



EMPLOYMENT TRIBUNALS

Claimant: Ms C Shaw

Respondent: Nottinghamshire County Council

Heard at: Nottingham

On: 5 September 2019 (Reading Day)
9 September to 24 September 2019 (Hearing Days)

Before: Employment Judge Blackwell

Members: Mr K P Chester
Mr A Kabal

Representatives

Claimant: Mr Jones of Counsel

Respondent: Mr Wallis of Counsel

RESERVED JUDGMENT

The Unanimous decision of the Tribunal is:-

1. The claim of being subjected to unlawful detriments contrary to Section 47B of the Employment Rights Act 1996 (the 1996 act) fails and is dismissed.
2. The claim of automatically unfair dismissal contrary to Section 103A of the 1996 act fails and is dismissed.
3. The claim of unfair dismissal contrary to Section 94 and 98 of the 1996 act also fails and is dismissed.
4. The claim of wrongful dismissal fails and is dismissed.
5. Mr Jones of Counsel represented the Claimant whom he called to give evidence. He also called Ms K Eddy and we took into account the written statement of Mrs E Holmes, both of whom were former colleagues of the Claimant. In respect of Mrs Holmes, due to a failure of the Tribunal's video link it proved impossible for Mrs Holmes to give evidence but as we have said we took into account her written statement.
6. Mr Wallis represented the Respondents and he called Ms S Roe who conducted the investigation. Mr G McKay a Group Manager, Mrs M Reed, Ms Shaw's Line Manager at the time of dismissal, Mrs I Peel who had been for six years, Ms Shaw's Line Manager, Ms N Peace who presented the management's case to the disciplinary hearing, Mr M Walker, Mr B Illiffe and Ms J Forbes, the members of the disciplinary panel who dismissed Ms Shaw and Ms S Jeffery a senior HR Manager.

7. There never was an agreed bundle of documents but nonetheless we were able to proceed and references are to page numbers in the bundle used by the Tribunal. There was supposed to be an agreed chronology and an agreed list of issues prior to the first reading in day of this hearing; neither were provided. We have had our say about the disregard for Tribunal orders and the waste of Tribunal time consequent thereupon. It has not however prevented us from reaching our decisions. It has merely made life more difficult.

RESERVED REASONS

Issues and the law

1. There being no agreed list of issues the Tribunal identified the following on the first morning:-

1.1 Did the Claimant make protected disclosures within part 4A of the 1996 act on or about the following dates?:-

- a) 9 March 2017 and/or;
- b) 19 March 2017 and/or;
- c) 2 May 2017.

1.2 If so did the Claimant suffer any or all of the detriments pleaded in paragraph 33 of her claim form on the grounds that she had made such protected disclosures?

1.3 If so was the reason or principle reason for the Claimant's dismissal with the effective date of termination being 13 November 2017 that she had made protected disclosures? If so her dismissal is at that point unfair.

1.4 If not can the Respondent show that it had a potentially fair reason for dismissal within the meaning of Sections 98(1) and (2) of the 1996 act? If not the dismissal is at that point unfair.

1.5 If a potentially fair reason is proved was the dismissal fair having regard to subsection 4 of Section 98 of the 1996 act and the applicable case law? The reason for the dismissal relied upon by the Respondent is conduct namely the unauthorised access of Mrs Holmes's records and therefore it follows pursuant to the case of **BHS v Burchell** [1978] IRLR 379 that the three stage test applies:-

1.5.1 Did the Respondents have a genuine belief in the Claimant's guilt? (Respondent burden) and;

1.5.2 Was the Respondent's belief based upon reasonable grounds at the time of the dismissal? (neutral burden) and;

1.5.3 did the above follow an investigation that was reasonable in all the circumstances? (neutral burden).

And thus did the decision to dismiss the Claimant fall within the band of reasonable responses available to a reasonable employer?

1.6 Did the Claimant commit a repudiatory breach of contract that entitled the Respondent to terminate the contract of employment? If not then the Claimant was wrongfully dismissed.

2. Whilst the purpose of this hearing is the determination of liability only the Tribunal asked Counsel for submissions both in respect of **Polkey** and contributory fault.

Background – Findings of Fact

3. Ms Shaw (we shall refer to the Claimant as Ms Shaw throughout notwithstanding she has very recently married and is now known as Mrs Cope, that is because throughout the documentary evidence and the oral evidence that was how she was described) was employed as a Social Worker by the Respondents (the County Council) from 1 September 2011 to her summary dismissal on 13 November 2017, that being her effective date of termination.

4. The County Council is a very large employer with a dedicated HR function.

5. Ms Shaw was employed as a Social Worker at the Queens Medical Centre at all relevant times. She was a member of a team managed by Mrs Peel up until 12 May 2017. Thereafter Mrs Reed became her Line Manager. At all relevant times there were two teams respectively managed by Mrs Peel and Mrs Reed. Ms Shaw's task was to assist adult service users, conducting welfare and needs assessments in anticipation of their discharge from the QMC.

6. At all relevant times Ms Shaw was a Senior Social worker employed on the County Council's band B. She was a dedicated and competent professional, highly regarded by her managers and colleagues. At the time of her dismissal she was studying for an MA in social studies.

7. In February 2017 Ms Shaw was allocated to look after an elderly, male service user (SU1). Within a few weeks SU1 made a will leaving to Ms Shaw his residence. He died shortly after making the will.

8. Inevitably there was an investigation which the County Council was duty bound to carry out. It concluded that SU1 was of sound mind at the time of making the will and that there was no evidence that SU1 had been subjected to coercion by Ms Shaw or anyone else. Thus it was concluded that there was no legal impediment to Ms Shaw accepting the inheritance.

9. It is clear from her evidence that Ms Peace, the Group Manager to whom Ms Reed and Ms Peel reported, thought there were ethical issues that went beyond purely legal issues involved in any Social Worker benefitting in the way that Ms Shaw had. It may well be that that influenced Ms Peace's approach to the disciplinary procedure that was to come.

10. At about the same time, that is late February 2017 begins the events which led to Ms Shaw's dismissal. Mrs E Holmes referred to throughout the documentary evidence as SU2, a colleague of Ms Shaw's and whose Line Manager was Mrs Reed suffered a debilitating stroke on 26 December 2016. Earlier in 2016 Ms Shaw had helped Mrs Holmes during the illness of her husband and his subsequent death.

11. Mrs Holmes was rendered immobile by the stroke and sadly remained so. That was the reason why she could not give evidence in person.

12. Mrs Holmes was allocated a Social Worker but that was not Ms Shaw.

13. In February Ms Shaw was asked by Mrs Reed to visit Mrs Holmes in hospital both on her behalf and on behalf of her colleagues bearing flowers. Mrs Holmes had made it clear that she did not wish to be visited by Mrs Reed because Mrs Holmes had the belief that Mrs Reed had not correctly dealt with an allegation of bullying made by Mrs Holmes against a colleague.

14. On that visit Mrs Holmes informed Ms Shaw that she felt that the care package that was on offer consequent upon her discharge from hospital to her own home was inadequate. Mrs Holmes after that visit began to telephone Ms Shaw expressing her concerns about both her treatment in the hospital and the inadequacy of the care package being promised. Ms Shaw also received phone calls from the private care provider who would carry out Mrs Holmes's care upon discharge to the same effect.

15. We accept that Ms Shaw was concerned and wished to do the best she could for her.

16. In March and May Mrs Shaw alleges that she made three protected disclosures; we will return to those in detail.

17. On 9, 18 and 21 March, Ms Shaw accessed Mrs Holmes's confidential records on the Mosaic system (see page 255) as was revealed by an audit carried out on 11 May 2017.

18. An investigation began and Ms Shaw was suspended and informed on 19 May, see page 260.

19. A formal investigation report was ordered and prepared by Ms Roe, see pages 350 to 376 a matter that we will also return to.

20. This led to an invitation to a disciplinary hearing on 23 October, see pages 407/8 and a disciplinary hearing that was held on 13 November 2017, the disputed note of which are at pages 522 to 534.

21. As a consequence Ms Shaw was dismissed which was confirmed in a letter of 15 November, see pages 541/543.

22. Ms Shaw appealed that decision but an appeal was never heard for reasons which the parties accept they were equally to blame.

The first issue – Did Ms Shaw make protected disclosures?

23. This is a sad case. We were conscious from the beginning, and Mr Jones reminded us, that the effect of our decisions will probably be to end Ms Shaw's professional life as a Social Worker.

24. First Ms Shaw has accepted throughout that on 9 March, 18 March and 21 March 2017 she accessed the Mosaic system in order to search the confidential records of Mrs Holmes (see page 255).

25. Turning now to the alleged disclosures Ms Shaw says the first two took place on 9 March 2017 and on or about 19 March 2017. She alleges that she made the disclosures to Mrs Reed and the first she sets out at paragraph 48 of her witness statement. Seven separate disclosures are set out though in essence they boil down to two allegations. Firstly that the care package proposed for Mrs Holmes was inadequate because insufficient time was being allowed. The second was “that a Staff Nurse at Kingsmill Hospital had told me that all referred patients are discharged without adequate care in place”. Ms Shaw describes the disclosures as being very serious. She goes on to say that when she made the disclosures to Mrs Reed, Mrs Reed told her to stay out of it, not to get involved and abruptly and very directly said “you cannot cross Gary McKay” (Mr McKay was the Group Manager responsible on the County Council’s behalf for discharges from the Kingsmill Hospital at Mansfield). Ms Shaw says that as a consequence of that discussion she made the first access to the Mosaic system. She says that she felt conflicted and needed to be better informed by checking Mrs Holmes’s case notes.

26. Mrs Reed gives an entirely different account. She had no recollection of any such discussions but is adamant that if any such discussions had taken place that raised safeguarding issues she would not have brushed them aside, she would have advised Ms Shaw to use the appropriate courses of action which she says were well known to Ms Shaw, namely the reporting system known as MASH or by contacting the hospital direct. However since giving her witness statement Mrs Reed does now recall an approach by Ms Shaw expressing concern about the fact that Mrs Holmes had been repeatedly telephoning her. Mrs Reed accepts that she may well have told Ms Shaw to leave it alone. That fits with Mrs Peel’s recollection of a conversation. Mrs Reed also now recalls that she did so out of concern for Ms Shaw knowing that at that time Ms Shaw was going through the SU1 process and that she knew Ms Shaw had not been allocated as Mrs Holmes’s Social Worker. She denies making any reference to Mr McKay. The contemporaneous documents are not of great assistance, although we note that in the first interview with Ms Shaw once the access to Mosaic had been uncovered Ms Shaw said as follows:

“Ms Shaw said she had raised concerns with the ward staff at Kingsmill Hospital. However they dismissed her concerns and refused to provide details of the discharge. Ms Shaw said she then took her concerns to Mary Reed. However felt that she was not being taken seriously and so decided to look into the matter herself.”

We further note that there is no relevant reference to Mr McKay until the disciplinary hearing held on 13 November 2017.

27. Broadly the same evidence is given about the second alleged disclosure. Ms Shaw says that she repeated the matters raised on 9 March but added that Mrs Holmes was being bullied into accepting a place in a residential home rather than returning to her own home with an adequate care package which was Mrs Holmes’s preference. There is some confusion as to when such a discussion could have taken place but it seems to us that that is not of any great assistance in determining the conflict of evidence.

28. The first matter to be taken into consideration is the credibility of the two witnesses. We regret to say that we did not find Ms Shaw a reliable witness. This is perhaps best illustrated by her answers to the question which is central to this case, namely whether she accepted that her access of Mosaic was unauthorised and therefore wrong. She vacillated between answers that indicated that it was not wrong because it was justified to yes, it was wrong but in mitigation I had good reasons for accessing the system. In our view Ms Shaw has never, in her heart of hearts, accepted that accessing Mosaic to look at Mrs Holmes's records was wrong and that colours her whole approach to this unfortunate case.

29. On the other hand we found Mrs Reed to be a credible witness. We accept that had genuine safeguarding issues in relation to Mrs Holmes or to patients generally discharged from Kingsmill been raised she would have acted. She would not have been disinterested as alleged by Ms Shaw.

30. Further we find it difficult to accept that if Ms Shaw was twice rebuffed by Mrs Reed, and that had she really had serious concerns, she would have let the matter drop.

31. We note that she did not take the matter to Mrs Peel. She gave various explanations for not doing so, none of which were convincing.

32. We particularly note that on 13 April 2017 she had a supervision meeting with Mrs Peel. This was a regular event taking place approximately every 6 weeks. We have in the bundle two other examples of such supervision meetings, one on 12 December 2016 and the second on 8 February 2017. Ms Shaw says in her proof of evidence at paragraph 84 that the supervision on 13 April was rushed and interrupted by Ms Peace. She says that without such interruptions "it is highly likely I would have explained in more detail why I was feeling this way". By which she means she would have told Mrs Peel about accessing Mrs Holmes's Mosaic records and being rebuffed by Mrs Reed. However the minutes of the meeting show that in content and length it appears very similar to the earlier supervisions. We do not find Ms Shaw's explanations for not taking the matter up with Mrs Peel credible.

33. We also note that by that date ie 13 April Mrs Holmes was six days away from discharge from hospital with a care package which appears to have been acceptable. This was no doubt partly as a consequence of Ms Holmes's son making a formal complaint on or about 17 March. However the general complaint about discharges from Kingsmill remained unresolved. In paragraph 40 of her evidence Ms Shaw records in respect of the discussion with the Staff Nurse:

"To my absolute horror Karen told me that all patients are discharged home without adequate care in place."

That statement is emphasised in her proof of evidence by bold type. Despite this Ms Shaw appears to have done nothing in relation to what she describes as a very serious safeguarding issue, breaching a number of provisions of the Care Act 2014. Again this is not credible. In our view therefore nothing was said to Mrs Reed in March 2017 that can possibly constitute a protected disclosure.

The third disclosure

34. This disclosure was originally alleged to have occurred on 5 May. It is common ground that the meeting between Ms Shaw and Community Care Officers Ms Vincent and Ms Craven at Mrs Holmes's bedside took place on 2 May. Ms Shaw in her proof of evidence at paragraph 88 describes the disclosure as follows:

“During the meeting I told Beth and Nicola that Edith's care package offered whilst Edith had been in hospital had been insufficient for her needs so raising safeguarding issues.”

Thus the alleged disclosure clearly refers to the past rather than either the present or the future. In terms of contemporaneous documentary evidence at pages 253 and 254 recorded on 5 May 2017 are Nicola Vincent's notes of the home visit which took place on 2 May. In summary they set out a discussion of Mrs Holmes's current and future needs and how such might be met. Three action points are recorded in relation to Mrs Holmes's care plus an action point to discuss the visit with the CCO's Team Manager in respect of Ms Shaw's involvement in the assessment process.

35. At page 260 which is the suspension meeting with Ms Shaw there is no reference to the 2 May meeting. Both Ms Vincent and Ms Craven are interviewed in connection with the allegation of misconduct made against Ms Shaw, Ms Craven's being at page 354 and Ms Vincent's beginning at 357. There are later transcriptions of the full interview but in relation to the discussion around Mrs Holmes there are no significant differences. Ms Vincent notes at page 358 in answer to the question what was discussed as follows:

“The service user's medical conditions were discussed, along with her hospital treatment, discharge STRAT received and what she would need going forward.”

36. Ms Shaw in her statement of case prepared in anticipation of the disciplinary hearing which was held on 13 November goes into considerable detail on pages 444 to 446 (note in the bundle pages 445 and 446 were juxtaposed). Ms Shaw's account is very similar to that of the two CCO's though she goes into more detail about Mrs Holmes's current needs. We also note that Ms Shaw records that she advised Mrs Holmes that it was likely that if Mrs Holmes elected to continue to stay at home, which was her wish, then the County Council might well offer the budgeted cost of Mrs Holmes's care in a residential home as a contribution to her care at her own home. In our view that puts Ms Shaw's concerns about Mrs Holmes's care in context. Ms Shaw goes on to record that she reassured Mrs Holmes that the authority could not force Mrs Holmes to move into a care home against her will. Again presumably this was a view held by Ms Shaw throughout.

37. We accept that we have not heard evidence from the two CCO's but we cannot accept that anything discussed during the bedside meeting of 2 May amounted to a safeguarding issue and thus a protected disclosure.

38. In conclusion therefore we do not accept that as a matter of fact any of the alleged disclosures occurred as Ms Shaw has described. It therefore follows that her claims pursuant to Section 47B of the 1996 act in respect of detriments must fail.

It further follows that her claim brought pursuant to Section 103A of the 1996 act must also fail, again because as a matter of fact Ms Shaw did not make any protected disclosures.

What was the reason for dismissal

Statute law

39. Employment Rights Act – Section 98:-

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it:-

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

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

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

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):-

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

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

40. The burden of proof to show a potentially fair reason for dismissal lies with the County Council. They assert that the potentially fair reason is conduct in that they allege Ms Shaw:-

40.1 Used the Mosaic system to look at private records of a member of the public (Edith Holmes) which she had no professional involvement with or right to do so and;

40.2 As a result of allegation 1 “You have breached the professional standards and the NCC code of conduct”.

41. As to allegation 1 Ms Shaw is recorded as saying the following at the suspension meeting that took place on 19 May:

“Caroline Shaw said she held her hands up, she did access the system and said it was a stupid thing to do. She now accepted that this was wrong and deeply regretted it. She added that she realised the seriousness of her actions and is willing to take any punishment and to learn from it.”

42. Those remarks are broadly repeated in the trade union statement of case submitted in respect of the disciplinary hearing held on 13 November. In Ms Shaw’s personal statement for that disciplinary hearing she says:

“I am deeply remorseful for my actions and realise now that I should have proceeded to contact the Safeguarding Team to raise my concerns.”

43. Her account also goes into detail as to the circumstances in which she accessed Mosaic and why she had done so.

44. As we have indicated above Ms Shaw’s claim for automatic unfair dismissal pursuant to Section 103A cannot proceed. However Mr Jones submits that Ms Shaw’s accessing of Mrs Holmes’s Mosaic records were not the real reason for the dismissal. The real reason was a conspiracy involving Mr McKay, Ms Sayer, Ms Roe and in particular Ms Peace. That conspiracy began because, as we understand the argument, Ms Shaw had challenged the decisions of Mr McKay in regard to Mrs Holmes’s discharge package. According to Ms Shaw’s evidence Mr McKay had a reputation as a bully and she had once witnessed a colleague returning from a panel meeting chaired by Mr McKay in tears, consequent upon his treatment of her. Ms Shaw also asserts that Mrs Reed told her not to cross Mr McKay and that later once the Mosaic records had been audited and Ms Shaw’s access to it disclosed, that Mr McKay was gunning for her. For the reasons set out above we do not believe Mrs Reed gave Ms Shaw that information. She may have formed the view that Mr McKay was out to get her based on her perception of Mr McKay as a bully. Mr McKay’s evidence was however clear that apart from initiating the original audit of Mosaic he had taken no further part in the disciplinary proceedings and had had no contact with anyone involved in it. We accept that evidence.

45. As to Ms Sayer she plainly influenced the way in which the investigation was set up and the choice of both Ms Roe as the Investigating Officer and Ms Peace as the Presenting Officer. We see nothing unusual or in any way suspicious about that. Ms Sayer is also accused of prejudicing the disciplinary hearing by saying in an e-mail to Mr Walker:

“It’s not a question of if the sanction should be imposed but rather you need to consider the full range including dismissal.”

We see nothing prejudicial in this. It is simply advice that the whole range of sanctions be considered. It seems to us a statement of the obvious given Ms Shaw’s admissions that dismissal is a potential outcome.

46. As to Ms Roe and her investigation we accept that there are flaws within it, particularly in her conclusions at page 348 where she concludes that two allegations are proven. We accept that she went beyond the role of an Investigating Officer in so saying, however once again the comments have to be viewed in the context of Ms Shaw's admissions.

47. As to Ms Peace she clearly adopted an adversarial approach throughout her involvement. However the disciplinary procedure envisages such an adversarial approach. We also accept that Ms Peace would not "normally" be the Presenting Officer. However we see nothing preventing her from doing so.

48. In relation to the adversarial nature of the proceedings, Section 6 of the policy at pages 94 to 97 set out the procedure and in many ways they mirror that of this Tribunal.

49. Mr Jones in his submissions asserts that a variety of reasons are given both in the dismissal letter at pages 541-543 and in the evidence of the three panel members, the Chair Mr Walker, Mr Iliffe the HR representative and Ms Forbes who had a social care background. There are some differences in terminology but in our view it is plain that the three panel members had the common view that Ms Shaw had admitted access to Mosaic on three separate days and on eight separate occasions, had accepted that it was wrong and that it was in breach not only of her professional code of conduct but also the County Council's code of conduct for employees.

50. We found Mr Walker to be a measured and wholly credible witness. We are satisfied that the reason for the dismissal was conduct, namely Ms Shaw's access of the Mosaic system. We are satisfied therefore that a potentially fair reason has been proved.

Was the dismissal fair

The relevant law

51. Employment Rights Act – Section 98 subsection 4:-

"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):-

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

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

52. Also the 5 points from **Iceland Frozen Foods v Jones** - Range of Reasonable Responses:-

"The law for this band of reasonable responses was laid out in the judgment and is as follows:

1. The starting point should always be the words of section 98(4) 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 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 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."

53. As a reminder, the EAT in **Burchell** said that a three-fold test applies:-

- "The employer must show it believed the employee is guilty of misconduct.
- The employer must have reasonable grounds to sustain such a belief.
- The employer must carry out as much investigation into the matter as is reasonable in the circumstances."

54. As to the genuine belief in the misconduct complained of we accept that the three panel members in the light of the incontrovertible evidence of the IT audit of Mrs Holmes's records and Ms Shaw's admissions had a genuine belief in the misconduct that formed the two allegations made against Ms Shaw.

55. The second two components of the **Burchell** test are in our view linked. We will deal with a reasonable investigation first and remind ourselves that the test of the band of reasonable responses applies equally to the process which led to the dismissal.

56. Mr Jones makes two main criticisms in respect of omissions from Ms Roe's investigation. The first is the failure to interview Mrs Holmes, her son and Vita the private care provider. We see from Mrs Holmes's statement what she would have said had she been interviewed.

Their evidence would all have been similar ie to the effect that the original offer of a care package to Mrs Holmes was inadequate is nevertheless fully set out in Ms Shaw's evidence to Ms Roe and in her statement of case which was before the disciplinary panel.

Ms Roe did not interview these witnesses on the advice of HR. However that decision clearly lies at the County Council's door. On balance we cannot see that the failure to interview these witnesses causes the investigation to fall outwith the band of reasonable responses of a large employer such as the County Council.

57. The second and much more significant criticism is that whilst Mr Walker relied on Mr Iliffe to ensure that there was consistency of treatment across the County Council, Mr Iliffe did nothing to discharge that responsibility notwithstanding that the trade union statement of case made specific reference to a similar disciplinary process which led to the issue of a final written warning. We find this omission surprising and it is perhaps something which the County Council should reflect on.

58. However in order for alleged inconsistency to affect the equity of Ms Shaw's dismissal there needs to be sufficient evidence of inconsistent treatment to support allegations of unfairness within the meaning of subsection 4 of Section 98. We had very little evidence. Ms Shaw asserted that there was a case of a Finance Officer who had accessed Mosaic to obtain financial information and had been issued with a final written warning. On the other hand Ms Shaw accepted that two employees one of which was Mrs Locke had been dismissed for accessing Mosaic. Whilst on this point at page 549 in the addition to the minutes put forward by Ms Shaw, Nicola Peace is recorded as follows:

“Nicola confirmed during her evidence in the meeting that both her and Gary McKay believed it was gross misconduct.”

Ms Peace believed that the context in which that statement was made was this very context, namely that both she and Mr McKay had been the dismissing officer in cases (one of which was Mrs Locke's) that had involved unauthorised access to Mosaic and had resulted in dismissal.

59. In those circumstances such evidence as there is does not point to inequity or unfairness rather the opposite though this is no thanks to Mr Iliffe. On balance therefore we are of the view that the investigation, in the context of the incontrovertible evidence that Ms Shaw had accessed Mosaic fell within the band of reasonable responses.

60. We discussed above in the context of establishing the reason for dismissal the conduct of Ms Roe and Ms Sayer. We need to look at that conduct again in the context that as Mr Jones put it to each of the panel members they were prejudiced and either consciously or subconsciously affected by Ms Roe's conclusions and Ms Peace's language. As we have said above we found Mr Walker to be a careful and measured witness and we are satisfied that he adopted the same approach in chairing the disciplinary hearing.

He accepted that Ms Roe had gone beyond her role as the investigating officer in reaching “proven” conclusions. He also accepted that some of Ms Peace’s language was inappropriate even allowing for the adversarial nature of the disciplinary hearing. He said that he was not consciously affected by any of these matters and approached the decision making process in the knowledge that the panel’s decision could end not only Ms Shaw’s employment with the County Council but also her career.

61. We have reviewed carefully the whole of the documentation relating to the disciplinary process including Ms Shaw’s additions to the sadly inadequate minutes originally provided by the County Council. Again we trust that the County Council will look carefully at the consequences of the conduct of the minute taker and in particular will look at its policy on the taking of minutes in conjunction with the recognised trade unions if it has not already done so. We would also comment, though it is not asserted by Mr Jones as a reason rendering the dismissal unfair, that the disciplinary process took far too long particularly given that Ms Shaw was suspended for a period of nearly 6 months and any good employer will recognise the effects that such a lengthy suspension has. This was a case that was very simple and it ought to have been dealt with within a much shorter period.

62. Turning back to the question of whether Mr Walker and his panel member colleagues were subconsciously affected by the matters set out in Mr Jones’s submissions we see no evidence to infer that they were. Thus we are satisfied that on the balance of probabilities the panel had a genuine belief in the misconduct complained of, that they had reasonable grounds for holding that belief (ie the conduct was admitted) and that a reasonable investigation in all the circumstances had been carried out.

63. We now turn to the central issue in this case namely whether the decision to dismiss fell within the band of reasonable responses. We once again remind ourselves of the **Iceland** approach. At this stage perhaps we should note that in her evidence on a number of occasions Ms Shaw stated that she said what she did at a particular point in the disciplinary process was on the advice of her trade union. We were also told by Ms Shaw that her trade union was reviewing its practices in the light of the advice that she says she was given that “whistleblowing cases do not go anywhere with the County Council”. In that regard the factual basis of Ms Shaw’s first two allegations of protected disclosures were clearly set out in her statement of case and were equally clearly understood and dealt with by the panel but as mitigation ie explaining why Ms Shaw had accessed Mosaic. It is clear that throughout the trade union’s advice to Ms Shaw was that she should admit the conduct. That must be sound advice given that the IT audit was clear proof. It is also clear from the evidence of all the professional Social Workers involved, including Ms Eddie, that Ms Shaw’s accessing of Mosaic was a very serious matter. Thus the trade union clearly relied on mitigation so as to avoid dismissal and further the ending of Ms Shaw’s professional career. Plainly the trade union’s conduct of Ms Shaw’s case is not a matter for us but we would comment that in the light of Ms Shaw’s admitted conduct the band of reasonable responses would appear to lie between a final written warning to summary dismissal.

64. Reading the disciplinary minutes together with the dismissal letter it is clear that the debate centered upon the mitigating factors. The mitigating factors set out in the dismissal are as follows:

“You did eventually show remorse and admit the misconduct alleged against you.

You were dealing with a number of challenges in your personal life during the time you undertook the misconduct.

You accessed the data in order to challenge the level of care being provided to your friend either by your employer or by Kingsmill Hospital.”

65. The panel were also aware, though did not make reference to the fact that Ms Shaw was highly regarded as a professional and there were a number of testimonials to that effect. Again the panel were aware that Ms Shaw had an unblemished disciplinary record. Put together these are strong mitigating factors and it seems to us on the basis of the panel members’ evidence and in particular Mr Walker’s that had the panel been satisfied that they could trust Ms Shaw not to repeat the offence or an offence of a similar nature it is likely that a final written warning would have ensued rather than dismissal.

66. Mr Walker’s evidence in that regard was clear as to why the panel felt that they could not trust Ms Shaw notwithstanding her assertions of remorse. Mr Walker’s evidence was that when questions were put to her to test her future behaviour she became aggravated and aggressive. In her evidence before us whilst Ms Shaw was never aggressive she was often challenging and we have outlined above what we believe underlies the difficulties in having trust and confidence in Ms Shaw’s future conduct namely that she has never herself come to terms with whether her access of Mrs Holmes’s records was wrong.

67. Thus we can understand and accept the panel’s conclusions. Perhaps the most telling comment about Ms Shaw was by Ms Peel her Line Manager for some six years, when she said in response to a request for information from Ms Shaw’s trade union:

“I have also been asked to comment on C’s work. C has worked hard as a Social Worker and BIA and she often goes beyond what is expected which is a strength and also a weakness.”

68. Mr Johnson in his submissions referred to Ms Shaw as being passionate in carrying out her professional duties. That may well be so but it seems to us that that very passion at times clouds Ms Shaw’s professional judgment. We conclude therefore that the dismissal did fall within the band of reasonable responses and thus the claim of unfair dismissal pursuant to Sections 94 and 98 of the 1996 Act must fail. In summary Ms Shaw allowed her personal concern for Ms Holmes to cloud her professional judgment leading her to access Ms Holmes’s records without authority. Both the panel and this Tribunal were not assured that such behaviour would not occur again.

Wrongful dismissal

69. Put briefly, did the accessing of Mrs Holmes's records on Mosaic by Ms Shaw constitute a repudiatory breach of her contract of employment. Based upon the facts set out above we are satisfied that on the balance of probabilities it did. It is equally clear that the County Council brought Ms Shaw's contract of employment to an end as a consequence of her actions in accessing Mrs Holmes's Mosaic records. Therefore the claim of wrongful dismissal must fail.

Employment Judge Blackwell

Date: 03 October 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE