EMPLOYMENT TRIBUNALS

Claimant: Mrs A Bowen

Respondent: Tenon FM Limited

Heard at: Manchester **On:** 3 December 2019

Before: Employment Judge McDonald

REPRESENTATION:

Claimant: Mrs King (Friend)
Respondent: Mrs Smeaton (Counsel)

JUDGMENT

The judgment of the Tribunal is that the claimant's complaint of unfair dismissal succeeds.

REASONS

Introduction

1. The claimant complained that she had been unfairly dismissed by the respondent. She also complained that the respondent had made unlawful deductions from her wages. At paragraphs 64-68 of its response the respondent conceded it had made unlawful deductions. It set out those unlawful deductions at paragraph 4.1 of its List of Issues for the hearing. Mrs King confirmed that the amounts at paragraph 4.1 of the respondent's List of Issues were the amounts being claimed by the claimant. At the end of the hearing I therefore gave judgment confirming that the claimant's complaint of unlawful deductions from wages succeeded, and that the respondent was ordered to pay the claimant the amounts set out at paragraph 4.1 of its List of Issues. I reserved judgment on the claimant's complaint of unfair dismissal.

2. I apologise to the parties that my absence on extended leave over the Christmas and New Year period has led to a delay in sending this reserved judgment to the parties.

The issues in the case

3. The claimant was employed by the respondent as a cleaner. The respondent provides facilities management and associated support services. The claimant had been employed by Bolton Council from 20 April 2009. On 21 May 2018 her employment transferred from the Council to the respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). That was because the respondent won the contract to provide services to Bolton at Home ("the Client") under which the claimant worked. It was agreed that the claimant's continuous service ran from 20 April 2009 until her dismissal on 3 April 2019.

4. The respondent said that the claimant was dismissed because of third party pressure. Specifically, it said that the Client made it clear that it did not want the claimant to return to work at any of its premises. The respondent said (and I accept) that third party pressure is recognised as a potentially fair reason for dismissal.

5. At the start of the hearing we had a brief discussion about the claimant's complaint and in particular clarified that she was not arguing that her dismissal was because of the TUPE transfer. Mrs King specifically confirmed that it was not and that she was not seeking to amend the claim to add that as a ground of complaint.

6. With that in mind, we agreed that the issues which I needed to decide were those set out in the respondent's proposed List of Issues, namely:

(1) Was the claimant dismissed for a potentially fair reason?

(2) Did the respondent carry out a reasonable investigation into the complaints raised against the claimant by the Client?

(3) Did the respondent follow a fair procedure in dismissing the claimant?

(4) Was the decision to dismiss the claimant reasonable in all the circumstances? In particular, did the respondent take reasonable steps to mitigate any injustice to the claimant by the Client's decision?

(5) If the dismissal was found to be procedurally unfair only, should any award of compensation be reduced to reflect the fact that the claimant would have been dismissed fairly if a fair procedure had been followed?

(6) If the dismissal is found to be substantially unfair, should any award of compensation be reduced to reflect any contributory conduct by the claimant?

7. For the respondent I heard evidence from Mrs Dennehy, its HR Director. I heard evidence from the claimant in support of her case. There was an agreed bundle of documents of 278 pages. References in this judgment to page numbers are to page numbers in that bundle.

8. One preliminary matter was that the contract between the respondent and the Client ("the Contract") had been significantly redacted with whole pages showing black and no legible text. That also applied to an email which was central to the case (page 100) where paragraphs preceding and succeeding a paragraph complaining about the claimant had been redacted. After taking instructions, Mrs

Smeaton provided an unredacted copy of the email which was added at pages 101A-101C of the bundle. I was provided with an unredacted copy of the ontract between the respondent and the Client. Mrs Smeaton explained that the respondent was concerned about commercial sensitivities and did not want to disclose the contract as a whole because it was coming up for retender.

9. Having read the Contract in full, I was satisfied that there were no contractual provisions relevant to the issues that I needed to decide other than clause 7.1 (which had not been redacted) and two further provisions which might become relevant after hearing oral evidence. The first of those was clause 12 of the Contract which confirmed that the respondent and the Client had to comply with their obligations under the DPA. That was potentially relevant to one of the complaints raised against the claimant, namely that she had worn a bodycam at work. The second provision was Annex 3 which referred to a contract communication book in which the respondent and Client could log and monitor cleaning standards. That seemed potentially relevant if questions of communication between the respondent staff and the Client staff came into play.

10. I asked Mrs King whether she wanted to read the unredacted Contract in full but she indicated that she was happy to rely on my reading of it. In the event, neither of the previously redacted contractual provisions were relevant to the facts I needed to find and the issues that I needed to decide.

11. Mrs King did not have any previous experience of making submissions before the Tribunal. To assist her and Mrs Smeaton in preparing their submissions I indicated after hearing the evidence that the key issue which I needed to decide was the one highlighted by the Employment Appeal Tribunal ("the EAT") in **Henderson v Connect South Tyneside Limited [2010] IRLR 466,** i.e. whether the employer in this case had done everything that it reasonably could do to avoid or mitigate the injustice brought about by the stance of a third party. I explained that in **Henderson** the EAT had given as an example of an employer trying to change the third party's mind or, if that was impossible, trying to find the employee alternative work. According to **Henderson**, provided an employer attempted that any eventual dismissal was likely to be fair.

The Law

12. S.94 Employment Rights Act 1996 ("ERA") gives an employee a right not to be unfairly dismissed by her employer. To qualify for that right an employee usually needs two years' continuous service at the time they are dismissed, which the claimant had in this case.

13. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or if more than one the principal reason) for dismissal is one of the potentially fair reasons set out in s.98(2) of ERA or some other substantial reason justifying dismissal.

14. In this case the respondent said the reason for dismissal was some other reason justifying dismissal ("SOSR") namely third party pressure to dismiss in the form of the Client's instruction that it did not want the claimant working on any of its premises.

15. Third party pressure to dismiss can amount to SOSR and so a potentially fair reason for dismissal: **Dobie v Burns International Security Services (UK) Ltd 1984 ICR 812, CA.**

16. Where an employer has shown a potentially fair reason for dismissal, whether the dismissal was fair or unfair depends on whether in the circumstances of the case the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. The Tribunal has to decide that in accordance with equity and the substantive merits of the case. (S.98(4) ERA). It is not for the Tribunal to substitute its own decision but to decide whether the employer's decision to dismiss was within the band of reasonable responses to the circumstances.

17. Where the potentially fair reason is SOSR in the form of third-party pressure, It is not enough for an employer simply to show that there was third-party pressure to dismiss an employee, thereby establishing SOSR as the reason for dismissal. The tribunal will also need to consider whether it was reasonable to dismiss the employee because of that pressure.

18. In **Dobie** the Court of Appeal said that, in considering reasonableness, a Tribunal should look at the conduct of the employer and, crucially, whether dismissal is an injustice to the employee. An argument based on injustice is less likely to be sustainable if the employee's own contract warned that a third party could intervene to have him or her removed.

19. An employer must do everything that it reasonably can to avoid or mitigate the injustice brought about by the stance of the third party - **Henderson v Connect South Tyneside Ltd [2010] I.R.L.R. 466**. In a case of 'patent injustice' the employer may have to 'pull out all the stops'. In **Henderson** the Employment Appeal Tribunal gave the example of an employer trying to change the third party's mind or, if that is impossible, trying to find the employee alternative work. Provided that an employer has attempted this, any eventual dismissal is likely to be fair.

20. In **Polkey v A E Dayton Services Ltd [1988] 1 AC 344, [1988] ICR 142** Lord Bridge said that "If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment] tribunal is not permitted to ask in applying the test of reasonableness... is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section [98(4)] may be satisfied."

21. S.118(1) ERA says that:

> "Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—

(a) a basic award (calculated in accordance with sections 119 to 122 and 126, and

(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126)."

22. The basic award is calculated based on a week's pay, length of service and the age of the claimant.

23. The compensatory award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

24. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee could have been dismissed at a later date or if a proper procedure had been followed (the so-called **Polkey** reduction named after the House of Lords decision in **Polkey v AE Dayton Services Ltd** referred to above).

25. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).

26. Where the tribunal considers that any conduct of the claimant 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 (s122(2) ERA).

Findings of Fact

27. The claimant worked as a cleaner at two of the Client's premises. She worked from 6 a.m. to 8.30 a.m. Monday to Friday at its Valley House site and 5.30 p.m. to 7.30 p.m. Monday to Friday at its Riverside site. The claimant had worked those same hours at those same sites for Bolton Council before the TUPE transfer on 1 May 2018.

The May complaint

28. It was accepted that prior to the TUPE transfer the claimant had a clean disciplinary record. However, shortly after the TUPE transfer, the respondent received a complaint about her behaviour. This was from Jules Nicholls, the Client's Facilities Manager. The complaint was set out in an email dated 1 May 2018 to Vincent Hoaereu, the respondent's Operations Manager (p.100).

29. The complaint was about the claimant's attitude. It resulted from an incident that morning at the Client's Valley site. Ms Nicholls wrote that while she was sitting at her desk on the second floor she asked the claimant if she could wipe down the desktop she was sat at as it had not been cleaned for some days. Ms Nicholls said that the claimant's response was very aggressive, stating the desk was cleaned the day before and that Ms Nicholls should take it up with her supervisor. Ms Nicholls said that she had explained the desk was not cleaned daily on a regular basis but

that the claimant had continued to talk in the same manner, so Ms Nicholls had asked her name. Ms Nicholls had then viewed the claimant clean the desk and others on her bank of desks. She complained that the claimant did not clean all the desks and only cleaned half of her desk. Ms Nicholls said that "the cleaning staff do not appear very happy this morning" but went on to say that others she had spoken to had been courteous and that she was concerned that others would experience the same attitude from the claimant. She asked Mr Hoaereu to "look into this for me". The respondent did not suggest that it had raised this complaint with the claimant at the time and no action was taken against her.

The August complaint

30. There was a second complaint from Ms Nicholls about the claimant on 2 August 2018. It related to the Valley House site. It alleged that on Thursday 26 July 2018 the claimant had dusted and used a feather duster on desks which had been specially allocated to some of the Client's staff who are asthmatic or who have chemical allergies. It was also alleged that once she had been told not to clean the desks and why, the claimant had said that asthma and allergies were all in people's heads. It was also alleged that she had continued to deliberately use a feather duster around those Client staff who had asthma and allergies, smirking at them while doing so. Ms Nicholls attached an anonymised email from the Client's employee who had complained to her, setting out the details of that employee's complaint

31. In the email to Madeleine Dennehy reporting the complaint Ms Nicholls requested that the claimant "be removed from Valley House/Riverside sites initially, pending the outcome of your internal disciplinary investigation....with immediate effect" (p.102). As a result, the claimant was suspended on full pay from 10 August 2018 pending an investigation into the allegations against her (p.107).

32. At the investigatory meeting conducted by Mr Hoaereu on 29 August 2018 (postponed from 14 August 2018 at the claimant's request) the claimant said she was baffled by the complaint because she did not come into contact with staff at Valley House. She said the staff all started after 8.30 a.m. when her morning shift there finished. She also said she had not been told by her supervisor, Tina, that she was not to clean those desks (p.113).

The first disciplinary proceedings (August-October 2018)

33. The investigation led to disciplinary proceedings being taken against the claimant. The disciplinary hearing was held on 3 October 2018, the previous hearing on the 26 September 2018 having been adjourned at the request of the claimant and her trade union representative who needed more time to prepare. The disciplinary hearing was conducted by Antonyia Hristonova, the respondent's Deputy Head of HR.

34. Prior to that first hearing the claimant had been sent the email dated 2 August 2018 making the allegations; the investigatory meeting notes; a further anonymous email dated 14 September 2018 and an anonymous statement. The anonymous email of 14 September 2018 (p.114-116) was from another of the Client's employees corroborating the allegations made against the claimant. It was sent to the respondent by Jules Nicholls on 14 September 2018 with a brief covering email saying "attached further witness statement for your internal investigation in relation to

[the claimant] as requested" (p.115). The statement was a handwritten statement from a Client Health and Safety rep. At the disciplinary hearing the claimant and her representative raised concerns that the anonymous email dated 14 September 2018 was written by a family member of the person who had raised the complaints against the claimant and was "inadmissible". They also submitted that the witnesses should be interviewed.

35. Ms Hristonova decided that the claimant should be given a final written warning. She accepted the claimant's evidence that she had not been told by her supervisor Tina Farley not to dust the allocated desks until 26 July 2018. However, she concluded that she had been grossly negligent in relation to health and safety by continuing to dust around employees who had serious conditions like asthma after she had been told not to do so. Ms Hristonova also decided that she had a reasonable basis to believe that the claimant's behaviour towards the Client's staff had been inappropriate.

36. Before the claimant was informed of the outcome, Linda Barnes (the respondent's account manager for the Client) reported it to Ms Nicholls. In an email exchange on 8 October 2018 Ms Barnes told her that the claimant was issued with a final written warning and asked whether the Client was "happy for the claimant to come back on site" (p.134). Ms Nicholls replied on the same day (p.133) to say that while she had no objections to the claimant returning she did have some concerns about her working at Valley House. That was because "there have been several occasions where her actions have been brought up by staff in relation to her behaviour". She said that she would need to understand "how will [the claimant] be managed in her daily work to ensure there are no repercussions". She also asked that the claimant not work on the 1st floor at Valley House.

37. When Ms Hristonova wrote to the claimant on the 10 October 2018 (p.136-139) to tell her that she was being issued with a final written warning she also told her about the concerns raised by the Client and the request that she not work on the 1st floor at Valley House. The letter explained that as a result, the claimant would have an informal meeting with Linda Barnes and Tina Farley on 12 October 2018 "to reassure [the Client]" and to "make you aware of the Client's concern and how they will be addressed". The claimant would then return to work at Valley House on Monday 14th October (though that is an error and should refer to Monday 15th October).

38. At that meeting on the 12 October 2018 (the notes of which are at p.140-142) the claimant was given a list of duties and confirmed she was happy with that and with returning to work on the 2nd Floor at Valley House. She explained she would not be in work on Monday due to a funeral and agreed she would start work on Tuesday 16 October 2018. In the meeting she also told Linda Barnes and Tina Farley that she would be going into hospital to have an operation on 17 December 2018 and asked about her sick pay.

39. On 15 October 2018 Ms Hristonova emailed the claimant to say that the respondent had been in touch with the Client who had confirmed that the claimant could return "on site" (p.143).

40. On 16 October the claimant appealed by email against the decision to issue her with a final written warning (p.144). She did so on two grounds. The first was that

the sanction of a final written warning was too severe given that she had a clean disciplinary record. The second was that there were doubts about the authenticity of the witness statements because they were anonymous. In a letter dated 23 October 2018 Mrs Dennehy acknowledged the appeal and told the claimant it would be dealt with in writing unless the senior manager asked to review it felt that a hearing was necessary (p.145). On 6 November 2018 Gareth Leverton, the respondent's Business and Operations Director wrote to the claimant to confirm that he had reviewed the decision to issue her with a final written warning. He considered the evidence relied on was authentic and upheld the decision to issue the claimant with a warning. However, he agreed with the claimant that the sanction which was imposed was too severe. He therefore replaced the final written warning with a first written warning (p.169).

41. Between the lodging of the appeal and Mr Leverton's decision, however, there have been other complaints about the claimant by the client.

The October allegations

42. The claimant returned to work at the Client's premises on Tuesday 16 October 2018. In an email to Mr Hoaereu on Friday 19 October 2018 Ms Nicholls raised a complaint that the claimant and another cleaner had clocked off early while working in the evening at the Client's Riverside premises (p.151). Ms Nicholls forwarded as evidence of the allegation an anonymous email from one of the Client's employees (p.152). It alleged that on Wednesday 17 October 2018 the claimant and another cleaner had been sitting chatting for 20 minutes during their shift and had then left at 7.20 p.m. The shift was supposed to end at 7.30 p.m. Ms Nicholls said in her email that "given that [the claimant] has only just returned from an earlier disciplinary [Ms Nicholls was] really disappointed and trust this will be dealt with promptly" (p.151).

43. By the morning of 22 October 2018 it had been agreed that Andy Griffiths, an Area Manager with the respondent, would conduct an investigation into the allegation. Mr Hoaereu asked him to make an appointment to see the claimant and the other cleaner involved at his earliest opportunity (p.148).

44. However, before that first allegation was investigated a further allegation was made against the claimant namely that she had worn a personal camera/recording device at the Client's premises. Mrs Dennehy's unchallenged evidence (para 27 of her witness statement) was that Ms Nicholls had raised this complaint with Linda Barnes on 22 October 2018. The claimant's evidence (para 35 of her witness statement) was that at 9.30 a.m. on the 22 October Linda Barnes had phoned her and asked her whether she wore a recording device and she had confirmed that she did.

45. Mr Hoaereu reported the allegation to Silvia Garcia of the respondent's HR team in an email on 22 October at 19.36 (p.148). Mr Hoaereu says he has received an allegation (presumably from Linda Barnes) that the claimant had been seen wearing "what looks like a dashcam type device on her person. When challenged by another cleaner she made out it was a pen". He goes on to say that "in addition to this [Ms Nicholls] has had the same allegation passed on to her via one of her own staff. I have yet to confirm this directly with [Ms Nicholls] though". It was agreed that Mr Griffiths would raise this new allegation with the claimant when he held his

investigatory meeting into the allegations that she and a colleague had clocked off early and taken an unauthorised break on 17 October 2018.

46. On 23 October 2018 the respondent wrote to the claimant requesting that she attend an investigatory meeting with Mr Griffiths at 5.30 p.m. on Wednesday 31 October 2018 at the Client's Riverside premises, i.e. her place of work (p.153). The letter explained this was to investigate "alleged misconduct which includes:

- Not working full contracted working hours
- Taking unauthorised breaks
- Allegations of you having a recording device on you on site."

47. The investigatory meeting with Mr Griffiths eventually took place on 7 November 2018, having been postponed to enable the claimant's trade union rep to be present. In the meantime, however, the Client had on 30 October 2018 sent two emails to the respondent about the claimant. They were both from Ms Nicholls to Mr Leverton.

48. The first email ("the DPA email") was a long one (p.154-156). It had been prepared after Ms Nicholls had spoken to the Client's Information Governance Team. It set out a list of questions and points of information which the Client wanted the respondent to put to the claimant at the investigatory meeting. I find the Client's concern was that if the claimant had recorded footage at the Client's premises this could mean that there had been a breach of its data protection obligations. The particular concern was that any footage recorded by the claimant might have captured information about the Client's tenants or customers on notice boards, computer screens or in conversations between the Client's staff.

49. The questions aimed to clarify what footage, if any, the claimant had recorded on the device; what she had done with the footage; whether it had been shared with anyone; what training on data protection and information security the claimant had received; and what confidentiality obligations she was subject to. The points of information to be made clear to the claimant were that recording and retaining personal data without consent were criminal offences and that if she had such footage she was "strongly advised" to ensure it was erased. The email said that could be done either by her bringing it in so the Client's IT Service could erase it or by arranging for Concept Management Ltd to erase it at her cost. If the latter option were chosen, the Client required that CML provide an assurance that it had been securely erased. That email ended with a recommendation that the claimant be informed that "we expect her to take this action immediately and by Tuesday 6 November 2018 at the latest".

50. The second email was sent at 4.59 p.m., about an hour and 45 minutes after the first (p.154). In it Ms Nicholls said that after "further consideration with Mark [Delaney of the Client] we request that [the claimant] be removed from the site immediately whether the allegation is proven or disproved as we find that this behaviour is totally unacceptable from the contractor and their operative…Please can you ensure [the claimant] is informed immediately and appropriate cover is booked".

51. I find as a fact that as at 30 October 2018 the Client's clear position was that they no longer wanted the claimant working on their premises. The reference to "whether the allegation is proved or disproved" makes it clear that the Client was not simply saying that it wanted the claimant removed pending the outcome of the investigation into whether she had recorded footage on the Client's premises.

The investigation of the October allegations

52. As a result of that second email, the claimant was suspended on full pay pending the investigation into the allegations against her. The letter confirming the suspension is dated 31 October 2018 but refers to a conversation which the claimant had with Linda Barnes on the previous day. It says that "you were informed that the client at the above site has instructed us clearly and irrevocably that you were not permitted to return to their site with immediate effect" (p.157). The claimant (para 35 of her witness statement) confirms that she was called by Ms Barnes at the end of her shift on 30 October 2018 and told not to report for her shift in the morning.

53. At the investigation meeting on the 7 November 2018 the claimant denied not working her full hours and leaving early on the 17 October 2018 (notes at 170-175). She confirmed that she wore a personal camera. Her explanation was that her husband had bought it for her for her personal safety so that she could record her walk into and from work. She accepted she had once forgotten to take it off when she was on the Client's premises but denied that it was ever switched on when she was on the Client's premises. She was asked by Mr Griffiths whether she would be happy to show him the footage and said "yes". She confirmed that the footage could be viewed by downloading it onto a computer, though she said it was "on a loop". By that, I understand her to mean that the footage was overwritten regularly rather than all previously recorded footage being available.

54. Mr Griffiths did not ask to view the footage at that point saying "we can organise to look at the footage at a later date" (p.174). He did not go through the detailed list of questions in the DPA email from Ms Nicholls with the claimant, though he did ask her some of the questions including whether she had had data protection training. He did not inform her that breach of the DPA was a criminal act nor did he "strongly advise" the claimant that she should arrange for any footage to be erased.

55. At the meeting, Mr Griffiths read a written statement prepared by the claimant (p.159-161). In addition to repeating the denials of recording any footage at the Client's premises or clocking off early, the claimant in that statement alleged that there was a "vendetta to terminate my employment or after drawing my supervisors attention to my unhappiness about left on my own as a lone worker I am now being victimised" (p.160). This refers to an incident on the 25-26 October 2018 when two colleagues of the claimant who arrived late and left early and whose entries in the cleaners' singing in/out book had, the claimant said, been doctored to show that they had actually arrived and left on time.

56. The claimant's evidence (paras 31-34 of her witness statement) was that she had been left alone at the Client's Riverside premises during the evening shift on the 25 October 2018. The two other cleaners (one of who, Codie, was the supervisor's daughter) had not arrived until 6 p.m. rather than 5.30 p.m. because of traffic. This was corroborated by text messages received by the claimant from her supervisor Tina (p.163). The claimant's evidence was that both the other cleaners had then left

at 7.10 p.m. leaving her alone in the building until 7.30 p.m. The claimant wrote a note in the "comment" section of the signing in book to say that she had been left alone and also to note that incorrect timings had been entered for the other two cleaners. She had taken a picture of the signing in book on her phone and it does show the other cleaners signing in at 5.45 p.m. and leaving at 7.45 p.m. (in the case of one) and 6.45 p.m. (in the case of the other) (p.164). The following day, the claimant said she raised the issue with Tina at the start of the morning shift. When she came to sign in for the evening shift there was a note from Tina to the claimant saying "please do not touch the signing in book. I have reported it to Linda and Vincent and they are aware of the times and been docked this is my job not yours" (p.165). The claimant's evidence (corroborated by a further photo of the signing in book at p.166) was that the other cleaners' times had been tippexed and changed to arriving at 5.45 p.m. and leaving at 7.10 p.m. The claimant in her statement (para 34) pointed out that this was still not correct since neither had arrived before 6 p.m. Given the corroborating documentation I accept the claimant's evidence about what happened on the 25-26 October 2018.

57. Mr Griffiths did not directly address or ask questions about the claimant's allegations at the investigatory meeting on 7 November 2018. Instead he said he would take the evidence away "and digest it". By a letter dated 19 November 2018 the claimant was invited to a second investigatory meeting with Mr Griffiths on the 22 November 2018. The meeting was arranged "because we are in the process of investigating" the points she had raised in her statement to the 7 November meeting. The letter said that the footage from her recording device would also be viewed at the meeting (p.177).

58. There was no evidence either in the bundle or from Mrs Dennehy that the respondent kept the Client informed of the progress of the investigation at this point. That is despite the long email from Ms Nicholls on 30 October 2018 having requested that the claimant confirm by 6 November 2018 that any footage had been erased. Neither is there any evidence that the claimant was alerted to this deadline by Mr Griffiths at the meeting on the 7 November 2018 nor by the respondent in any of its letters to her. She was at that point suspended from work and there was no evidence that the Client wrote to her direct about this issue or the 6 November 2018 deadline. The claimant's union rep in an email to the Client's Group Chief Executive Officer, Jon Lord, on 11 April 2019 said that the claimant was unaware of that deadline until April 2019 (p.239). I find that that was the case.

59. The claimant and her union rep attended the further meeting with Mr Griffiths on 22 November 2018. The notes of the meeting were at p.186-189. The notes are headed "Grievance Hearing" and Mr Griffiths seems to have treated the allegations raised by the claimant in her statement at p.159-161 as a grievance though it is not put in those terms. The allegations covered:

- the previous disciplinary proceedings;
- a refusal on 18 October 2018 to allow her to carry over outstanding leave which she did not think she would be able to take before she was due to be admitted to hospital for an operation in December;
- the events on 25-26 October 2018; and

- the claimant's responses to the allegations against her of unauthorised absence and wearing a recording device at the Client's premises.

The claimant confirmed that her view was that there was a vendetta against her because of drawing attention to her lone working and the events surrounding that on the 25 and 26 October. She felt in particular that Tina had acted to protect her daughter Codie and that her actions in changing the signing in book amounted to defrauding the respondent and/or the Client. By that I understand her to meant that the Client had paid for work not actually done by the cleaners because they had not worked the hours the signing in book said they had. She suggested that also cast doubt on evidence which she said Tina had given in the proceedings which resulted in the claimant being given a written warning in October 2018.

60. Mr Griffiths emailed the notes of the meeting on the 22 November 2018 to Tara Farrell of the respondent's HR team and Mr Hoaereu on the 23 November 2018. His covering email (p.179) confirmed that there was no footage on the recording device. In the email correspondence leading up to a meeting between the claimant and the respondent in March 2019 the claimant suggested that there had been a fifth page to the notes confirming that the footage on her recording device had been viewed by Mr Griffiths and there was nothing on it (p.213). The respondent at that time checked with Mr Griffiths and he confirmed there was no fifth page to the notes but also confirmed that there was no footage on the recording device shown to him (p.213). I do not think anything turns on this dispute because it is clear from Mr Griffiths' email that he did confirm to his colleagues in November 2018 that there was no footage on the recording device.

61. On 26 November 2018 Ms Farrell reported back by email to Mrs Dennehy (p.178). She forwarded Mr Griffiths' email with the attached notes from the 22 November 2018 meeting and confirmed that there was no footage on the recording device. She said that she had checked with Mr Leverton and Mr Hoaereu "if we can check with the Client that they stick by the email [Ms Nicholls] sent to say they no longer want [the claimant] on site. [Mr Leverton] has said that she will want this and does not want her back on site". Ms Farrell then continues "Therefore the next step will be to call her (i.e. the claimant) to a meeting and advise her that the Client has asked for her removal from site and offer her alternative employment". Mrs Dennehy in her reply to Ms Farrell confirmed the proposed meeting with the claimant should go ahead and asked whether the respondent had confirmation in writing from the client of their decision exercising their right to have the claimant removed from the site (p.178). That email does not suggest to me that Mr Leverton had already discussed the position with the Client – saying as it does "she <u>will</u> want this" rather than "she <u>does</u> want this".

62. Mrs Dennehy in her evidence (para 34 of her witness statement) said that Mr Griffiths "found there was insufficient evidence to support the allegations in respect of failing to work contracted breaks or taking unauthorised breaks and decided that no action would be taken against the claimant in this regard". She cross refers to the notes of the meeting on the 7 November 2018 (p.170-175). Those notes do not include that conclusion on Mr Griffiths' part. I do find, however, that by 26 November 2018 the respondent had decided not to take disciplinary action against the claimant arising out of any of the October allegations. Otherwise, the next step would have been to invite her to a disciplinary hearing as it had done in respect of the first

disciplinary proceedings rather than a meeting to discuss alternative employment as Ms Farrell had proposed.

Client's confirmation of its position

63. On 28 November 2018 Mr Hoaereu emailed Ms Nicholls with the responses to the list of questions in the DPA email. The version of the response in the bundle was multicoloured, involving input from a number of the respondent's employees. (p.189A-189D). What Mr Hoaereu did was to forward an email string which included the DPA email itself, to which the answers to the questions had been added by Mr Griffiths. The string also included confirmation from another HR colleagues about the confidentiality clauses in the contract between the respondent and the Client which Ms Nicholls had asked about. There were some questions (in yellow) which were left unanswered pending information from Linda Barnes.

64. The forwarding email from Mr Hoaereu said "I understand that a further meeting is being held with [the claimant] next week following on with a grievance she raised. Please be assured that as discussed in our meeting she will not be allowed on to any [Client] sites as instructed and as part of her overall suspension. I will of course keep you updated on our progress in respect of [the claimant] next week."

65. In answer to the key questions in the DPA email. Mr Griffiths confirmed that there was no footage on the recording device; that the claimant told anyone who asked [the device] was for personal protection but wasn't activated during work "apart from at Valley House". However, in answer to the question whether the device had been activated at the Client's premises, his answer was "she admitted the camera was activated at one point during but said it wasn't turned on at Valley House, but she mainly uses it for personal protection outside of work".

66. I find that email gives no indication that the claimant had not seen the DPA email nor been told of its contents and the 6 November 2018 deadline for her to respond to the request to erase data. It gives no indication that the claimant had agreed to let the respondent watch any footage on the device on 7 November 2018 at the first investigatory meeting. I also find that it gives no indication to the Client that the respondent had decided that none of the October allegations warranted disciplinary action.

67. I also find that the answers to the questions in the email do not accurately reflect the evidence given by the claimant at the meeting with Mr Griffiths on 7 November 2018. The answers to the DPA email suggest that she did have the recording device turned on at Valley House whereas the notes of the meeting on 7 November 2018 record her as saying "There was one time I forgot to take it off but it wasn't turned on-this was at Valley House" (p.173). Mr Griffiths' email to Mr Hoaereu and others after that meeting also records that "[the claimant] admitted wearing the device on one occasion but claims it wasn't turned on, this was at Valley House" (p.184).

68. On the 3 December 2018 Mr Leverton emailed Ms Nicholls asking her "so that I can close off the [claimant's] disciplinary to please re confirm" her email of 30 October 2018 requiring the claimant's permanent exclusion from the Client's premises under clause 7.1 of the Contract between the Client and the respondent (p.191). On the 5 December 2018 Ms Nicholls replied saying that the Client

confirmed "enact clause 7.1.1 to refuse admission to the relevant person. Further pursuant to clause 7.3 please notify [the Client] of your actions in this matter" (p.190-191).

Termination of employment and appeals

69. By a letter dated 6 December 2018 from Ms Farrell (p.195-196), the claimant was invited to a "formal meeting" on the 18 December 2018 to discuss

- the Outcome of the Investigation
- the Client's Request
- Alternative Employment".

The letter said that "I can confirm the Investigation process has now been completed. However, I must also inform you that our client at the above site have decided to exercise clause 7.1 of the contract with [the respondent] of third-party pressure removal from any [of the Client's] sites. Therefore you will not be permitted to return to work on any of their premises". It also warned that if no alternative employment was available the outcome might be the termination of the claimant's employment.

70. There was then a hiatus until 12 March 2019 because the claimant was off sick recovering from an operation. However, on 5 March 2019 she was sent a letter inviting her to an informal return to work meeting (p.200). On the 12 March 2019 she emailed to confirm that she was well enough to return to work (p.203). On that same day she sent an email to the respondent about the arrangements for the return to work meeting in which she reported that she had spoken to her union rep. In that email she requested copies of the notes of the meeting with Mr Griffiths on the 21 November 2018 [an error for the 22 November] ; a copy of clause 7.1. of the Contract "along with the correspondence to the Client exonerating the camera use etc as proved on the 21 November" (p.202). Ms Farrell responded to these requests by saying that those were "issues before your absence at work" and would not be dealt with at the return to work meeting. She asked the claimant to propose dates for the return to work meeting and "we will then go from there" (p.201).

71. On the 13 March 2019 the claimant was invited to a meeting on the 22 March 2019. That invitation letter (p.204-205) was identical in its contents to that sent on the 6 December apart from the changes to the date of the proposed meeting. It did not directly address the requests for information in the claimant's email of 12 March 2019. However, clause 7.1 and the notes of the meeting on the 22 November 2018 were supplied by email by Ms Farrell on the 14 and 19 March 2019 (p.213-214). This was the point at which the claimant suggested that there was a page missing from the notes of the meeting, a matter I already have dealt with in para 60.

72. The meeting on the 22 March 2019 was held by Mr Hoaereu with Linda Barnes as notetaker. The claimant was represented by her trade union rep. Most of the meeting was spent discussing the list of alternative jobs which the respondent put forward for consideration by the claimant. However, Mr Hoaereu did confirm that the respondent was not taking any of the October allegations any further. The claimant's rep did ask whether the Client had been made aware that Mr Griffiths had

not found anything on the recording device. Mr Hoaereu's response was to say that the client can decide whether they want an employee on their site (p.217 of the meeting notes at p.216-221).

73. On 3 April 2019 the claimant emailed the respondent to say that none of the alternative posts offered were suitable. She also said that she believed the respondent owed her a duty of care and asked again on what grounds the Client had invoked clause 7.1 of the Contract and what right of appeal she had "given my exoneration from any wrongdoing" (p.232). She had made the same point in an email dated 27 March 2019 (p.224) and via her union rep on the 2 April 2019 (p.226).

74. On 3 April 2019 the claimant was sent a letter of dismissal (p.233). It said that since she did not wish to consider any of the alternative positions her employment was terminated with effect from 3 April 2019 "due to Some Other Substantial reason namely third party pressure". She was paid in lieu of notice and advised that if she wanted to appeal the decision she should do so in writing by 11 April 2019 to Mrs Dennehy.

Appeal against dismissal

75. The claimant did appeal by emailed letter on 11 April 2019 (p.235). Mrs Dennehy's evidence was that she did not receive it. I do note that the email seems to be addressed to the claimant and it may well be that she did accidentally email it to herself. In any event, the appeal was resubmitted and acknowledged by Mrs Dennehy on 30 April 2019 (p.241-244).

76. Mrs Dennehy emailed the claimant again on the 13 May 2019 (p.246A) to apologise for the delay and explain that it was due to her absence from the office due to a family bereavement. She confirmed she would review the appeal and hoped to respond by the 17 May 2019. Since the claimant was not raising new evidence she decided that it was not necessary to convene an appeal hearing but proposed dealing with the appeal in writing only.

77. Mrs Dennehy did not send the appeal outcome until 23 July 2019. In the letter of outcome (p.249-252) she upheld the decision to dismiss the claimant.

78. In summary, the claimant's appeal was based on the claim that the allegation on which the Client based its decision to invoke clause 7.1 was an allegation in relation to which the claimant had been "completely exonerated". She also claimed that the respondent had failed in its duty of care to her by failing to immediately relay to her the information in the DPA email and the request in it that she confirm erasure of any footage by the 6 November 2018. She asked what written evidence there was that the respondent had provided the Client with confirmation that she had the recording device in her possession for her personal safety and that they should "reconsider their decision based on anonymous unfounded allegations which had been disproved". She claimed that the alternative employment offered was not suitable because it was not at the same pay rate and too far in terms of travelling time. She alleged that the termination of her employment due to third party pressure was also a breach of her human rights being a violation of her right to work under article 23 of the Universal declaration of Human Rights.

79. In support of her appeal the claimant provided an email from Mr Lord, the Chief Executive of the Client in which he said that the claimant "has not been banned from [the Client's] premises indefinitely. The decision regarding attending premises as a cleaner was put in place in line with the contract, following disciplinary issues which have been dealt with by [the respondent] her employer". Mr Lord also confirmed that "in terms of applying for other positions within the Bolton at Home Group, [the claimant] can apply for positions in line with our normal recruitment activities" (p.247). Although Mr Lord's email does suggest that the claimant was not banned from ever working for the Client or on the Client's premises, I find it did not undermine the position as regards the claimant working at the Client's premises at Valley House and Riverside as set out by Ms Nicholls in her email of 30 October 2018 (p.154).

80. The key points made in the appeal outcome letter by Mrs Dennehy are that the Client requested the claimant's removal from the site regardless of whether the allegation of wearing a recording device was proved or disproved. Mrs Dennehy's letter says that "we followed up with the Client on 3 December 2018" and refers to Ms Nicholls email of 5 December confirming the Client's position. She says that the Client "reconfirmed their original decision regarding your removal from site despite the outcome of our investigation and conversations between ourselves and the Client". Pausing there, I did not hear direct evidence of any conversations between the respondent and the Client nor are there notes of any such conversations in the bundle. In answer to my question Mrs Dennehy asserted that there would have been such conversations but confirmed she had not herself been involved in any. In the absence of any direct evidence I do not find that any such conversations took place.

81. When it comes to the recording device allegation Mrs Dennehy said that although Mr Griffiths had found there was no footage on the device, the claimant "did not provide any footage/data to demonstrate how and/or what the device records. As a result we are unable to support your claim that you only recorded on the way to and from work as a safety precaution and cannot provide the required assurances to our client". She also said that if the claimant had forgotten to take the device off and taken it on to the Client's premises this breached the rule that respondent's employees were not allowed to take personal property onto client premises. I note this was not an allegation ever made against the claimant during the investigation meetings conducted by Mr Griffiths.

Other relevant findings of fact

82. There are two further findings off act which provide a context for the respondent's actions. The first is that that the respondent knew prior to the DPA email response on 28 November 2018 and the final communication with the Client on 3 December 2018 that if the Client did not take the claimant back it was likely she would lose her job. The email from Tara Farrell to Mrs Dennehy on 26 November 2018 (p.178) makes it clear that if the claimant was not able to return to the Client's sites "we have no vacancies near to her therefore we would have to terminate her employment".

83. Finally, I accept Mrs Dennehy's unchallenged evidence that the Contract was due for renewal, had not been going all that smoothly and that the respondent was very wary of doing anything to adversely affect their chances of regaining the Contract.

Analysis and conclusions

84. Applying the law to the findings of fact I now turn to the list of issues I need to decide.

Was the claimant dismissed for a potentially fair reason?

85. The evidence was clear that as at 30 October 2018 the Client had said that it would not let the claimant return to their sites at Valley House and Riverside where the claimant normally worked regardless of the outcome of the investigation into the October allegations. Mrs King did not really seek to dispute that that was the case. I find that the email from Mr Lord dated 29 April 2019 (p.237) did not alter that position.

86. Mrs King submitted that there had been an inconsistency between the treatment of the claimant and the treatment of other respondent employees, specifically the two colleagues of the claimant who arrived late and left early on 25 October 2018 and whose entries in the signing in book had been altered (see para 56). The claimant herself had gone further and alleged at her meeting with Mr Griffiths on 7 November 2018 that the October allegations were a result of a vendetta against her because she'd drawn her supervisor's attention to what had happened on the 25-26 October and her unhappiness at being left alone on the Client's premises (p.160). However, as Mrs Smeaton pointed out, the October allegations were raised against the claimant on the 22 October 2018. It cannot, therefore, be that those allegations were made in retaliation for what happened three days later on 25-26 October.

87. When it comes to consistency of treatment, there was no evidence to suggest that the Client had required that the claimant's colleagues involved in the 25-26 October 2018 incident be removed from site. There was also no evidence that those colleagues had been subject to previous complaints by the Client. I find that those colleagues were not in the same position as the claimant and that it would not be comparing like with like to compare their treatment with that of the claimant.

88. I therefore find that the respondent has established that there was a potentially fair reason for dismissal, namely the third-party pressure exerted by the Client to remove the claimant from its Valley House and Riverside sites. That is some other substantial reason justifying dismissal within s.98(2) ERA.

Did the respondent carry out a reasonable investigation into the complaints raised against the claimant by the Client?

89. There is an overlap between the next three issues. That is because this was not a straightforward case of an employer investigating allegations of misconduct against one of its employees. Instead, there was a third party involved, namely the Client. In assessing whether the respondent followed a fair procedure and acted reasonably, it seems to me I need to assess both whether it carried out a fair disciplinary procedure per se and whether it did so given the demands that the Client was making upon it in terms of reporting back on the allegations it had raised against the claimant.

90. Although it is slightly artificial to separate out those elements, I will consider first whether the internal process the respondent carried out in investigating the October allegations was a reasonable one. I find that it was. It gave the claimant notice of the allegations against her and the supporting evidence for those allegations (p.153); carried out two investigatory meetings giving the claimant an opportunity to respond to the allegations against her. It allowed the claimant to be represented at both meetings and indeed postponed the first meeting from its original date of 31 October 2018 to 7 November 2018 to allow the claimant's representative to attend. If there is a flaw in the process it was that the claimant was never given an express confirmation in writing that the outcome of the investigation was that there would be no disciplinary action taken against her. The letter dated 6 December 2018 from Ms Farrell does confirm that "the investigation has now been completed" (p.195) but without expressly stating what its conclusion was. However, I accept that it was clear to the claimant from that letter that the decision was that no disciplinary action would be taken. I find that the internal investigation in to the October allegations was a reasonable one in terms of the internal process followed by the respondent.

Did the respondent follow a fair procedure in dismissing the claimant?

Was the decision to dismiss the claimant reasonable in all the circumstances? In particular, did the respondent take reasonable steps to mitigate any injustice to the claimant by the Client's decision?

91. I find convenient to deal with these two issues together. That is because in assessing whether the procedure followed by the respondent in dismissing the claimant was fair, it seems to me it is necessary to ask what the respondent should have done to "avoid or mitigate the injustice" to the claimant by the Client's decision.

92. In this case, it does seem to me that the requirement was that the respondent should "pull out all the stops" because the case involved a "patent injustice" to the claimant. I say that because the Client had on 30 October 2018 said that it required that the claimant be removed from its premises whether the allegations against her were proved or disproved. It therefore required her removal even if she was wholly innocent of the allegations it had raised against her. The requirement to "pull out all the stops" was it seems to me even greater in this case when the respondent knew as at 26 November 2018 that the likely outcome was the claimant losing her job with the respondent (see para 82 above).

93. I do accept that the respondent did take steps to offer alternative roles to the claimant and that it was the claimant who decided that none were suitable. The claimant did not suggest that the respondent could have done anything further other than offering her her old job back. I do not accept that the claimant should have been offered her old job back because so far as the respondent was concerned, the Client had made it very clear they would not accept her by exercising clause 7.1 of the Contract in December 2018. It was not unreasonable therefore for the respondent to refuse to offer her that job.

94. I have found that the internal investigation into the October allegations was a reasonable one. However, in assessing whether the respondent carried out a fair procedure I also need to assess how it interacted with the Client in the lead up to the claimant's dismissal. Mrs Smeaton submitted that it did not simply take the Client's

position at face value. Instead it decided to undertake an investigation and then to go back to the Client asking it to confirm its position.

95. I accept what Mrs Smeaton says is correct as far as it goes. However, based on my findings of fact, I find that there were flaws in the respondent's approach.

96. First, as Mrs King submitted, the respondent accepted that it had not immediately asked the claimant to clarify whether she had footage from the Client's premises on her recording device. This was despite the fact that the respondent had in the DPA email on 30 October 2018 (p.154-156) asked for confirmation by 6 November 2018 that any footage on the device had been erased. I found that the claimant was unaware of that deadline until April 2019 (p.239). Mrs King submitted, and I accept, that had the respondent immediately checked the position with the claimant and confirmed to the Client that there was no footage from the Client's premises, it could have increased the chances of the matter being resolved quickly. I accept that would not necessarily have resulted in the Client accepting the claimant should return to work at its premises but it would have potentially resolved one of its main concerns, namely whether there was a DPA breach for which it might be liable.

97. I accept that the reason the first investigatory meeting was postponed to 7 November 2018 was to enable the claimant's representative to attend. That does not, it seems to me, explain why Mr Griffiths or another of the respondent's managers did not alert the claimant to the 6 November deadline or pass on the information in the DPA email to the claimant so that she could respond to it by the 6 November 2018 deadline. There was no evidence of the respondent going back to the Client and explaining that it was due to meet the claimant on the 7 November 2018 and asking for more time to respond to the DPA email or of it confirming after the 7 November 2018 meeting that the claimant was co-operating fully and was willing for the recording device to be checked for any footage. There was no evidence of any communication about the issue with the Client until the respondent responded to the DPA email on the 28 November 2018 (p.189A-189D).

98. Second, I found that when the respondent did report back to the Client on 28 November 2018 it did not clearly and accurately reflect what the claimant had told it about the recording device. In the absence of any other evidence, I found that the only reporting back of the outcome of its investigation was in its response to the DPA email questions (p,189A-D). Although it correctly told the Client that there was no footage on the recording device it also said that "she admitted the camera was activated at one point during but said it wasn't turned on at Valley House, but she mainly uses it for personal protection outside of work". In contrast, as I noted above, what the claimant had said was "There was one time I forgot to take it off but it wasn't turned on-this was at Valley House" (p.173) and Mr Griffiths' email to Mr Hoaereu and others after that meeting also records that "[the claimant] admitted wearing the device on one occasion but claims it wasn't turned on, this was at Valley House" (p.184).

99. Third, the respondent gave no indication in its response to the DPA email that it had decided not to take disciplinary action against the claimant arising from the October allegations. In her appeal outcome letter, Mrs Dennehy suggested that the respondent was "unable to support your claim that you only recorded on the way to and from work as a safety precaution and cannot provide the required assurances to [the Client]". However, I found that as at 26 November 2018 the respondent had

decided not to take disciplinary action against the claimant. There was no evidence that it communicated that to the Client. It did not do so in the DPA email response on 28 November 2018. It did not do so in the email from Mr Leverton to Ms Nicholls on 3 December 2018 (p.191) asking Ms Nicholls whether the Client still wished to exclude the claimant from its premises under clause 7.1 of the Contract. That email asks Ms Nicholls to "reconfirm" the decision to exclude on October 2018 "so that I can close off the [claimant]'s disciplinary". If anything, the implication from that email seems to be that the decision on disciplinary action it still an open one. There was no evidence of any further communication between the respondent and the Client about the issue, e.g. trying to persuade the Client to change its mind given the allegations against the claimant had not been proved.

100. Fourth, the respondent took no steps to spell out to the Client the likely consequences for the claimant of the Client not allowing the claimant back on site. I have found that the respondent was aware by the time it asked the Client to confirm its position on the 3 December 2018 that there were unlikely to be suitable vacancies for the claimant.

101. It seems to me that those failings by the respondent mean it cannot be said to have "pulled out all the stops" to mitigate the injustice to the claimant. The test is whether the employer's actions were within the band of reasonable actions. Applying that test it seems to me no reasonable employer would have failed to act more proactively, knowing that the claimant faced a patent injustice, namely potentially losing her job of 11 years even if innocent of the allegations against her. In that context it seems to me no reasonable employer would have delayed in responding to the DPA email or, at least, in alerting the Client to the fact that any delay in responding was not the fault of the claimant. No reasonable employer, it seems to me, would have failed to accurately report to the Client what the claimant had told it about the central issue in the allegations (i.e. whether the recording device was active on the Client's premises) and to tell it that it had concluded that disciplinary action was not appropriate in relation to the allegations made against the employer. It seems to me that in this "pulling out all the stops" case, no reasonable employer would have failed to spell out the likely consequences for the claimant if the Client maintained the position set out on 30 October 2018 and to suggest that in those circumstances it was appropriate for the Client to review its position and allow the claimant back on site.

102. If I am wrong that there had been a "patent injustice" to the claimant so that the reasonable steps to be expected of the respondent were fewer than in a "pull out all the stops case", it still does not seem to me that it did everything it reasonably could to avoid the injustice to the claimant. At the very least (and even taking into account the evidence about the sensitive nature of the relationship between the respondent and the Client at that point (see para 83)) it seems to me no reasonable employer would have failed to ensure it accurately reported what the claimant had said about when the recording device was activated on the Client's premises. No reasonable employer would have failed to make clear when asking the Client whether it still wanted to invoke clause 7.1 that it had decided that disciplinary action was not appropriate in relation to the October allegations and the likely consequences for the claimant. Mrs Smeaton submitted that the respondent acted as a good employer should in not taking the Client's allegations at face value and instead investigating them but it seems to me that does not help mitigate any

injustice to the claimant unless the outcome of the investigation is then fully and accurately reported to the Client and the consequences of the Client's decision clearly spelled out.

103. I have considered whether there it is arguable that those steps were not reasonable given that the respondent believed at that time that the Client would not want the claimant back on its premises whatever the outcome of its investigation. It seems to me that does not relieve the respondent from the obligation to at least try and change the respondent's mind even if it may be an uphill struggle.

104. I therefore find that the respondent did not take all reasonable steps to mitigate the injustice to the claimant arising from the Clients decision and that it therefore failed to follow a fair procedure. That failure means the claimant was unfairly dismissed.

If the dismissal was found to be procedurally unfair only, should any award of compensation be reduced to reflect the fact that the claimant would have been dismissed fairly if a fair procedure had been followed?

105. I have found that the claimant was unfairly dismissed because the respondent failed to take all reasonable steps to mitigate the injustice to the claimant arising from the Client's refusal to allow her on its premises. The next question is what would have happened had the respondent taken those reasonable steps. Would the Client have changed its mind if the respondent had made it clear sooner that there was no footage from the recording device; that the claimant was co-operating; that she had never activated the device on their premises (though she had worn it once by accident) that the respondent had decided no disciplinary action was appropriate in respect of the October allegations and that the claimant was likely to lose her job if not allowed back on site?

106. Given the evidence, I find that it would have been extremely hard to change the Client's mind in this case. As at 30 October 2018 the Client's clear position was that they no longer wanted the claimant working on their premises whether the allegations against her were proved or disproved. On 26 November 2018, Ms Farrell reported back by email to Mrs Dennehy (p.178) that she had checked with Mr Leverton and Mr Hoaereu "if we can check with the Client that they stick by the email [Ms Nicholls] sent to say they no longer want [the claimant] on site. [Mr Leverton] has said that she will want this and does not want her back on site".

107. The claimant submitted that the email from John Lord (page 247) suggested that the claimant would be allowed back to work at the Client's premises. I accept that email does indicate that the Client did not feel so strongly about the claimant that they would never contemplate employing her in the future. However, I find that the overwhelming likelihood is that even had the respondent taken the reasonable steps I have set out, the Client would have stuck by its decision to require the claimant's removal from its premises. I have considered whether there was no chance that the Client would change its mind so that any compensatory award should be reduced by 100%. In light of Mr Lord's email I do find that, had the respondent taken reasonable steps, there was a very small chance that the Client would have changed its mind and allowed the claimant back on its site. The Client had done so once before when the claimant <u>had</u> been subject to a disciplinary sanction whereas it would now being asked to take her back when had not. On the

other hand, Ms Nicholls had made the Client's views about the loss of trust in the claimant very clear. Taking all those factors into account I find that even had the respondent acted fairly, there is a 95% chance that the Client would have refused to allow her to return to their premises. The small chance that she would not have been dismissed arises from the fact that the Client had never had spelled out to it the consequences for the claimant of maintaining its stance in the light of the investigation outcome. If the Client still refused to allow the claimant back, the lack of alternative employment would mean that the claimant would have been fairly dismissed.

108. I do not find that the claimant's dismissal would have taken place any later had the respondent taken all reasonable steps.

109. I therefore find that the compensatory award in this case should be reduced by 95% to reflect the overwhelming likelihood that the Client would have maintained its refusal to accept the claimant back on site and that she would have been fairly dismissed at the same date as she was actually dismissed.

If the dismissal is found to be substantively unfair, should any award of compensation be reduced to reflect any contributory conduct by the claimant?

110. I have not found the dismissal to be substantively unfair. I will hear any further submissions from the parties about remedy at the remedy hearing of the case.

Decision and next steps

111. The claimant's claim of unfair dismissal succeeds.

112. The matter will now be listed for a remedy hearing with a time estimate of 3 hours. A Notice of Hearing will be sent to the parties in due course.

Employment Judge McDonald

Date: 3 February 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
20 February 2020

FOR THE TRIBUNAL OFFICE