciplinary hearing. He complied with the request over the spreadsheet, although it did not have the detail that Mr Townsend envisaged. I thought about a modest reduction of some 10%, but this did not reflect the justice in the case because I have found that Mr Townsend had made up his mind from at least 28 July 2017 that the claimant would be dismissed in any event. I concluded, therefore, that there should be no reduction for contribution.

37. At this point the claimant confirmed that he did not wish to seek the remedy of reinstatement or re-engagement and therefore the remedy rested in compensation.

38. Finally, I deal with the issue of the counterclaim. Article 4 of the 1994 order includes, amongst other things, the provision that an employer's claim is one which: "arises or is outstanding on the termination of the employment of the employee against whom it is made." In his oral evidence Mr Townsend told me that at the time of the claimant's dismissal there were no identifiable damages. Stated shortly, the amount being claimed does not comprise any actual claims that the respondent has had to meet; but arises out of an abundance of caution on the part of Mr Townsend to go through the claimant's work to be satisfied that the position of the respondent's clients was protected. That seemed a reasonable business decision but was not something which was caused by the conduct of the claimant. Specifically, it is not caused by his wilful conduct or neglect of duty. The burden of proof is on the respondent, it has failed to shift it and therefore the counterclaim is not well-founded fails and is dismissed.

39. Judgment. The judgment of the Tribunal is that the claimant was unfairly dismissed; his claim for breach of contract over notice is well-founded and succeeds; but the counter-claim fails and is dismissed.

40. The remedy. In terms of the remedy for unfair dismissal, the basic award is £3,423.00 which is an agreed amount. I award compensation in relation to salary loss in the sum of £25,141.60. The respondent did not demonstrate that the claimed had failed to mitigate his losses. The pension loss is £395.25. For loss of employment rights, the award is £500 making the total sum payable by the respondent £29,459.85. There was a request by the claimant to increase that by 20% for specific breaches of the ACAS procedure which I had found in my analysis; but I was not inclined to do that and made an award of 10% on the salary and pension loss elements of the compensation, amounting to an additional £2,553.68. I did invite further submissions; but none were made. On

the breach of contract claim I made no award of damages because it would have duplicated the unfair dismissal compensation.

Signed by _____on 21 Aug. 2019
Employment Judge Dimbylow

Reasons sent to parties on

_S.Hirons 22/8/19_____

_____