EMPLOYMENT TRIBUNALS

Claimant: Mrs J Marshall

Respondent: GR and MM Blackledge PLC

Heard at: Manchester **On:** 12 and 13 June 2019

Before: Employment Judge Batten
(sitting alone)

REPRESENTATION:

Claimant: Ms C Fowler, Solicitor
Respondent: Mr A Moore, Solicitor

JUDGMENT

The judgment of the Tribunal is:

1. The claimant's claim of unfair dismissal is well-founded and succeeds;

2. The claimant's claim of wrongful dismissal, for notice pay, succeeds;

3. The case shall proceed to a remedy hearing.

REASONS

1. This Judgment is reserved and given with reasons because the evidence of the parties and submissions were completed only at the very end of the second hearing day. Accordingly, there was insufficient time for the Tribunal to deliberate and reach a decision at the end of the hearing day.

The claims

2. The claimant claimed unfair dismissal and wrongful dismissal, in relation to notice pay, arising from her dismissal by the respondent with effect from 1 May 2018.

The hearing

3. The hearing took place over two days, on 12 and 13 June 2019. The Tribunal was provided with an agreed bundle of documents compiled by the parties. References in this Judgment to page numbers are references to the contents of the agreed bundle of documents.

4. The Tribunal was also provided with witness statements from the claimant and for the respondent from Ms Margaret Sorrell, Retail Sales Controller, and from Mr Roy McFarlane, a Director. The witnesses' written witness statements formed their evidence in-chief and each witness was subject to cross examination.

5. At the start of the hearing, the Tribunal questioned a redacted document in the bundle at page 429, which also appeared at page 158 in a less redacted form. This was a disclosure document from the respondent. The respondent subsequently produced the document, unredacted, during the first hearing day and it was inspected by the claimant's representative who confirmed they took no issue with the redactions made.

Issues

6. The parties' representatives had cooperated to draw up a joint draft statement of issues. This was discussed with the Employment Judge at the beginning of the hearing. The issues which the parties and the Tribunal have identified as being relevant to the claims are as follows:

Unfair Dismissal

(1) Was the potentially fair reason for dismissal relied upon by the respondent, i.e. the claimant's conduct, the reason for her dismissal?

(2) If so, in the circumstances (including the size and administrative resources of the respondent) did the respondent act reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing her, taking into account equity and the substantial merits of the case?

(3) In particular, did the respondent carry out a reasonable investigation into the allegations against the claimant before reaching the decision to dismiss?

(4) On the basis of that investigation, was the decision to dismiss within the band of reasonable responses open to the respondent?

(5) If the claimant was unfairly dismissed, to what compensation is she entitled?

(6) If the claimant was unfairly dismissed because the procedure followed by the respondent was inadequate, would following an adequate procedure have led to the same outcome?

(7) If so, should the claimant's compensation be reduced?

(8) If the claimant was unfairly dismissed, was there any element of contributory fault, and if so, should her compensation be reduced?

(9) If so, has the claimant done enough to mitigate her loss, and how much compensation is she entitled to?

Wrongful Dismissal

(10) Was the respondent entitled to dismiss the claimant without notice or pay in lieu of notice because by her conduct she was in fundamental breach of her contract of employment?

(11) If not, was the claimant entitled to the statutory minimum notice for an employee with her length of service of 12 weeks' notice?

Findings of fact

7. The Tribunal made its findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on a balance of probabilities. The Tribunal took into account its assessment of the credibility of witnesses and the consistency of evidence with surrounding facts.

8. The Tribunal's findings of fact relevant to the issues which it has to determined are as follows.

9. The claimant commenced employment with the respondent on 1 June 1995. She worked as a Branch Manager for five years and then as an Area Manager for 18 years, working an average of 48 hours per week in charge of a large geographical area and 17 of the respondent's stores. This meant that the claimant's job involved significant travelling, staying away from home overnight, and the management of staff.

10. The respondent is a retail group that specialises in beauty products and trades as "Bodycare". The majority of the respondent's staff are part-time shop assistants who had very few direct dealings with the claimant. The claimant's line manager was Alveen McCarney who was the respondent's Regional Manager. The claimant was one of 4 Area Managers at the respondent. The claimant's management of staff primarily involved contact with store managers.

11. The claimant had a contract of employment which appears in the bundle at page 36. In the course of her work as an Area Manager, the claimant attended 'Managing Investigations Training', provided by the respondent's solicitors.

12. The claimant's employment was also subject to an Employee Handbook. The claimant's contract of employment confirms that the Employee Handbook forms part of the contract of employment. In the Employee Handbook there

are policies about workplace harassment and grievances and a disciplinary procedure.

13. The 'Workplace Harassment Policy' appears in the bundle at page 121 and states that "*all employees of this Company have the right to be treated with dignity"* and that "*all employees are required to behave in a way that does not cause offence to others*". In addition, "*employees are assured that they will not be victimised for bringing a complaint*" and that "*any person who is found to have victimised or retaliated against another for complaining, supporting an employee or giving evidence about harassment, will be subject to disciplinary action"*. In addition, the policy provides that anyone found to have acted in breach of the workplace harassment policy will be dealt with under the company's disciplinary procedure.

14. The respondent's Disciplinary Policy appears in the bundle at page 137. Its stated aim is "… *to ensure consistent and fair treatment for all employees"*, and the "*procedure is designed to help and encourage all employees to achieve and maintain satisfactory standards of conduct, attendance and job performance* …". At page 138 of the bundle it states that "*It is important to investigate any disciplinary offence. No formal disciplinary action will be taken until the matter has been fully investigated*." The policy further says that "*facts should be established promptly before memories fade, including taking statements from available witnesses"*. In addition, at the disciplinary hearing stage, *the employee should be given the right to put their version of events* …" prior to any decision being taken. Within section 3.5, headed "Dismissal", a list of gross misconduct is set out, which includes "*harassment or bullying of other employees for any reason*".

15. The claimant was one of the respondent's most effective Area Managers, and the respondent's witnesses confirmed on several occasions in evidence that the respondent had no issues with the claimant's performance of her role and the stores which she oversaw. In addition, the claimant had a clean disciplinary record.

16. In 2015, the claimant re-employed a member of staff who had previously left the respondent during a disciplinary process. The claimant's Regional Manager did not agree with the appointment. Regrettably, it eventually came to light that this member of staff stole money from the respondent's Wakefield store and the police were involved. The claimant was devastated and felt responsible for the losses because it had been her decision to re-appoint the individual in question, albeit that the appointment had been sanctioned by the Retail Sales Controller, Ms Sorrell. From this time onwards, the claimant considered that her relationship with her Regional Manager began to deteriorate, and the claimant began to feel stressed. The claimant visited her GP and received counselling.

17. In 2017, HMRC investigated the respondent over possible breaches of the National Minimum Wage regulations and the claimant's Regional Manager suggested that the problem had come from the claimant's area. The claimant was upset at this suggestion and felt that she had done something wrong and had somehow let the business down. At one point, the Regional Manager told

the claimant that the owners of the business had declared that they would not be paying HMRC. This led the claimant to believe that the respondent might close down and that everyone could lose their jobs. The thought of closure of the business began to prey on the claimant's mind. Gradually, over time, the claimant came to believe that her relationship with her Regional Manager, which had previously been good for a number of years, was deteriorating and the claimant began to lose confidence.

18. In addition, from 2016 onwards, the claimant's workload had begun to increase as more tasks were placed onto her and the other Area Managers. Eventually the claimant disclosed to the respondent's HR Manager, Sarah Blackledge, that she was feeling overwhelmed with her workload and was getting behind with risk assessments and other matters. The claimant also disclosed that she was concerned about her relationship with her Regional Manager. In response, Ms Blackledge suggested that the 3 of them should meet to talk things over in the form of a welfare meeting. Initially the claimant declined but later called her Regional Manager about Ms Blackledge's suggestion, and the Regional Manager agreed that they should meet.

19. On 28 February 2018, the claimant met with Ms Blackledge and her Regional Manager, Alveen McCarney. In the course of the meeting the claimant described how the Regional Manager spoken to her recently, including using the words "fetch you into the real world" as one example. The claimant also pointed out that the Regional Manager had sent her up and down the country for work, and the Regional Manager commented "I broke you, didn't I". The claimant was shocked by this comment but thereafter formed the view that she was in fact "broken" by her workload and recent experiences. Ms Blackledge suggested that the respondent would look at the claimant's workload and potentially could remove 7 stores from the claimant's portfolio of 17 stores.

20. The claimant drove home from the meeting feeling physically unwell. She was so tense that, by the time she got home, she could not move her arm. On 2 March 2018, the claimant saw her GP who signed her off sick from work due to a frozen shoulder. The claimant's GP had also wanted to sign the claimant off with work related stress but the claimant asked her not to - the claimant believed that she would then be seen as a troublemaker by the respondent. The claimant was therefore signed off work, sick, for 4 weeks, to 29 March 2018.

21. Whilst the claimant was off sick, her Regional Manager and another Area Manager, Emma, visited the claimant's shops and had spoken to staff about the claimant. A number of staff then tendered grievances to the respondent about the claimant's behaviour. Those grievances are undated and anonymous and the detail of them is unclear, as dates of events and details are sparse.

22. On 23 March 2018 the doctor gave the claimant a further fit note for her frozen shoulder and also for 'work related stress'. The claimant telephoned Sarah Blackledge to let her know that she had a new fit note. In the course of this conversation, the claimant asked if she could be line-managed by Ms Sorrell,

rather than by Ms McCarney. In response, Ms Blackledge said that for such a change to be considered the claimant would need to put in a formal grievance against her Regional Manager and Ms Blackledge proceeded to tell the claimant that, while she had been off work, a number of grievances had been put in against the claimant. The claimant was devastated.

23. Ms Blackledge collated the grievances, which were handwritten, and typed them up, with minor amendments. She then compiled a summary of the complaints and allegations. The summary appears in the bundle at pages 161-164. It is entirely unclear when, where, or how the matters complained of took place, who had witnessed them or whether there was any corroboration. A number of bald assertions are made without any substantiation nor examples of how a particular matter is evidenced. Together with the summary are 12 grievances, all of which are anonymous, undated and unsigned. The grievance tendered by Emma Twis appears in an email dated 12 April 2018 in the bundle at page 158, and comprises examples of what she has been told by other staff, some of whom are named. The timescales and dates are not stated. One of them is signed by Rachel Dyer – bundle page 422. The individuals were identifiable to the claimant from the narrative of the grievances. They all worked in one store, the Leicester store, or had worked there as cover managers or, in one case, were related to one of the cover managers. The grievance numbered 12 says that it is from 7 people over 7 stores. However, what it in fact consists of is an edited version of the summary of complaints and allegations compiled by Ms Blackledge and is not a separate grievance.

24. Having compiled a summary of the grievances, Ms Blackledge made no effort to identify or interview the individuals who sought to complain about the claimant, she did not speak to any of the people named in the grievances nor to the 2 complainants, Emma Twis and Rachel Dyer, whose names were apparent.

25. On 19 April 2018, Sarah Blackledge invited the claimant to an investigation meeting to discuss the grievances that had been received. The claimant was sent copies of those grievances.

26. The claimant was, in her words, “completely gutted”. She was a long-serving and senior employee and no such problems had ever been raised or intimated by the respondent’s senior management. The claimant told Ms Blackledge that she could identify the authors from the content of the grievances. It was apparent that the events complained of had taken place over a number of years – one talks about when the individual (with over 20 years’ service) was 16 years old. None of the matters had been raised or addressed at the relevant times.

27. The claimant identified that the complaints were made as follows:

- Grievance 1 from Carny, the Assistant Manager at the Leicester store.

- Grievance 2 from Naomi who worked at the Derby store but who was the granddaughter of Judith, a store manager who covered the Leicester store.
- Grievance 3 from Harley, who worked in Leicester.
- Grievance 4 from the Leicester store team.
- Grievance 5 from Jayne, the supervisor in the Leicester store.
- Grievance 6 from a Leicester team member.
- Grievance 7 from Gaby in the Leicester store.
- Grievance 8 from Judith, the store manager at Burton who covered the Leicester store.
- Grievance 9 from Rachel who worked in the Leicester store.
- Grievance 10 from Emma, an Area Manager, who was reporting what she had been told by staff at the Leicester store.
- Grievance 11 from Barbara, who was a store manager in Scunthorpe but who had also covered the Leicester store.

28. On 23 April 2018, the claimant attended the respondent's Head Office for her investigation meeting with Sarah Blackledge. The claimant took a colleague with her and a notetaker was also present. The allegations were discussed individually and the investigation meeting ran over into the following day, 24 April 2018. Despite this, the claimant was not told of specific details and she was informed that her colleagues wished to remain anonymous.

29. The notes of the meeting appear in the bundle at pages 195-256. The beginning of the notes has a pre-printed section which was prepared before the meeting. At the end of the handwritten notes, there is a further printed section that was prepared before the meeting. The printed section at the beginning reads as a prompt to Ms Blackledge on what to say at the beginning of the meeting. The printed notes at the end of the meeting suggest that Ms Blackledge had already decided to refer the matter as a disciplinary matter. This was despite that Ms Blackledge had not checked-out the origin or substance of the grievances nor commenced an investigation. The printed notes at the end say:

"*The grievances that have been received are very serious and some of these people have been with the company a long time. They have expressed concerns previously but only in confidence and didn't want to make things official*."

The printed notes go on to say:

"*Unfortunately, too many people are saying the same thing in regards to how you speak to them. It is unprofessional and I believe that at times, it can come*

across as bullying, harassment and intimidation and it is unwarranted. It is as a result of this, that I am putting this through to disciplinary. *The allegations are very serious and as a company we have a duty of care to those employees that have had the courage to put their grievance in writin*g."

30. At the end of the investigation meeting, the claimant said that, whilst she had been off sick, she was aware that Ms McCarney and Emma (an Area Manager) had been into her stores. The claimant expressed a concern that they had been looking for people who had a problem with her and that she saw a link between the complaints.

31. At the end of the meeting the claimant was suspended on full pay.

32. On 25 April 2018, the claimant was invited to a disciplinary hearing to take place on Tuesday 1 May 2018 at the respondent's Head Office to discuss allegations of: -

"32.1 Intimidating, bullying and harassment towards you work colleagues which has been brought to our attention in a number of grievances;

32.2 Loss of trust and confidence due to your conduct."

33. The claimant was informed that Margaret Sorrell was appointed to conduct the disciplinary hearing. The letter went on to say that:

"*Please be aware that the above points may constitute gross misconduct under the employee handbook, and if the allegations are proven one outcome of your meeting could be dismissal without notice*."

34. On 27 April 2018, Ms Sorrell met with Alveen McCarney, the claimant's Regional Manager. Ms Sorrell was not accompanied to the meeting and she made a note of the discussion sometime after the meeting. Despite this, both Ms Sorrell and Ms McCarney later signed Ms Sorrell's note of the meeting, backdating their signatures and the notes to 27 April 2018.

35. Ms Sorrell described this meeting in her evidence as an investigation meeting, and that she was investigating Ms McCarney, although the notes do not read as such. The discussion focussed on the claimant. Within the meeting notes, it is apparent that Ms Sorrell asked a number of closed questions of Ms McCarney. In response, Ms McCarney painted a picture of there having been problems with the claimant for some time but without providing any dates, details or names of complainants. Ms McCarney asserted that she had, over time, been privy to people's frustrations with the claimant but that nobody had confided content and she had not encouraged anybody to write a grievance. Ms McCarney also suggested that the issues that people had now raised would have warranted investigation and, at the end of the meeting, Ms McCarney comments that she felt her reputation and what she has done in her job role with the claimant was in question.

36. On 1 May 2018 the claimant attended the disciplinary meeting with Ms Sorrell. She took a colleague with her as a companion and notes were taken by an employee of the respondent.

37. The meeting opened with Ms Sorrell announcing that "this disciplinary meeting is the outcome of your investigation which was conducted by Ms S Blackledge on 23 and 24 April 2018". That is a reference to the investigation meeting between the claimant and Ms Blackledge as no other investigation meeting was held with any other person by Ms Blackledge or by anybody else. The complainants were not interviewed and further details were not sought, except that Ms Blackledge did email Emma Twis on 9 April 2018 asking for the specific examples that she had talked about to Ms Blackledge. Ms Twis replied on 12 April 2018 giving examples of what she had been told. Ms Twis refers to the Leicester store alone. The contents of the email constitute hearsay and there are no dates given although certain employees are identified by name.

38. In the course of the disciplinary meeting, the claimant was told that grievances had been sent to HR during the claimant's sickness absence and that was when issues came to light with the claimant's conduct. The claimant asked why things had not been brought to her attention earlier and why she was not being given the chance to improve. In response, Ms Sorrell suggested that the requirement for the complainants to be anonymous meant that the respondent had been unable to progress matters. Ms Sorrell also suggested to the claimant that the complainants had only felt able to speak up because the claimant had been off work sick.

39. The claimant sought to answer the criticisms made of her as best she could with the limited detail and absence of dates or specifics. However, Ms Sorrell was not prepared to go through the grievances point by point and discuss them. She commented that this had been done during the meeting with Ms Blackledge, - Ms Sorrell specifically said she did "… not feel the need to recount over all those details again". Nevertheless, Ms Sorrell at one point told the claimant she was a formidable Area Manager and that she had done a good job.

40. When the meeting broke for lunch Ms Sorrell commented that she was not going to ask the claimant if there was anything she wanted to say or add before the lunch break. After lunch, Ms Sorrell did most of the talking, describing her view of the grievances that the respondent had received. Ms Sorrell then announced that because of "the magnitude and the number of grievances", she did not feel it would be appropriate for the complainants to work with the claimant again, "or you with them". Ms Sorrell also said that she believed that Alveen McCarney had tried to "get across situations about how you manage people" but Ms Sorrell had decided that the claimant had not been receptive. Then Ms Sorrell said that she felt she had no other option but to "let [the claimant] go" from the respondent. Ms Sorrell commented that she did not think any training course would necessarily change the claimant or that demotion would be an option because the claimant would still be managing people. The claimant was then asked if there was anything she would like to say and she stated her belief that Alveen had wanted her out of the business for some time.

41. On 8 May 2018, a letter was sent by the respondent to the claimant confirming her dismissal. The letter appears in the bundle at pages 321-322. Whilst the

letter was sent in Ms Sorrell's name, she did not write the letter, she had not checked the contents or signed it personally. The letter said that the claimant had been provided with "statements taken from staff detailing the precise nature of the allegations". The letter also said that the claimant "did not dispute the nature of the allegations in the main" but that given the evidence and the claimant's explanations the respondent had concluded that she did bully and harass staff under her supervision. Further, the letter said that the respondent had received complaints/grievances from employees who were apparently in 9 different locations, although in cross examination Ms Sorrell was unable to explain to which locations that referred or why that was different to the seven locations suggested in the grievance summary.

42. On 23 May 2018 the claimant wrote a letter of appeal to Mr Roy McFarlane, a Director of the respondent. The claimant raised 5 five points of appeal, including:

42.1 That there was evidence of collusion in some of the statements and that the wordings were similar;

42.2 That the statements related to aspects of her job where she had made employees aware that they were not maintaining expected company standards;

42.3 That the claimant was never made aware, directly or indirectly, of her alleged behaviour and was never given the opportunity to change her conduct - The claimant disputed that at any time in the past Alveen McCarney had tried to make her aware of issues;

42.4 That the claimant was not allowed to consider, agree or disagree with the allegations and was constantly reminded of the volume of complaints.;

42.5 That it was evident that the decision regarding the outcome of the hearing had been already made and that she was not given a full hearing or a full opportunity to defend herself.

43. The claimant's letter of appeal was accompanied by 3 pages of notes of evidence for the appeal and examples of supportive cards she had received from staff, together with a statement for her appeal which consists of a further three pages of tightly typed submissions. The claimant identified 5 employees with whom she thought she had good working relationships, and of whom she believed at least 3 would speak up for her if asked. The claimant also identified a further employee who had left the company recently but who would speak up for her.

44. On 4 June 2018, the claimant was invited to an appeal hearing, subsequently rescheduled to 3 July 2018, to be conducted by Roy McFarlane. The delay was due to Mr McFarlane's holiday.

45. On 3 July 2018, the claimant attended her appeal meeting at the respondent's Head Office. The appeal hearing was conducted by Mr McFarlane and a

notetaker was present. The claimant was unaccompanied. The claimant had asked if her sister could come for moral support, but as she was not a company employee or a trade union representative this request was refused by the respondent.

46. The claimant went through her points of appeal. At the end of the meeting Mr McFarlane said he had got a lot to think about and that he needed to speak to a lot of people and therefore it might take 2-3 weeks to make a decision.

47. Following the meeting, Mr McFarlane spoke to Barbara and Jayne, both store managers who had put in grievances. He said in evidence that he did not know who had made the complaints and that he made no notes of his conversations. The claimant was not informed that Mr McFarlane had made such enquiries. However, he did not speak to any of the individuals that the claimant identified as people who could speak up for her.

48. On 19 July 2018 Mr McFarlane wrote to the claimant rejecting her appeal. He dealt with her points of appeal briefly in turn and without going into any detail.

The applicable law

49. A concise statement of the application law is as follows:

Unfair dismissal

50. Section 98 of the Employment Rights Act 1996 sets out a two-stage test to determine whether an employee has been unfairly dismissed. First, the employer must show the reason for dismissal or the principal reason and that reason must be a potentially fair reason for dismissal. The respondent contends that the reason for dismissal was the claimant's conduct. Conduct is a potentially fair reason for dismissal under Section 98 (2) (b) of the Employment Rights Act 1996.

51. If the employer shows a potentially fair reason in law, the Tribunal must then consider the test under section 98(4) of the Employment Rights Act 1996, namely whether, in the circumstances of the case, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or unreasonably in treating that reason, i.e. conduct, or capability, as a sufficient reason for dismissing the claimant.

52. In considering the reasonableness of the dismissal, the Tribunal must have regard to the test laid out in the case of British Home Stores -v- Burchell [1978] IRLR 379 and consider whether the respondent has established a reasonable suspicion amounting to a genuine belief in the claimant's guilt and reasonable grounds to sustain that belief and the Tribunal must also consider whether the respondent carried out as much investigation as was reasonable in the circumstances.

53. The issue of the reasonableness of the dismissal must be looked at in terms of the set of facts known to the employer at the time of the claimant's dismissal, although the dismissal itself can include the appeal; so, matters

which come to light during the appeal process can also be taken into account: West Midlands Co-operative Society Ltd -v- Tipton [1986] IRLR 112.

54. The Tribunal must also consider whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer in the circumstances of the case: Iceland frozen Foods Ltd -v- Jones [1982] IRLR 439.

55. The ACAS Code of Practice on Disciplinary and Grievance Procedures contains guidance on the procedures to be undertaken in relation to a dismissal for conduct. Although compliance with the ACAS Code is not a statutory requirement, a failure to follow the Code should be taken into account by a Tribunal when determining the reasonableness of a dismissal.

Wrongful dismissal – Notice pay

56. Section 86 of the Employment Rights Act 1996 provides that an employer is required to give minimum notice to an employee to terminate his/her contract of employment. The minimum period of notice which an employer is required to give to an employee is one week's notice for each completed year of service up to a maximum of 12 weeks' notice. Notice requirements under a contract of employment may be greater. However, an employer is entitled to terminate the contract of an employee without notice in circumstance of gross misconduct.

57. The Tribunal was referred to the following case law authorities of which the Tribunal took note but not in substitution for the relevant statutory provisions:

Maund v Penwith District Council [1983] ICR 143
Linfood Cash and Carry Limited v Thomson & Others [1989] ICR 518
Sneddon v Carr-Gomm Scotland Limited [2012] CSIH 28

Submissions of the Parties

Claimant's Submissions

58. The claimant's representative made detailed submissions concerning the reason for dismissal, contending that the respondent used the grievances as an excuse to dismiss the claimant and that the decision to dismiss was predetermined. The claimant's representative pointed to the evidence of Ms Sorrell who said that she did not want to dismiss the claimant and that she was hoping that at the disciplinary hearing the claimant would say something that meant she did not have to.

59. The claimant's representative further contended that conduct cannot constitute bullying and harassment just because an individual says it does; there must be some enquiry into whether the belief is reasonable and that, in this case there had been no investigation and therefore the respondent had no reasonable grounds for its belief that the claimant was guilty of misconduct, particularly where such a belief was based on anonymised grievances which the respondent had accepted at face value even though they had no basic details such as dates of incidents alleged or details of witnesses; and that it

was important that such serious allegations were thoroughly tested, which had simply not been done.

60. The claimant's representative further contended that the total inadequacy of an investigation meant that no reasonable employer with the limited information the respondent was acting on, in circumstances where more could be obtained, would have taken the decision to dismiss in this case.

61. The claimant's representative also pointed to the fact that the respondent had made much of protecting the complainants. In contrast, it had shown no respect for the claimant nor any regard for her rights nor any duty of care towards her in investigating the matter carefully, thoroughly or at all. It was suggested that the respondent did not consider the possible effects of stress on how the claimant may have interacted with her colleagues and that the dismissal was therefore procedurally and substantively unfair. Further it was submitted that the claimant's dismissal was also wrongful because it was contended that this was not a gross misconduct - the claimant was able to explain and provide context to challenge the allegations but she was never given a proper opportunity to do so.

Respondent's Submissions

62. The respondent's representative submitted that the respondent had shown the reason for dismissal was the claimant's misconduct because of the very serious and numerous allegations against her. The respondent's representative contended that the Tribunal should only find this to be an unfair dismissal if no reasonable employer were to act as the respondent did, and that the respondent had a genuine belief in the claimant's guilt, through Ms Sorrell who genuinely believed the claimant had committed the acts alleged, that she had reasonable grounds to sustain those beliefs through the 11 grievances, and that it was reasonable for the respondent to form a general view that the claimant was a bully, on the basis of the material before Ms Sorrell, when she decided to dismiss her.

63. In respect of the investigation it was submitted that there was no prescribed procedure for investigation and that this was not a case in accordance with the facts of the Linfood judgment as the respondent contended that did not know who the complainants were.

64. The respondent's representative further submitted that there was nothing else the respondent could do. It had 11 very serious allegations, and the reason why the respondent's managers did not speak to the complainants was because the respondent did not know who they were and that the circumstances therefore were unusual and very difficult for the respondent. It was also argued that in any event, the claimant was able to respond to the vast majority of the allegations because she believed she had worked out who the employees were, and therefore it was not outside the band of reasonable responses to decide not to go back and try to identify the complainants or interview them.

65. In respect of the appeal, it was submitted that it was reasonable for Mr McFarlane to respect the anonymity of the complainants; otherwise, it was contended, employees would not raise issues.

66. Lastly, the respondent's representative contended that the claimant had not shown any ulterior motive, that the grievances had been raised in the claimant's absence and that Ms Sorrell was right to conclude that this was because the employees were fearful of the claimant and her bullying and harassing nature.

67. The respondent's representative submitted that, in all the circumstances, dismissal was within the band of reasonable responses, given that the allegations were serious and that the claimant had acknowledged such, and given the serious nature of the bullying and harassment disclosed by employees there was no alternative to dismissal. In any event, the respondent's representative contended that there was no need to go back and speak to the complainants - he questioned what would be gained from doing so in a situation where the claimant had accepted in her evidence that they had said what they had said and that that may be how they felt, albeit that the claimant said that things were taken out of context.

68. The respondent's representative further submitted that the suggestions of collusion were not made out and that, even if there was collusion, the fact was that the claimant was accused of bullying and harassment and the case merited dismissal. If there was collusion, it was submitted that this had been to tell the respondent the truth.

69. Lastly, it was contended that the conduct disclosed was sufficient to amount to gross misconduct and therefore no notice pay was payable.

Conclusions

70. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

71. The respondent dismissed the claimant for her conduct towards work colleagues, relying on up to 11 grievances which came in whilst the claimant was off work sick. Conduct is a potentially fair reason for dismissal and the employer has shown conduct to be its reason for dismissal in this case, by relying on the contents of the grievances.

72. The issue then arises as to whether the respondent acted reasonably in treating the conduct set out in those grievances as a sufficient reason for dismissal. The context in which the grievances arrived is important here. The claimant was an experienced and senior employee with over 22 years' service. To suddenly receive so many apparent complaints in such a short space of time, the timing of them and the absence of dates, details or corroboration should raise questions. The allegations were potentially serious. In those circumstances, the Tribunal considered that no reasonable employer would have accepted such grievances without further enquiry. However, Ms Blackledge simply collected the grievances and summarised them. As Ms

Blackledge was not called to give evidence it is not possible to say why she thought it appropriate to accept the complaints without question.

73. The grievances were accepted at face value and without question even though the claimant went to some lengths to show Ms Blackledge that the employees were easily identifiable, that they all came from or were connected with only one out of the 17 stores that the claimant managed and that much of what was reported was historic. That information should have alerted the respondent to the need to make proper enquiries to ascertain the authors of the grievances, interview them and if appropriate produce anonymised statements and to check their motivation or for collusion. The respondent's managers knew who the complainants were. Ms McCarthy said as much in her meeting with Ms Sorrell. Instead, at the time, and in evidence, the respondent sought to hide behind apparent requests for anonymity even though it was far from clear that the authors of the grievances had in fact requested such and even though the contents of the grievances negated anonymity. Indeed, at least 2 of the individuals concerned had put their names to their submissions. In those circumstances, the Tribunal concluded that it suited the respondent not to probe into matters and that such a failure was unreasonable.

74. The contents of the grievances raise questions about the claimant's behaviour. It was suggested by Ms McCarthy that she was aware that the claimant had behaved as described for some time but that she could do nothing because employees would not complain. Ms Sorrell's statement says that there was "no need to carry out an investigation or take formal action" before, because no one had raised a formal grievance. The Tribunal considered that it was simply not credible for senior managers to suggest that nothing could be done unless or until a formal complaint was made. The respondent made much of its duty of care to its employees but then sought to argue that it was unable to act on that duty unless employees formalised a complaint.

75. The Tribunal considered that a reasonable employer, upon receipt of allegations of bullying, would have taken action, of its own volition, long ago. Therefore, the Tribunal considered that the respondent either knew of the claimant's behaviour and tolerated it because she got results, or they knew of the claimant's behaviour and that in fact it was not as serious as since suggested. In reaching that conclusion, the Tribunal is mindful of the context of the claimant's deteriorating relationship with her manager, Ms McCarthy, who had taken the opportunity, whilst the claimant was off sick, to visit the claimant's shops and speak to staff about the claimant. As a result of Ms McCarthy's approach, a number of staff from one store tendered grievances about the claimant. At the very least, given allegations amounting to bullying the respondent should have checked whether the behaviour described had been experienced by employees elsewhere. Bullying behaviour is unlikely to manifest itself only in one place. It would have been easy to survey other stores but the respondent's managers either chose not to do so, or they did and found nothing to report elsewhere. The Tribunal considered that, if the claimant's behaviour was as set out in the grievances, which came from one store, it would be likely that other stores would also have issues but no

complaints were forthcoming. The Tribunal concluded that this was because the respondent was fishing for grievances only in one place – the Leicester store – and there was no evidence that any complaints originated independently of those presented.

76. The alternative scenario is that the matters reported were a local issue, confined to the Leicester store. That possibility could and should also have been investigated because the grievances may have originated from one employee who held a grudge and who had made a number of separate complaints anonymously or who had stirred up others to do so. It poses the question that if Ms Sorrell herself was not aware of who the complainants were, how could she be satisfied that there was no ulterior motivation or collusion at play? For all these reasons, the Tribunal concluded that the respondent did not genuinely believed that the claimant had committed the misconduct alleged in the grievances and it had no reasonable grounds to sustain such a belief.

77. In any event, the grievances demanded investigation but the respondent failed to conduct any or any meaningful investigation. Ms Blackledge told the claimant that she was investigating matters at the meeting on 23 April 2019, when that was patently not the case. The notes of the "investigatory meeting" demonstrate that Ms Blackledge was not listening to the claimant and that it would make no difference what the claimant said about her concerns that it was one store and that a number of matters were historic. Ms Blackledge was not going to check out these aspects. She had already decided, before her meeting with the claimant, that she would be referring the matter for a disciplinary. A note to that effect had been prepared before the meeting. That was an unreasonable approach which went unexplained in the absence of evidence from Ms Blackledge. It was certainly unreasonable of her not to consider the claimant's representations and to investigate them. The meeting was therefore not an investigatory meeting but a meeting for the primary purpose of informing the claimant that she would be facing a disciplinary hearing.

78. In light of the above, the Tribunal concluded that there was no effective investigation – the collection of grievances and their content was not looked at or questioned even though the claimant asked Ms Blackledge to do so. There was a shocking lack of enquiry. In the circumstances, the Tribunal concluded that the respondent was simply not interested in conducting a fair process.

79. If Ms Blackledge's role was merely to collect and collate the grievances and to add the notes of her interview with the claimant, then this raises questions about the role of Ms Sorrell. She was appointed to deal with the disciplinary hearing and yet she conducted an interview with Ms McCarthy as if she was investigating matters. The notes of that meeting are headed "Investigation Meeting Notes". When asked how this fitted into the chronology of events, Ms Sorrell suggested that she was in fact investigating Ms McCarthy although her witness statement hardly refers to their meeting. When pressed, Ms Sorrell's answers to cross-examination on the point became uncertain and at times evasive. In attempting to explain her meeting with Ms McCarthy, she said that she "wanted Alveen's perspective" and that she "supposed" their meeting

formed part of the investigation into the claimant although she then attempted to qualify that comment by saying "but not in my mind".

80. Ms Sorrell admitted in cross-examination that she had been aware of the claimant's relationship with her line manager, Ms McCarthy and how that had deteriorated in recent times, and she also accepted that the disciplinary process could be seen as the last step in a chain. The Tribunal has found that the discussion between Ms Sorrell and Ms McCarney focussed on the claimant and that Ms Sorrell asked a number of closed questions of Ms McCarney who then responded by reinforcing the substance of the grievances but again without dates or detail. In a repeat of Ms Blackledge's approach, Ms Sorrell accepted what she was told with little question. Setting aside the question of whether Ms Sorrell should have conducted that meeting at all when she did, the meeting was not conducted in a way consistent with an open-minded approach to the disciplinary allegations and, if it was intended to be some sort of investigation of Ms McCarney, it was woefully inadequate. Given that the claimant's case is that the respondent's managers were looking for a reason to remove her, Ms Sorrell's meeting with Ms McCarney and the content of their discussion serves to support what the claimant believed was going on.

81. In terms of the disciplinary procedure, Ms Sorrell's approach to the disciplinary hearing was disclosed under cross-examination. She said candidly that she was expecting to dismiss the claimant and that she was hoping that the claimant would give her a reason not to dismiss her. Therefore, the argument follows it was the claimant's fault that she was dismissed because she did not come up with a reason that Ms Sorrell could use to keep her.

82. At the disciplinary hearing, Ms Sorrell said that people had felt able to speak out, but still wanted their anonymity. The Tribunal considered that the anonymity point relied upon by the respondent was a red herring. Ms Sorrell described it as "a requirement for confidentiality" but without explaining on what basis. If Ms Sorrell knew who the complainants were, she could have either interviewed the individuals herself or instructed Ms Blackledge to do so and to produce statements of their testimony, anonymised if required. As the grievances stood, however, the claimant was easily able to identify the complainants so the respondent had in fact done little to protect them from identification, if that had been its intention. There was also no evidence of the complainants asking for anonymity and indeed 2 are identifiable by name. In those circumstances, the Tribunal concluded that "anonymity" suited the respondent. If it gave the names of the complainants, the link to one store would be obvious. When the claimant pointed out the link anyway, the respondent proceeded regardless and, on a balance of probabilities, the Tribunal concluded that the respondent and its managers knew that the complaints came from one place, that they were the result of a trawl against the claimant and that, if investigated, the complaints would not stand up to scrutiny.

83. Further, the dismissal letter said that the respondent had received complaints/grievances from employees who were apparently in 9 different locations, although in cross examination Ms Sorrell was unable to explain to

which locations that referred or why that was different to the 7 locations suggested in the grievance summary produced by Ms Blackledge.

84. In dealing with the appeal, Mr McFarlane said that he did not know of the origin of the grievances. The Tribunal found him to be at best mistaken about that, as evidenced by the fact that, after the appeal meeting, he spoke to the 2 managers who had put in grievances. Why approach those 2 managers? There was no suggestion that he had spoken to others and he did not approach any of the individuals that the claimant had said could assist. In addition, those 2 managers would have known who else might have put in a grievance, given their connections. Mr McFarlane however failed to make any further enquiries to verify what he was told. In the appeal outcome letter, Mr McFarlane makes statements such as "I cannot find any evidence or suggestion that staff colluded so as to falsify claims", and in respect of the discrepancies that the claimant highlighted, he "[did] not consider they affect my decision in any respect". However, he did so little to look into the matter, it is perhaps unsurprising that he found no evidence. Mr McFarlane was, like the other managers, simply going through the appeal process without regard to any requirement to consider and look into matters, and regardless of any fairness to the claimant.

85. In all the circumstances, the Tribunal concluded that the respondent's managers were focussed solely on the objective of getting rid of the claimant. The grievances were sought out and then used as an excuse to remove the claimant from her employment. An investigation was unlikely to have assisted that objective. The decision to dismiss was predetermined and unfair in all the circumstances. It follows that the claimant's dismissal was outside the band of reasonable responses because no reasonable employer would have dismissed the claimant in the circumstances of this case.

86. The respondent's procedure was inadequate. The Tribunal therefore asked the question of whether following an adequate procedure would have led to the same outcome and concluded that it would not. The Tribunal considered that once the fact of the complaints coming from one store and that they were largely historic was known, it could not say with any certainty that a proper investigation would have concluded that the claimant was guilty of the misconduct alleged. This is particularly so in light of the fact that many of the allegations are vague and unsubstantiated, some consisting of bald allegations without any substance or context provided.

87. In light of all the above, the Tribunal further considered that it would not be just to hold the claimant in any way responsible for her dismissal – she did not cause or contribute to her dismissal and no reduction in any compensation should be made for contributory fault or on a just and equitable basis.

88. Wrongful dismissal: it follows from the Tribunal's conclusions about the claimant's dismissal that the claimant cannot be held guilty of gross misconduct and so is entitled to her notice pay.

89. This case shall now proceed to a remedy hearing to be listed for one day.

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Employment Judge Batten

Date 2 September 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

23 September 2019

FOR THE TRIBUNAL OFFICE