EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100315/2019 Hearing at Edinburgh on 15, 16 and 17 May 2019, and by written submissions provided by 14 June 2019

Employment Judge: M A Macleod

Elaine McArthur	Claimant Represented by Ms A Salt Solicitor
The Board of Management of Edinburgh College	Respondent Represented by Ms M Armstrong Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondent unfairly dismissed the claimant, but that any basic and compensatory awards are reduced by 100% due to the claimant's contributory conduct, and therefore no award is made to the claimant.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 18 January 2019 in which she complained that the respondent had unfairly dismissed her and unlawfully deprived her of notice pay on termination.

2. The respondent submitted an ET3 response in which they resisted all claims made by the claimant.

3. A hearing was fixed to take place on 15 to 17 May 2019. The claimant attended and was represented by her solicitor, Ms A Salt. The respondent was represented by Ms Armstrong, solicitor.

4. The parties presented a joint bundle of documents to which reference was made in the course of the hearing.

5. The respondent called as witnesses the following individuals:

   - Jonathan Mark Pearson, Vice-Principal, Education and Skills; and
   - Alan James Williamson, Chief Operating Officer.

6. The claimant gave evidence on her own account, and also called Sheila Drysdale, a life coach and personal trainer, as a witness.

7. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

8. The claimant, whose date of birth is 6 June 1971, commenced employment with the respondent on 7 October 2015 as a Lecturer in Health and Social Care.

9. The respondent is responsible for the management of a further education college, formed by the merger of the former Stevenson, Jewel & Esk and Telford Colleges in 2012.

10. The claimant was based at the respondent's Sighthill campus in Edinburgh.

11. The claimant became absent from work in October 2017, and remained absent for some months. On 24 January 2018, Stephen McLaughlin, HR Adviser, wrote to her to notify her that due to the current period of absence, and in conjunction with previous periods of sickness absence over the preceding 12 months her salary would reduce to half pay with effect from 27 January 2018 (103).

12. A Formal Stage 1 Absence Meeting, as provided for in the respondent's Absence Management Policy (79ff), took place on 24 January 2018. The clamant attended, and the meeting was chaired by Rachel McFadden, her line manager, with Stephen McLaughlin in attendance as note taker. Notes of the meeting were produced at 106ff. The conclusion of that meeting was noted as follows:

"Stephen concluded the meeting by saying that before she could return to work we would seek another OH meeting and that then a meeting would need to take place again with Rachel and Stephen to look at a plan for her return to work. She agreed to OH. Stephen said she could return before that and however it would be in her best interests to wait until we had a clear plan in place."

13. The claimant attended an Occupational Health appointment on 9 February 2018. During the course of that meeting, the claimant became aware of comments which had been made by Mr McLaughlin and Ms McFadden in the referral to Occupational Health (OH). She was sufficiently concerned to write to Anne-Marie Dempsey on 12 February 2018 (111) to address concerns to her due to her lack of confidence in the manner in which her absence had been managed by Mr McLaughlin and Ms McFadden. She noted that when she attended the OH appointment on 9 February,

"…I had FIRST sight of comments and observations made by Rachel and Stephen at the meeting of 24th January.

The comments/accusations do not reflect the tenor of the meeting I believe I had attended, which as I say, left me feeling motivated and actively considering a return to work. Firmly believing that the purpose of the meeting was to discuss the best way to achieve this objective, imagine my distress when confronted with this document for the first time."

14. She went on to observe a number of points about the document which she first saw at the OH appointment, one of which was that *"I am left incredulous with the observations that I may have been under the influence of substances or alcohol and have the following response to this:*

A. The comments are potentially a serious slur upon my professional standing as a nurse and a lecturer

B. This was not addressed with me at the meeting in order that I could respond

C. The meeting was allowed to continue for 40 minutes with someone they regarded was under the influence of substances

D. As a responsible employer, representatives knowing I had travelled from Glasgow by car, allowed me to exit the meeting to travel home

E. There was no follow up either formally or informally to enquire about my wellbeing

F. At no time was there mention of any concerns which might get in the way of a return to work, only the best way it might be achieved…

I would be grateful if you could advise me of what should now happen as the document now in my possession states that Edinburgh College 'are not in a position/willing to allow a return to work'. This appears to directly relate to the 'symptoms' which Rachel and Stephen state that I displayed at the meeting but, as previously mentioned, they did not raise with me in person. I categorically refute this allegation…"

15. Ms Dempsey replied to that email on the same day (113). She set out a time line of events for the claimant. She noted that on 9 October, the claimant had displayed some *"out of character"* behaviour with both colleagues and students, and became upset, so being advised to go home by a colleague. In the week beginning 16 October, complaints were received by the respondent from students *"upset by your behaviour towards them and it was suggested you appeared to be under the influence of alcohol on the 9th also incident reports from two lecturers on the matter."*

16. Ms Dempsey went on to confirm that on 2 November, the claimant had met with Rachel McFadden and herself: *"I discussed the incident of the 9th, You did not offer any explanation, you presented with a bruise on your face and*

cheek, you intimated you should resign from your post & I reassured you, you should not. I raised the matter that students and staff felt you were under the influence of alcohol on 9th and also mentioned the colleges Drug and Alcohol policy. Rachel and I were so concerned as you seemed to have difficulty recalling the events of the 9th, your speech seemed slurred and you did not answer questions but rather responded with a question for example when I said to you 'There was a concern you were under the influence of alcohol on the 9th' you responded by stating 'Really?' Rachel and I walked you to your car and established your daughter was driving and was therefore satisfied you were safe to get home. I requested you focus on your recovery."

17. With regard to the meeting in January, Ms Dempsey stated:

"26th Jan – You met with Stephen and Rachel and both were concerned about your memory of the event in October, Stephen asked if they (sic) college could further support you as he was also worried for your health & wellbeing as you seemed to be slurring your speech and again could not accurately recall events. Stephen established your partner had brought you to the meeting and therefore was reassured you were safe to travel and it was agreed to offer you a further referral to OH."

18. Ms Dempsey went on to reassure the claimant that there was genuine concern for her welfare. She understood that the claimant's GP had certified her fit to return to work but that the respondent remained concerned about her behaviour. She confirmed:

"At this time your return to work is supported with immediate effect however, initially we would want to be sure that your exposure to students is limited until we can find a way to work through the issues and behaviour you have displayed and I would be content for Rachel to provide you with meaningful work around supporting the curriculum development.

With this in mind, perhaps it would be helpful for you to meet with Occupational Health again, to agree on a timeframe of a phased return to work with students, given the latest advice from your GP..

Given the above I look forward to seeing you tomorrow and Rachel will meet you first thing."

19. The claimant replied to that email on 12 February 2018 (116) to say that it had not been clarified that she had the information provided to OH before her appointments with them, but that in any event, she wanted to state that she had been absent with work-related stress, and that *"My concerns have been increased by Rachel's perception of the meeting of 26th January, and how they differ from mine. I feel anxious about returning to work without a plan in place and would ask for a meeting with reasonable notice, to enable me to arrange representation."*

20. Ms Dempsey replied in turn on 12 February (117):

"Dear Elaine,

It was from your email to me earlier today (which had OH referral attached) where I read the detail of the referral.

I have provided you with a short/interim return to work for the rest of this week as you have stated the following in previous emails:

1. *Being off work and currently on half pay is causing you further anxiety.*
2. *Your doctor has signed you as fit to return to work since last week (however the college was not aware of this until you emailed today).*

Next week you will attend your OH referral and then HR and Rachel can further discuss your phased return work and you will of course be given notice in order for your to arrange representation.

This would have been provided to you this week but you decided not to proceed with the OH appointment last week (again I understand why you decided not to proceed with the meeting).

Elaine I must reiterate it was not only Rachel who had concerns during meetings and there has only been two meetings since your absence…"

21. The claimant then submitted a further fit note from her GP (119) dated 13 February 2018, confirming that the claimant *"may be fit for work taking account of the following advice"*, following which two boxes, marked *"a phased return to work"* and *"altered hours"*, were ticked, and a comment was added that *"Would benefit from addressing issues contributing to stress".*

22. The claimant emailed Katie Willis, HR Business Partner, on 13 February 2018 (126ff), confirming that she would not be returning to work that day, and asking if it would be possible to have annual leave if entitled, or unpaid leave that day and the next. She explained the reasons for this:

"On the 9th October I attended work and had a nervous breakdown which resulted in me displaying out of character behaviour. It was witnessed by staff members and students. I do not recall much at all and accept what I've been told by members of staff as it must have been extremely upsetting for those who witnessed this episode, especially the students involved (this has never happened to me before…

At a sickness/absence meeting on the 26th January, I could not answer questions about what happened on the 9th October as I hardly remember it. I felt the meeting had gone well and I was looking forward to returning to work (albeit embarrassed about the events on the 9th October).

At an OH meeting on 9th February, I was shocked to read the content of the referral. The email attachment on my phone did not display the bullet points that Stephen and Rachel said they witnessed. There was no mention of alcohol or drugs made to me at the meeting and as I have recovered from the stress/anxiety and depression I can't understand the comments. I remember all of the discussions and was actually grateful at the time for the guidance, advice and understanding I felt had been provided…

My confidence has once again been severely dented by what was disclosed to me at the OH appointment on Friday, regarding the meeting on the 26th January. I now feel I need representation at any further meetings and a planned return to work, not with Rachel at this time. It would also be helpful

to know which lecturers had witnessed what happened on the 9th October so I can apologise to them. It may be less uncomfortable for the students involved if I don't teach them again but I'm happy to take guidance on this. I really want to put this difficult time behind me and wish to make it clear I would not seek a return to work if I was still unwell and will not put myself in a position where it could happen again…"

23. Ms Willis replied to the claimant that day (125) and assured her that the HR and OH teams were there to support her return to work as soon as possible, and would seek to resolve her concerns about lack of support and communication in the workplace. She said that she understood that the claimant's GP had signed her as fit to return to work, and suggested they plan for that to take place on Monday 19 February at 9.30am. She told the claimant that she would need to meet with Ms McFadden, with Mr McLaughlin present if she preferred, to complete a stress risk assessment. She was invited to bring a work colleague to the meeting, though Ms Willis said that this was not a statutory right.

24. In response, on 14 February, the claimant emailed Ms Willis to say (125):

"Dear Katie,

Thank you for your reply to my email.

I have now taken advice from the EIS and formally request that all correspondence from Edinburgh College either from HR or managers regarding all work related matters is sent to me via Penny Gower, EIS Branch Secretary who is my union representative.

As Penny has kindly agreed to represent me, I will not expect any further direct work correspondence to come to me accept (sic) through her."

25. Ms Willis wrote to the claimant on 26 February 2018, copied to Ms Gower and Ms Dempsey (124) to apologise for the delay in her response. She went on:

"…Further to recent emails from Penny Gower EIS, and your email dated 14th February (attached) to request that all communication is forwarded directly through Penny Gower as your union representative until further notice, I am now writing to ask about your intentions regarding your return to work.

Your GP fit note dated 13th February (attached) stated that you were fit to return to work on 5th February 2018. A return to work meeting was held with Rachel on 24th January 2018 to plan for your return. Following this meeting it was agreed that you would visit Occupational Health to seek further clinical advice on your health and arrangements for your return to work. Stephen McLaughlin, HR Adviser sent an Occupational Health referral document to you on 5th February 2018 and you replied thanking Stephen for his advice and assistance and confirmed you would attend the meeting with Dr Harker on Friday 9th February 2019. You attended this meeting but you stated that you were surprised at the referral document, saying you had not seen it prior to this date. On 11th February you emailed Anne Marie Dempsey raising concerns over the referral documents and then again on 13 February 2018 stating you would not be returning to work. I had then responded requesting that you return on 19th February to meet with Occupational Health and your CM to discuss the details of your return to working arrangements.

The college has a duty of care to all employees and given the reason for your absence, I would expect it reasonable for the line manager to seek to meet with you to ascertain what has triggered the stresses and work together to mitigate stressors in the short term and resolve the underlying issues as soon as practically possible. I note your request to communicate through a trade union representative, however it would be helpful, if you are willing to release the Occupational Health report from your meeting with Mary McHugh on 19th February 2018 to Anne Marie Dempsey, for her to then assess as to whether this request is reasonable.

Given that the policy allows up to 4 weeks of a phased return to work, and your GP requested this, along with altered hours, you have now entered the

fourth week without returning, so the college would expect you to return on 5th March 2018. If you are and remain unfit for work, the college would then expect you will submit another fit note…"

26. On 1 March 2018, Ms Gower emailed Ms Willis (121). She pointed out that both she and the claimant had expressly requested that communication should come to her, and not directly to the claimant, and asked why she had ignored the claimant's express wishes, and what had been an arrangement honoured for decades by the respondent. She requested that HR honour the communication strategy to assist the claimant's recovery.

27. With regard to the claimant's intentions about returning to work, Ms Gower said:

"Regarding your question about Elaine's intentions re her return to work, the emails below state quite clear that Elaine returned to work on 19 February. We met at Sighthill that day, and discussed her options, having made it clear in writing the previous before (sic) in work time that she did not feel able to attend a RTW meeting with the CM. That message regrettably was not passed on by you to Elaine's CM when we discussed this with Rachel, I referred her to HR so that she could take up the failure of communication with the latter…Therefore the delay was not caused by Elaine…"

28. Ms Gower went on to say that it was acceptable to the claimant to meet with Ms Dempsey to ascertain what had triggered the stressors and to work together to mitigate those stressors in the short term, and resolve the underlying issues as soon as practically possible.

29. A meeting was then set up between the claimant and Mary McHugh, on 12 March 2018. Ms Gower had confirmed that it was not necessary for the claimant to be accompanied by the EIS to this meeting, in the interests of making progress. Ms McHugh met with the claimant on that date, and subsequently emailed the claimant with her stress risk assessment and report (139) on 15 March 2018. She pointed out that she believed that meeting with Ms McFadden would be the ultimate goal for the claimant, and

suggested she share the stress risk assessment notes with her to allow her to put in place responses and support which would help a return to work.

30. In her report (141), Ms McHugh advised Ms Hernandez, Head of HR, that:

"As arranged I met with Ms McArthur at the Occupational Health Department on Monday 12th March 2018. It was hoped that at the meeting that OH would be working with her line manager Ms Rachel McFadden to complete a stress risk assessment. Unfortunately, Ms McArthur refused for Ms McFadden to be in attendance. During the meeting, I provided Ms McArthur with the stress questionnaire. Of the issues highlighted I asked for Ms McArthur to expand on them, and have attached her responses. Understandably I am unable to comment on them individually and feel without the input of her line manager that once the stress risk assessment is completed, the subsequent action plan will not be as effective as it should be. Ms McArthur has refused to allow the questionnaire to be shared with her line manager; therefore it is difficult to implement and provide support to facilitate a return to work. In my opinion it would be helpful if Ms McArthur reconsiders and shares the information with her line manager – which will allow both the department and Ms McArthur to agree on an appropriate action plan. She is aware that any adjustments need to be agreed by her, her line management and HR due to the implications on the service delivered by the department."

31. She repeated her view that the claimant was fit to return to work, though understood that that had not happened owing to a number of organisational issues which were being addressed.

32. On 14 March, the claimant emailed Ms Dempsey (148), with a copy to Ms Willis and Ms Gower, to say:

"Dear Anne-Marie and Katie,

I would really like to have this matter resolved as I'm sure you do. Would it be possible to arrange a meeting with Katie or Anne-Marie on a one to one

basis to discuss meeting with Rachel regarding returning to work and how to go about it?

I appreciate the support Penny has given me but now feel that we should communicate directly to speed up the process of my return and no longer communicate via Penny."

33. The claimant returned to work on 27 March 2018.

34. Ms McFadden and Mr McLaughlin met with the claimant on 18 April 2018. Notes of the meeting were taken by Mr McLaughlin (277). The meeting was described as an "Informal Investigation", and the reason was "NMC Notification".

35. Ms McFadden explained that the reason for the meeting was *"to discuss the sanction which has been placed on Elaine NMC file and would like to ask Elaine if she could supply the college with the background, the reason we are asking is to establish if the 18 month sanction could be in breach of disclosure Scotland."*

36. The claimant responded that the sanction was based on her having not followed procedure when disposing of medication while she was working in a care home the previous month, on Friday 9 and Saturday 10 March 2018, in care homes in Ayr and Lennoxtown. When asked why she had not informed the respondent of this sanction, she said that she was awaiting the written letter and that she would supply the respondent with a copy when she received it. She said that she had nothing to hide, that she was not aware of the need to inform the respondent, and she apologised.

37. A further informal investigation meeting took place on 25 April 2018, and on 26 April the claimant brought in some documents showing when she had been carrying out shifts for care homes.

38. On 27 April 2018, the claimant was suspended from duty pending an investigation into allegations of gross misconduct by Ms Dempsey. Ms Dempsey met with the claimant, in the presence of Ms Willis, and the claimant was accompanied by Julian Henderson (191). Ms Dempsey

advised the claimant that *"It has been brought to our attention that you have presented to work today as someone who is under the influence of alcohol; ie smelling of solvents or alcohol. We need to consider if a pre-cautionary suspension on full pay is appropriate at this stage. I therefore ned to conduct an initial fact-finding meeting to discuss the matter briefly with you."*

39. The claimant immediately replied: *"No, you're wrong. I haven't had a drink for 6 months".*

40. Ms Dempsey went on to notify the claimant that she was being suspended on full pay, and set out the allegations on which the investigation would be based. She insisted on taking the claimant's car keys from her and arranging for a taxi to take her home.

41. The allegations were confirmed in the letter of suspension of the same date (189):

    1. *"I am of the belief that you have presented to work today as someone who is under the influence of alcohol; ie smelling of solvents of (sic) alcohol.*

    2. *Failure to notify the college of ongoing investigations and restrictions with the NMC.*

    3. *Failure to request permission from the college to work as a bank nurse; as per section 19 of your contract of employment.*

    4. *Working as a bank nurse on a day that you should have been reporting for duty at the college.*

    5. *Failure to meet agreed work target deadlines to produce curriculum materials."*

42. Jakki Jeffery, Head of Creative Industries, was appointed to carry out an investigation into the allegations made against the claimant. She produced her investigation report, after carrying out interviews with a number of witnesses, dated 11 June 2018 (163ff).

43. Ms Jeffery interviewed Julian Henderson (who had witnessed the suspension interview); Anne-Marie Dempsey, Stephen McLaughlin, Rachel McFadden, the claimant, Fiona Stewart, Keith Harper, Paul Dykes and Lorraine Lyall.

44. She summarised the evidence of each of the witnesses, and then made a series of recommendations in relation to the allegations.

45. With regard to allegation 1, she recommended that the allegation be addressed at a disciplinary hearing.

46. Allegation 2, relating to the failure to notify the respondent of ongoing investigations and restrictions under the NMC, was dealt with by Ms Jeffery noting that the claimant had said that as the respondent is not a nursing provider it was her view that she was under no obligation to notify them of any allegations or subsequent sanction, and that this was not the view of Faculty management. She went on: *"Elaine's position is understandable. While the College might legitimately have expected to have been notified, there is nothing which would necessarily make it clear to an employee that there is an obligation to do so in these circumstances. Accordingly, there is not enough evidence to show that the failure to notify the College would amount to misconduct."*

47. Ms Jeffery considered that since the Curriculum Manager was aware that the claimant was working for Scot Nursing, the nursing agency to whom she was contracted, over the 2017 summer holidays, the claimant may have believed that no further permission was required. As a result, she recommended that Allegation 3 proceed no further.

48. With regard to Allegation 4, Ms Jeffery was of the view that there were 5 occasions in February and March 2018 when the claimant had undertaken agency bank work on days when she should have been working at the college and in respect of which she was in receipt of sick pay. One of those days was a day when the respondent was closed due to snow, but she commenced her shift prior to the decision to close being announced. She considered that there was evidence to suggest that the claimant may have

committed gross misconduct and therefore she recommended that this allegation be considered at a disciplinary hearing.

49. Allegation 5, she concluded, should not be pursued on the basis that there was a lack of clarity about instructions issued to her and in any event, she considered that this may truly be a performance issue rather than conduct.

50. Lynn Kinloch, HR Business Partner, wrote to the claimant on 15 June 2018 to invite her to a disciplinary hearing to consider the allegations to be taken forward by the respondent (347). The hearing was fixed to take place on 29 June 2018, chaired by Jonny Pearson, Assistant Principal. Ms Kinloch issued a further letter to the claimant dated 26 June 2018, seeking to rearrange the hearing to take place on 10 August 2018.

51. It was clarified that the allegations proceeding to the disciplinary hearing were as follows:

"Allegation 1 – A belief that you presented to work on 27 April as someone who was under the influence of alcohol; ie smelling of solvents or alcohol.

Note: Elaine committed gross misconduct by presenting to work on 27 April 2018 while under the influence of alcohol (or some other substance).

Allegation 2 – A failure to notify the college of ongoing investigation and restrictions with the NMC.

Note: It is recommended that Elaine provides updates on the NMC process in order that the College can further consider what bearing any development has upon her role.

Allegation 4 – That you worked as a bank nurse on a day that you should have been reporting for duty at the college.

*Note: Elaine committed gross misconduct by committing fraud by working elsewhere for money while knowing that she was still in receipt of sick pay from the College (and, in addition, while being fit to return to work for the College).***"**

52. That hearing was further delayed until 15 August 2018 (361), when it proceeded. The claimant attended and was accompanied by Terry Gray, EIS Area Officer. Mr Pearson chaired the meeting, and Chloe Currie took notes (383ff).

53. With regard to allegation 2, Mr Pearson insisted that this was part of the case proceeding to the disciplinary hearing, notwithstanding the point made by Mr Gray that the investigation report did not recommend disciplinary action on this point.

54. Mr Pearson went on to address the issue as follows:

"JP: With regards to allegation 2. You were quoted in the investigation as having said that the College had employed you as a lecturer and this had nothing to do with your employment at the College. I'd like to ask you if you still hold this view or have you now got a different view?

EM: I'll be honest I did offer more information to Rachel. I felt there was no one to trust. It was a very sensitive issue and I just wanted to get back to work. I felt I had no support. If I'd had a manager who was supportive and I could trust but I didn't with Rachel. I feel because I am sitting here now I feel that decision was correct. I met Katie Willis. I met Penny who tried to support me. I went to Occupational Health. I just wanted to get back to work but there was no support in place…

JP: Without putting words in your mouth and tell me if this is not correct. Are you saying you would have told someone at the College if you felt there was someone you could trust?

EM: Correct.

JP: Is there anything about allegations 1 and 3 that you wish to put forward in explanation or mitigation?

EM: Are you aware that I subsequently admitted that when I went off I had been drinking heavily? I engaged in every support possible. I was stressed and depressed and my drinking escalated. But at the point that I was

accused of being drunk it had been 8 months and I had never had a drink. I was so desperately disappointed to be accused of being drunk. I've gone to AA meetings, sought support through my GP."

55. Moving to allegation 3, the claimant said:

"I have to apologise as I didn't realise this was wrong. For ages I'd been trying to get back to work. I'd been sitting in the library crying. If I'd been at work the incidents with NMC would never have happened. I didn't do it deliberately. I did call ACAS for advice. I did some shifts to get my confidence back but I realise now that was wrong and I apologise."

56. Mr Gray added:

"EM called ACAS for advice. If she'd called me I would have told her not to do it. She's clear she got that wrong. I don't think we need to say anything else on that."

57. Following the disciplinary hearing, Mr Pearson reflected on the information available to him, and issued his letter of decision dated 23 August 2018 (391).

58. In relation to allegation 1, Mr Pearson found:

*"You provided a letter from your GP which suggests that your presentation on 27th April could have been related to side effects from your combined anti-depressant and anti-alcohol medication. I have concluded therefore that there is not sufficient evidence to uphold this allegation – **not upheld**…*

I am content that your failure to disclose your alcoholism was understandable and something which does not warrant disciplinary action. Nonetheless, it is something of some relevance to allegation 3, as discussed below, as in the context of that allegation I must consider whether you are an individual who is likely to volunteer relevant information."

59. The finding made in relation to allegation 2 was as follows:

"Although the NMC may now consider that you were required to report the matter to the College, I accept that you did not believe such an obligation (under NMC rules) to exist at the time and I appreciate the ambiguity around the wording of the order.

Therefore you did not commit misconduct by failing to report the matter in March 2018.

However, from what you said at the Disciplinary Hearing, the decision not to tell the College was a considered decision by you. you say that you specifically asked Paul Dykes whether you were obliged to tell the College (and you say that he tells you that you weren't). I accept that this may have been a professionally embarrassing matter for your and I note what you say about, in your view, there not being someone supportive to speak to and I appreciate that you may therefore choose not to disclose unless you have to do so. Nonetheless, it is a further demonstration of a reluctance by you to volunteer information to the College which might be relevant."

60. Mr Pearson then addressed the fact that the claimant did not subsequently update the respondent about the progress of the NMC process. He concluded that *"it may not be fair to treat your failure to provide an update regarding the Interim Order Review Hearing of 12 June as misconduct, at least of itself."*

61. He went on to say:

"However, the fact that we did not learn about the Interim Review Hearing of 12 June 2018 until August 2018 and that we did not learn of that from you, is relevant to the separate allegation of fraud (allegation 3). I believe that following receipt of the letter of 15 June 2018 at the latest, you were aware that the progress of the NMC matter may be considered by the College to be relevant to your role. You were aware that the College would like to receive progress updates in order to consider the position. Taken your decision to contact Paul Dykes to seek advice together with your continued failure to update the College, I believe that you deliberately chose to withhold information because it did not suit you to disclose the information.

Whilst neither allegation 1 or 2 are upheld as examples of gross misconduct I have had to consider whether the College can trust you when it comes to considering your defence under allegation 3."

62. With regard to allegation 3 (which was previously identified as allegation 4), Mr Pearson noted that while the claimant had said that she "did not do this deliberately", he had to decide whether or not to trust her in that regard.

63. Mr Pearson explained his reasoning:

"You have explained that you sought advice from ACAS. You have not provided any evidence to support this claim and I can see no obvious reason for you withholding that information during the investigation.

Aside from the fact that you did not disclose your call with ACAS during the investigation, I also do not trust you to be candid given your failure to volunteer information (in relation to both allegations but particularly in relation to allegation 2) and so I am unwilling to give you the benefit of the doubt.

I have decided that (in the absence of evidence from a credible source) I cannot accept your assertion that you did not believe that you were doing something wrong. You have explained that you were working because you needed the money. You knew that the College was still making payment to you. I believe that, on the balance of probabilities, you would have been aware that the College's payment to you of sick pay was because the College believed that you were not working. (For the avoidance of doubt I do not doubt your assertion that you believed that you were on half pay at that time, as I do not consider it to be relevant whether you were on half pay or full pay.)

However if I am to believe that you checked with ACAS then this would suggest you had some doubt as to whether it was permissible for your to work elsewhere. The obvious thing to do would be to contact the College rather than take legal advice from ACAS. Assuming you did contact ACAS, this indicates that you were choosing to withhold information if you could get

away with doing so. I believe that the most likely explanation for any reluctance to disclose the information was because you knew that disclosing it may not be in your interests as it may impact on your sick pay. Whether you received advice to the effect that this was not a disciplinary matter is not relevant as I am concerned with why it was that you chose not to volunteer the information – my conclusion is that you deliberately withheld information in order to ensure that you remained in receipt of sick pay; I consider that your decision makes you guilty of the allegation.

Separately, the failure to update the College regarding the NMC matter, together with your reluctance to provide details during the investigation on that matter and the failure to provide further details of your difficulties with alcohol until 25 May 2018, is part of a pattern of behaviour on your part which shows that you will withhold potentially relevant information if you consider that doing so is to your advantage/that disclosing it may be to your disadvantage. This offers even further support for the view that you probably withheld the information regarding your working because you considered that disclosure may be to your disadvantage.

*I therefore conclude that, in relation to allegation 3, there is sufficient evidence to support the allegation of gross misconduct – **upheld**."*

64. Mr Pearson concluded that the claimant's conduct in relation to allegation 3 justified her dismissal. He recognised her length of service and clean disciplinary record but said that *"I do not trust you on account of your behaviour in relation to that matter and no sanction other than dismissal is appropriate."*

65. He went on to say:

"Separately, the evidence gathered during the investigation shows a pattern of withholding information which, taken together, demonstrates that the College cannot rely upon you to be honest. That alone would also justify dismissal. While it is your guilt of allegation 3 alone which causes me to dismiss, this further conclusion regarding your dishonesty bolsters my view that dismissal is appropriate."

66. Mr Pearson notified the claimant of her right to appeal against his decision.

67. The claimant did submit an appeal against dismissal, by letter dated 6 September 2018 (399).

68. The grounds of her appeal were:

1. *"Mr Pearson has not taken full account of the evidence or the mitigating factors put forward by myself and my representative at the hearing. An example of this is that Mr Pearson has not reflected on the anxiety I was experiencing during my absence and return to work and the feelings of isolation I was experiencing.*

2. *The decision to dismiss me was excessive. In part this relates to my concern that Mr Pearson has not taken full account of issues highlighted in point 1. In addition, Mr Pearson has not upheld two of the allegations under consideration at the hearing but he has relied on a view formed about me in relation to these allegations to support his decision to dismiss me in the relation the final allegation."*

69. The claimant was invited to attend an appeal hearing on 27 September 2018 by letter dated 7 September (401). The appeal hearing was chaired by Alan Williamson, who was assisted by Lynn Kinloch taking notes (405ff). The claimant attended and was accompanied by Terry Gray.

70. The claimant explained that there was a climate of a lack of trust, and that having made attempts to get back to work she was not listened to, acknowledged or respected. With regard to the allegation that she should have reported the NMC sanctions, she pointed out that the NMC investigation was ongoing, and the sanction was very minor. She said that the fact that she worked at the care home while on a phased return to work was a mistake and she had apologised if she should not be working elsewhere at that time.

71. Mr Gray argued that while the claimant had not denied that she was working elsewhere she did not know it was wrong, but did now.

72. Following the hearing, Mr Williamson sent a letter confirming his decision on 12 October 2018 (423). He concluded that the appeal was not upheld.

73. The reasons he gave were as follows:

1. *"**Not taken full account of the evidence or the mitigating factors** – You emphasized at the meeting that your line manager, Rachel McFadden and Head of department, Anne Marie Dempsey were not listening to you, they were unhelpful, not trustworthy, and offered you no plans to return to work. In advance of the meeting I ensured that I was familiar with all documents relating to your case, and I stated to you that I would follow up on your statements with your line managers. I have since established that on at least twenty two occasions through meetings, emails, letters and texts you were offered a variety of personal support options throughout your periods of absence, which also covered your return to work arrangements. This included offers of referral to the OH nurse and doctor, PAM Assist and on return to work the offer of flexible work arrangements, and a different location (within the parameters of campus course provision) to undertake your duties.*

2. ***The decision to dismiss me was excessive** – You stated at the hearing that you offered the information that you had worked elsewhere when you were fit to work at the College, and that you did not think you were not doing anything wrong (sic), hence your attempts to contact ACAS for advice. You also stated that this clinical work for the nursing agency was an attempt to build your confidence, and to increase your earnings due to the College advising you that your salary would be reduced to half pay. However, I have since established that you were returned to full pay in March 2018 following late receipt of your medical certificate signing you back to work and subsequently paid arrears in relation to the February 2018 pay reduction."*

74. Mr Williamson went on to state: *"Therefore on this basis your appeal has not been upheld, as it is believed that you knowingly accepted College pay while gaining financial advantage by working elsewhere."*

75. Following the claimant's dismissal, she has been unable to secure alternative employment. The parties helpfully agreed figures between them in relation to loss, and the respondent confirmed that there was no dispute as to the reasonableness of the claimant's efforts to find alternative employment.

Submissions

76. Parties presented detailed written submissions following the hearing. What follows is a brief summary of the submissions, which were fully taken into account by the Tribunal in reaching its decision.

77. For the respondent, Ms Armstrong invited the Tribunal to dismiss the claim on the basis that the evidence established that the dismissal was fair and reasonable in all the circumstances.

78. She submitted that the respondent's witnesses gave their evidence in a truthful manner and genuinely sought to assist the Tribunal. While the claimant's evidence was straightforward on the whole, there were various points where her evidence was disingenuous. It is particularly relevant, she said, that during the internal proceedings, the claimant accepted that she should not have worked the agency shifts, while in the Tribunal, the claimant maintained that this was not her view, and that the trade union had misrepresented her position. Ms Armstrong suggested that before the internal hearings her aim was to try to avoid dismissal, and therefore candour was needed, whereas before the Tribunal she decided that she would adopt a new and opposite position to show that the dismissal was unfair.

79. The Tribunal should therefore find that it cannot rely upon the evidence of the claimant, and prefer the evidence of the respondent's witnesses where there is any conflict.

80. Ms Armstrong submitted that the respondent gave a potentially fair reason for dismissal, namely conduct. She addressed this in detail on the basis that the ET1 suggested that the claimant did not accept that this was the

reason for dismissal, though the claimant's submissions appear to accept this.

81. Addressing whether the respondent had a genuine belief that the claimant had been guilty of gross misconduct, and reasonable grounds upon which to base that genuine belief, Ms Armstrong submitted that the claimant was dismissed on account of Mr Pearson's belief that she had worked shifts with the nursing agency and received pay in respect of those shifts, on days on which she was fit to work for the respondent, refusing to attend work at the respondent and receiving pay from the respondent.

82. Ms Armstrong pointed out that there are a number of instances in the internal proceedings where the claimant accepted that what she had done was wrong. At no stage when provided with the notes of the various hearings did the claimant object to their contents. The position which the respondent accepted was what was said at the time, she said, not what was said by the claimant to the Tribunal.

83. Mr Pearson concluded that the claimant deliberately chose not to disclose to the respondent that she intended to work, or had worked, shifts for the agency because she wanted to receive payment from both the agency and the respondent. It is not simply the fact that she worked the shifts which led to the decision to dismiss, but doing so in the knowledge that the respondent would take issue with her doing so. The two aspects to his decision are therefore that she worked shifts on days on which she ought to have been working for the respondent, and deliberately chose not to tell the respondent that she was going to work or had worked the agency shifts and accepted pay from both employers.

84. The two elements of the decision are clear in the allegation set out in the investigation report, the letters inviting her to the disciplinary hearing and the decision letter.

85. Ms Armstrong then went on to address the different aspects of the decision. She submitted that it is clear that the claimant worked for another employer on days when she ought to have been working for the respondent. If she

had not been refusing to attend a return to work meeting with her manager, she would have been physically present in the workplace on the days in question, and therefore ought to have been reporting for work on those days.

86. She argued that the absence of a specific provision in the contract of employment which would prevent her working elsewhere was not necessary. She worked elsewhere when she should have been at work, and it was reasonable of the respondent to insist that she met with her line manager, which she was refusing to do.

87. With regard to the claimant's assertion that since she was in ongoing discussions with her employer about her return to work, she was not under any obligation to be at work, Ms Armstrong accepted that the parties had reached an impasse. However, that did not allow the claimant to go and work elsewhere. The issue which prevented her meeting with her line manager was not the direct action of the manager towards her but the terms of the OH referral about which she found out in January 2018, notwithstanding that the respondent had sent her a copy of that referral previously. The fact that she could not open it is not, she said, the respondent's fault.

88. She submitted that the claimant was in fact obstructing or delaying her return to work, until the incident occurred in the care home which led to action being taken against her by the NMC. It was in any event reasonable for the respondent to insist that she met with her line manager to discuss her return to work arrangements.

89. When she worked the shifts, the claimant was, said Ms Armstrong, in receipt of half pay from the respondent. Her full pay was subsequently reinstated following the submission of a fit note, and backdated. She suggested in evidence that she had told Ms Willis that she was working the agency shifts, but this does not emerge from the evidence in the internal proceedings. This was not therefore information available to the respondent when they made their decisions.

90. Mr Pearson knew that the claimant had contacted ACAS in advance of working the shifts, that she was in receipt of half pay when she worked the shifts, that she did not ask the respondent if she could work the shifts and she did not tell the respondent that she had worked them after having done so.

91. She submitted, therefore, that the respondent genuinely and reasonably believed that the claimant was guilty of gross misconduct.

92. Ms Armstrong then argued that the respondent conducted a reasonable investigation. An independent investigator was appointed, and she carried out an extensive investigation, meeting with the claimant and 5 witnesses, producing a detailed investigation report and making recommendations thereon. The hearings were conducted by independent managers.

93. Ms Armstrong accepted that the allegation which led to her dismissal did not use the word “dishonesty”, but argued that its terms were quite clear, including the note appended to the allegation. The allegation made reference to “fraud”. Neither the claimant nor her representative raised any concerns at any stage about the clarity of the allegations. Once the claimant had received the investigation report, the onus was upon her and her representative to present evidence in her own defence.

94. She also made submissions about the appeal, and argued that Mr Williamson had conducted the appeal correctly, particularly in light of the terms of the grounds of appeal.

95. Ms Armstrong then submitted that if the Tribunal were to find that the claimant had been unfairly dismissed, reductions to compensation should be made by reason of Polkey and contributory conduct.

96. For the claimant, Ms Salt invited the Tribunal to find that the claimant and Ms Drysdale were credible and reliable witnesses, and where their evidence came in conflict with that of the respondent’s witnesses, the claimant’s evidence should be preferred.

97. Ms Salt accepted that the reason for dismissal was a potentially fair reason under section 98(2) of the Employment Rights Act 1996 (ERA), namely conduct.

98. She then submitted that the respondent's belief in the claimant's misconduct was not based on reasonable grounds.

99. The dismissing officer admitted, she said, that he did not know what "reporting for duty" meant in the claimant's circumstances, nor could explain why the claimant was described as being fit for duty as well as receiving sick pay, a contradiction. There was no evidence that the claimant was requested to report for duty on the relevant days. The respondent agreed that she could not work until her phased return was agreed. She was not required to return to work until 20 March, but no disciplinary action was taken against her in respect of any failure to report for duty between 6 February and 20 March.

100. Ms Salt submitted that the respondent failed to take into account the circumstances which led to the claimant's understanding of her ability to work for other organisations, and in particular, that she was not required to carry out any duties for the respondent and was instructed not to do so by the respondent at the time; that she was in receipt of half pay; that she received advice from ACAS in this regard, and that she had worked as a bank nurse previously during summer holidays. There is no legal basis for the respondent's assertion that the claimant was guilty of misconduct.

101. She submitted that if the respondent's argument were that the claimant was dismissed because she misled them paying her sick pay while she was working for another organisation, that would not mean that dismissal should be the inevitable conclusion as there may be mitigating circumstances which mean dismissal is not reasonable.

102. Ms Salt argued that the respondent did not consider any mitigating factors in their decision making process. The claimant never misled the respondent as to her fitness to work, but the respondent insisted on continuing to pay her sick pay. She also submitted that the claimant was

under the stress of "patently false allegation" that she was under the influence of alcohol on 27 April 2018, and Mr Pearson ignored the claimant's evidence in the form of the letter from the pharmacy in his explanation for why he did not uphold the first allegation.

103. In any event, she submitted, the allegation on which the claimant was dismissed was not that she was in receipt of sick pay while working for another organisation or that she was receiving two salaries but that she "worked as a bank nurse on days when [she] should have been reporting for duty at the college", which is an entirely different allegation.

104. While Mr Pearson said that one of the reasons for dismissal was Mr Gray's admission of wrongdoing, he did not mention this in the letter of dismissal.

105. The claimant was dismissed because of assumptions of dishonesty which were never put to the claimant, she said.

106. Ms Salt then submitted that the respondent did not carry out a reasonable investigation. No attempt was made to investigate the effect of the correspondence between the claimant, HR and her management in the period 8 February to 14 March. They failed to investigate whether the claimant was required to work on the relevant dates. No investigation was carried out in relation to the claimant's health condition, nor into the role played by Ms Dempsey, and the contradictions of her evidence. Mr Pearson made the assertion of guilt of the claimant without verifying the basis for that assertion – for example, he suspected that she had not contacted ACAS for advice, but never investigated whether or not she had.

107. The respondent, she argued, failed to follow a fair procedure. There was a failure to comply with the ACAS Code of Practice, and in particular because of failing to carry out the investigations necessary to establish the facts of the case, failing to inform the claimant of the basis of the problem (and in particular the fact that Mr Pearson did not believe her, which was never put to her), and that allegation 3 was different in the course of the proceedings. In this last regard, the Note added to the allegation, she said,

significantly altered the meaning of the allegation and confused what the allegation actually was. There was a failure to frame the allegation in a precise manner, which affected the way in which the claimant responded to the allegation.

108. Mr Williamson requested a timeline after the appeal hearing, and took account of this notwithstanding that the claimant was never given the opportunity to consider its terms or challenge its accuracy.

109. Ms Salt then submitted that the outcome was predetermined, as it was not made on the basis of the available evidence.

110. She argued that the sanction of dismissal fell outwith the band of reasonable responses open to a reasonable employer in the circumstances.

111. The claimant's claim should succeed, and there should be no reduction in her compensation.

The Relevant Law

112. In an unfair dismissal case, where the reason for dismissal is said to be conduct, it is necessary for the Tribunal to have regard to the statutory provisions of section 98 of ERA. The Tribunal considered the requirements of section 98(1) of the Employment Rights Act 1996 ("ERA"), which sets out the need to establish the reason for the dismissal; section 98(2) of ERA, which sets out the potentially fair reasons for dismissal; and section 98(4) of ERA, which sets out the general test of fairness as expressed as follows:

> "Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –
>
> > (a) depends on whether in the circumstances (including the size and administrative resources of the employers undertaking), the employer acted reasonably or unreasonably

in treating it as a sufficient reason for dismissing the employee and

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

113. Further, in determining the issues before it the Tribunal had regard to, in particular, the cases of **British Home Stores Ltd v Burchell [1978] IRLR 379** and **Iceland Frozen Foods v Jones [1982] IRLR 439**, to which we were referred by the solicitors in submission. These well known cases set out the tests to be applied by Tribunals in considering cases of alleged misconduct.

114. **Burchell** reminds Tribunals that they should approach the requirements of section 98(4) by considering whether there was evidence before it about three distinct matters. Firstly was it established, as a fact, that the employer had a belief in the claimant's conduct? Secondly, was it established that the employer had in its mind reasonable grounds upon which to sustain that belief? Finally, that at the stage at which that belief was formed on those grounds, was it established that the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

115. The case of **Quadrant Catering Ltd v Ms B Smith UKEAT/0362/10/RN** reminds us that it is for the employer to satisfy the Tribunal as to the potentially fair reason for dismissal, and he does that by satisfying the Tribunal that he has a genuine belief in the misconduct alleged. Peter Clark J goes on to state that "the further questions as to whether he had reasonable grounds for that belief based on a reasonable investigation, going to the fairness question under section 98(4) of the Employment Rights Act 1996, are to be answered by the Tribunal in circumstances where there is no burden of proof placed on either party."

116. The Tribunal reminded itself, therefore, that in establishing whether the Respondents had reasonable grounds for their genuine belief, following a reasonable investigation, the burden of proof is neutral.

117. Reference having been made to the **Iceland Frozen Foods Ltd** decision, it is appropriate to refer to the well-known passage from that case in the judgment of Browne-Wilkinson J:

> *'Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by S.57(3) of the 1978 Act is as follows:*
>
> *(1) the starting point should always be the words of S.57(3) themselves;*
>
> *(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;*
>
> *(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
>
> *(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*
>
> *(5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'*

118. Parties referred to authorities which the Tribunal also took into account.

Discussion and Decision

119. The issues in this case are as follows:

1. **What was the reason for dismissal?**
2. **Did the respondent have a genuine belief in the claimant's guilt?**
3. **Did the respondent base that belief on reasonable grounds?**
4. **Did the respondent conduct a reasonable investigation, and follow a fair procedure?**
5. **Was dismissal within the range of reasonable responses open to a reasonable employer?**
6. **If the claimant was unfairly dismissed, what compensation should be awarded?**
7. **Should any award be reduced?**

120. It is appropriate to address these issues in turn.

What was the reason for dismissal?

121. In this case, it was accepted before this Tribunal that the reason for dismissal was a potentially fair reason under section 98(2) of ERA, namely conduct.

122. The precise wording of that misconduct was the subject of some debate between the parties. However, the letter of dismissal by Mr Pearson (391ff) sets out the basis upon which he took his decision. Essentially, he upheld allegation 3, which had up till then been designed as Allegation 4, as follows:

"Allegation 4 – That you worked as a bank nurse on a day that you should have been reporting for duty at the college.

Note: Elaine committed gross misconduct by committing fraud by working elsewhere for money while knowing that she was still in receipt of sick pay

from the College (and, in addition, while being fit to return to work for the College).”

123. I deal with the decision and its reasonableness below but it is my judgment that there is no doubt that the reason for dismissal was one related to conduct of the claimant.

Did the respondent have a genuine belief in the claimant’s guilt?

124. In my judgment, the respondent did have a genuine belief in the claimant’s guilt. The claimant did not deny that she worked the shifts under consideration on the days when she worked them, while still employed by the respondent. The greater part of the discussions, and indeed Mr Pearson’s decision, concentrated not on whether she had committed an act of gross misconduct, but on whether she was aware that what she was doing amounted to misconduct at all, at the time. Again, this will be dealt with below.

Did the respondent base that belief on reasonable grounds?

125. It seems to me that both the claimant and respondent have focused a great deal on the claimant’s state of knowledge and understanding of the quality of the act for which she was found to have been guilty of gross misconduct. What the Tribunal requires to do, firstly, is establish what the act of misconduct actually was.

126. The letter of dismissal confirms that the claimant worked five agency shifts, on 27 and 28 February and 1, 6 and 9 March 2018. She did so at a point when she was employed by the respondent. These statements are not in dispute between the parties.

127. The conflict on this matter may be summarised as follows:

1. The claimant argues that she was not required to “report for duty” on the days in question;

2. The claimant argues that she did not have to attend for work because the respondent had instructed her not to do so;

3. The claimant argues that she acted entirely reasonably and understandably by not attending work, and was supported in her reasoning by OH and her trade union representative, and by the actions of the respondent;

4. The claimant argues (now) that she was not doing anything wrong in working these shifts, because of her need for remuneration at a time when she was on half pay;

5. The claimant argues that the respondent's position is contradictory – on the one hand, saying that she was fit for work, and on the other, paying her sick pay; and

6. The respondent argues that the claimant displayed a pattern of non-disclosure of information to the respondent where she understood that that would disadvantage her, thus demonstrating that she knew that she was in the wrong and deliberately withheld the information.

128. The claimant argues that she was not required to report for duty on the days in question, and therefore that the allegation, that she worked as a bank nurse on days when she was required to report for duty for the respondent, has not been proved.

129. In my judgment, this is an entirely disingenuous argument. The claimant did not (and nor did her trade union representative) take issue with the wording of the allegation at the time. The drafting of disciplinary allegations must be understood to be the work of lay people, and not of parliamentary draftsmen or the framers of very precise criminal charges. They must be viewed by a standard of reasonableness in the context that this is an employer seeking to convey to its employee the behaviour which it is concerned about.

130. As a result, it is my judgment that the claimant well understood that she was being criticised for having worked for another organisation while on sick leave from the respondent, and being in receipt of sick pay (albeit reduced) from them at the time.

131. It is right, in my judgment, to interpret the allegation as referring to her having worked for another organisation when her primary obligation was to attend work for her employer, the respondent.

132. Her argument that the respondent had specifically not required her to report for duty is also not entirely accurate. The respondent was confronted with an unusual situation in which the claimant was declared by her medical practitioner to be fit for work on 5 February 2018. The respondent agreed with OH that she should be accommodated at this time by way of a phased return to work (158).

133. On 12 February 2018, having been notified of the claimant's fitness to return to work, Ms Dempsey wrote to her by email (113/4) in which she confirmed:

"At this time your return to work is supported with immediate effect however, initially we would want to be sure that your exposure to students is limited until we can find a way to work through the issues and behaviour you have displaced and I would be content for Rachel to provide you with meaningful work around supporting the curriculum development."

134. To suggest that this amounts to an instruction or signal that the claimant should not attend work is, in my judgment, incorrect. The claimant was being told at that point (which, notably, was some two weeks before she worked the first of the contentious agency shifts) that her return to work would be supported, but on certain conditions, and that her direct exposure to students would not be permitted immediately. I interpret this as a reasonable attempt to resolve issues outstanding since her absence on sick leave, and a desire on the part of the respondent to ensure that, for the benefit of the claimant as well as the staff and students, no concerns remained before she resumed her full duties. It is plain that she was expected to return to some form of duty, albeit not immediately her full contractual duties. This amounts to a phased return to work.

135. I do not therefore accept that the claimant was not expected at all to be at work.

136. It is true, in my judgment, that the claimant had some difficulties with returning to work, and the delays were essentially caused by her misgivings about working with her line manager, Rachel McFadden, after she discovered that Ms McFadden had suggested to OH that she had been under the influence of alcohol or another substance. The respondent, it is also true, did not take any action against the claimant in respect of her non-attendance at work.

137. However, it is quite plain that the intention of the respondent, expressed in that email of 12 February, was that the claimant would be returning to work, and that all the discussions and correspondence which followed were designed with that end in mind. While the claimant was not penalised for not having returned to work, it is not reasonable to conclude that she was therefore somehow entirely at liberty to act as she wished.

138. It appears to me that this whole issue arises out of the claimant's wish to show that the wording of the allegation, and its reference to her obligation to report for duty, raised by the claimant before the Tribunal in order to demonstrate the unfairness of the dismissal. The claimant and her representative did not raise any such issue before the disciplinary hearing or appeal hearing, and therefore in my judgment it is correct to find that she understood the nature of the allegation against her. A reasonable interpretation of the wording of the allegation (allied to the note which was appended to it) was that she was accused of working agency shifts when she was still employed to work for the respondent, and by earning payment in respect of the shifts as well as her contractual sick pay, was guilty of dishonesty.

139. The claimant argues that she was not doing anything wrong by working the shifts at the time, and that she did not know that she was doing anything wrong by doing so.

140. She says that she took advice from ACAS prior to working the shifts, to the effect that they said that it was legitimate for her to work them while employed by the respondent. The claimant's evidence on this point

stretched credibility. ACAS is a well-established organisation which provides, to the knowledge of the Tribunal, general advice to employee and employers, but does so in a responsible manner. It is very difficult to accept that the claimant was told, in simple terms, that it was legitimate for her to work for an agency while off sick and receiving sick pay from the respondent. The claimant was guarded in her evidence about this, and accordingly very little was said about what specific question was put to ACAS. For example, the claimant seems to have suggested in her evidence before the Tribunal, but not to the respondent, that Ms Willis knew that she was working agency shifts during this period. It may be that she told ACAS this, which would cast their advice, if given at all, in an entirely different light. As a result, the advice from ACAS, being unknown, does not allow the Tribunal to take matters further, and if based on disingenuous or false information, cannot be regarded as justification for her actions.

141. As to the respondent's knowledge, it is clear that they were aware that when her work commitments permitted, such as during the student summer vacation, she would be allowed to work agency shifts at times when she was not otherwise required by the respondent, such as at weekends, but that is not what happened in relation to these shifts.

142. It is notable that the claimant sought advice before doing the shifts; and that she did not seek the advice, or permission, or HR, her line manager or even her trade union representative. She was unable to explain in evidence why that was. If she genuinely thought she was doing nothing wrong, there would be no reason for her not be candid about her working plans, but in my judgment it is simply not believable that the claimant did not know that working these shifts would be considered by her employer to be unacceptable.

143. The respondent's position was unusual in this case. They recognised that she was fit for work, but that she required to continue to be paid despite not having attended. However, in my judgment, the respondent was seeking to make arrangements for a phased return to work for the claimant, and continued to pay her in order to encourage her to

engage with those discussions. I do not therefore conclude that the respondent's position was contradictory, but in any event, it does not justify the claimant acting as if she were at liberty to go and work elsewhere during that time.

144. The final area of dispute is the respondent's view of the claimant's pattern of behaviour in not disclosing information to them which she knew would be to her disadvantage.

145. The reason for dismissal was set out in the conclusion of the letter by Mr Pearson on 23 August 2018 (395) and it is worth repeating what was said there:

"I believe that your conduct, as referred to in allegation 3, justifies your dismissal. While I recognise your length of service and your clean disciplinary record, I do not trust you on account of your behaviour in relation to that matter and no sanction other than dismissal is appropriate.

Separately, the evidence gathered during the investigation shows a pattern of withholding information which, taken together, demonstrates that the College cannot rely upon you to be honest. That alone would also justify dismissal. While it is your guilt of allegation 3 alone which causes me to dismiss, this further conclusion regarding your dishonesty bolsters my view that dismissal is appropriate."

146. It is clear that Mr Pearson took into account the claimant's "pattern of withholding information" in reaching the conclusion that the claimant could not be relied upon to be honest, which alone would justify dismissal. The language is rather ambiguous – he stated that the guilt in allegation 3 is what caused him to dismiss, but his view on dismissal was bolstered by his view of her dishonesty – but it is clear, in my judgment, that he took this matter into account in deciding to dismiss her.

147. It is necessary, therefore, to consider what Mr Pearson considered amounted to a pattern of withholding information.

148. Under the first allegation, Mr Pearson found that the claimant deliberately chose not to disclose her alcoholism and subsequent treatment until the investigation meeting of 25 May. He went on to find, however, that "I am content that your failure to disclose your alcoholism was understandable and something which does not warrant disciplinary action." He then said that it was still relevant to allegation 3, as showing her to be a person who is unlikely to volunteer relevant information.

149. It is plain that Mr Pearson did not consider the fact that the claimant did not disclose her alcoholism or subsequent treatment to amount to an act of misconduct. He said so in terms in this letter. It was not, therefore, blameworthy conduct on the part of the claimant not to have disclosed this matter to her employer.

150. With regard to the second allegation, Mr Pearson accepted that there was insufficient evidence of gross misconduct, in relation to the claimant's alleged failure to have disclosed the fact that she was the subject of NMC discipline to her employer. He stated that "you did not commit misconduct by failing to report the matter in March 2018". He went on to find that it was a considered decision by the claimant, and that it was a "further demonstration of a reluctance by you to volunteer information to the College which might be relevant".

151. In my judgment, Mr Pearson has taken into account what he considered to be failures to disclose information to the respondent, even though he has made clear findings that in relation to both the first and second allegations there was no obligation upon her to make such disclosures. As a result, he has sought to add weight to his decision on the third allegation by linking the claimant's failure to disclose information to the respondent to her failures under the first two allegations.

152. While Mr Pearson has sought to be clear about the fact that he was dismissing the claimant because of finding her guilty of allegation 3, he has, in my judgment, tainted that finding by suggesting that there was a pattern of behaviour which would have justified dismissal. It is not at all apparent

why he did this. It was not, in my judgment, fair or legitimate for Mr Pearson to have taken into account her reluctance to disclose matters which she had, according to his own findings, no obligation to disclose, as if that somehow suggested that they were really acts of misconduct despite his finding that they were not.

153. It is my conclusion that Mr Pearson was seeking to bolster his decision by taking into account alleged failures to disclose which were not, in fact, failures, nor amounted to acts of misconduct at all, and by doing so, took into account matters which were not legitimate nor relevant in reaching his decision to dismiss. He did not have reasonable grounds, in my judgment, for reaching the conclusion that there was a "pattern of withholding information" which could cast doubt upon her honesty. His findings under allegation 3, which in my judgment were justified, do cast doubt upon the claimant's honesty. Mr Pearson did not have reasonable grounds upon which to find that there was a pattern of withholding information, in the sense that withholding that information amounted to misconduct or somehow blameworthy conduct, and therefore he took into account matters which he should not have in reaching his decision to dismiss.

154. In my judgment, therefore, Mr Pearson had reasonable grounds upon which to conclude that the claimant was guilty of gross misconduct under allegation 3, but not by taking into account what he called a pattern of withholding information which the claimant, on his own findings, was justified in withholding.

155. In essence, if Mr Pearson's conclusion had comprised only the first paragraph, and had not gone on to make reference to the pattern of withholding information, there would have been no difficulty in concluding that the respondent had reasonable grounds upon which to make its findings. Adding the second paragraph, which exposed his thinking about the claimant's honesty for reasons which were not justified, undermines his conclusion in the first paragraph, at least to some extent.

156. The question then is whether that failure undermines the fairness of the dismissal as a whole. In my judgment, it must. It is not fair for an employer to take into account matters which are not relevant in reaching its conclusions on the facts, as Mr Pearson did in this case. Accordingly, I am bound to conclude that the claimant's dismissal was unfair on this basis.

Did the respondent conduct a reasonable investigation, and follow a fair procedure?

157. It is appropriate, however, to consider whether the respondent conducted a reasonable investigation, and followed a fair process in reaching the decision to dismiss.

158. In my judgment, they did. The investigation was comprehensive and careful, and led to findings which came down, on allegations 1 and 2, on the claimant's side, as well as to the earlier disposal of other allegations. It was carried out by an independent manager who maintained an open mind throughout. The claimant was given the opportunity to defend herself against the allegations throughout, and took that opportunity.

159. The claimant complained that the allegations were not clear, and that she did not understand them. I dismiss this complaint. The allegations were clear, and she never stated at any stage in the disciplinary process that she did not understand the basis of the allegations against her. In my judgment, the allegations were clear, and in particular the allegation upon which the decision to dismiss was fundamentally taken was perfectly clear to the claimant in advance of the disciplinary hearing.

Was dismissal within the range of reasonable responses open to a reasonable employer?

If the claimant was unfairly dismissed, what compensation should be awarded?

Should any award be reduced?

160. Having concluded that the dismissal was unfair, I must now consider remedy. In doing so, however, it is appropriate for me to address the question of whether or not any reduction in the claimant's compensation is appropriate.

161. I have found that the claimant's dismissal was unfair because the respondent took into account irrelevant matters in reaching the decision to dismiss her. It is necessary both to consider whether the decision to dismiss is capable of falling within the band of reasonable responses open to a reasonable employer, and then whether the claimant, by her own blameworthy conduct, contributed to her dismissal.

162. In my judgment, the claimant's conduct, as found by the respondent, under allegation 3 amounted to gross misconduct justifying summary dismissal. It was an act of misconduct in the form of dishonesty, and the claimant's explanations for her actions were quite inadequate in the circumstances. The claimant is plainly an intelligent person who is quite capable of seeking advice and assistance when she needs it, from the appropriate source, and in particular from her trade union representatives. In my judgment the respondent was entirely justified in dismissing her argument that she had taken advice from ACAS which allowed her to believe that she could take paid work elsewhere while receiving pay from the respondent, and to view such an explanation with scepticism when she made no effort to seek advice from the respondent or her trade union.

163. I accept that both the claimant and her trade union representative plainly accepted that she was wrong to have done this, during the internal proceedings. I was unimpressed by the claimant's apparent volte-face on this before the Tribunal. She now seeks to argue that neither she nor her representative accepted that she had done wrong; and further, that she did not do wrong. In my judgment, she plainly acted dishonestly and must face the consequences of having done so.

164. An employer faced with a senior employee who has a clean disciplinary record must take into consideration that record and her length of

experience. In this case, Mr Pearson did so, and was, in my judgment, justified in concluding that he could no longer trust the claimant as a result of her own actions under allegation 3.

165. In the event that the only finding against the claimant were that she had been guilty of allegation 3, that would fall firmly within the band of reasonable responses open to a reasonable employer in these circumstances.

166. The question then is whether or not there should be any reduction in the claimant's basic and compensatory awards.

167. With regard to the basic award, the Tribunal must refer to section 122(2) of ERA, which provides that *"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."*

168. With regard to the compensatory award, the Tribunal must refer to section 123(6) of ERA, which provides: *"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."*

169. In my judgment, the claimant was guilty of culpable and blameworthy conduct prior to dismissal, which caused that dismissal, by working for another agency and receiving payment from that agency while receiving pay from the respondent, without the permission of the respondent to do so. In doing so, she acted dishonestly, and I am not persuaded that she was justified in doing so by any advice received from ACAS, for the reasons set out above.

170. I am persuaded that had the respondent not undermined and obfuscated the conclusions reached by adding the paragraph in which it

was, in my view unfairly, found that the claimant had exhibited a pattern of withholding information, they would have been entirely justified in dismissing the claimant for gross misconduct on the basis of their findings under allegation 3. Had they done so, the dismissal would have been entirely fair.

171. Accordingly, I am bound to conclude that any basic award or compensatory award to the claimant should be, according to justice and equity, reduced to nil, on the basis that she has contributed to her own dismissal by 100%. I appreciate that this is a rare finding by Employment Tribunals, but in this case it is abundantly clear that the respondent would have been justified in reaching the conclusion that she should be dismissed on the basis of their reasonable findings under allegation 3, and therefore her own actions have brought her to this point. I cannot consider it to be just and equitable, in these circumstances, to make any award to the claimant as it should be reduced by 100% to nil.

172. The claimant's claim therefore succeeds, in that the Tribunal finds that her dismissal was unfair, but no award is made to her.

Date of Judgement: 5th August 2019

Employment Judge: Murdo MacLeod

Entered In Register: 6th August 2019

And Copied to Parties