



EMPLOYMENT TRIBUNALS

Claimant Miss Y Carr

Respondent Citizens Advice Bureau Plymouth

Heard at: Plymouth

On: 7 & 8 January 2020

Before:
Employment Judge Goraj

Representation

Claimant: Mr N Dilworth (McKenzie friend)

The Respondent: Mr T Challacombe, Counsel

JUDGMENT having been sent to the parties on 13 January 2020 and written reasons having been requested in accordance with Rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided: -

REASONS

1. By a claim form which was presented to the Tribunals on 18 September 2018, the claimant brought complaints of unfair dismissal and wrongful dismissal, in respect of notice, against the respondent.
2. The Tribunal was provided with an agreed bundle of documents ("the bundle"). The documents referred to in this Judgment are contained in section 2 of the bundle unless otherwise identified.

Witnesses and associated matters

The claimant

3. The Tribunal heard evidence and received witness statements from the claimant and also from Mrs K Long whose statement was not challenged by the respondent and was therefore taken as read. The Tribunal also received

a written statement, which has been treated as a written representation, from Jane Guy in support of the claimant which is essentially a character reference.

4. Mr Dilworth attended this hearing on behalf of the claimant in the role of “McKenzie friend” rather than as a formal representative. Mr Dilworth had previously represented the claimant at the investigatory/ disciplinary meetings referred to below. Mr Dilworth did not however, seek to give any evidence as a witness in respect of his attendance at such meetings.

The respondent

5. The Tribunal also received witness statements and heard oral evidence from Mrs S Cumberland, the respondent’s chief operating officer and dismissing officer, and Miss E Symonds, Head of Advice Services - the appeal officer, on behalf of the respondent.
6. For the purposes of confidentiality, other employees involved in this matter were identified by initials only unless otherwise referred to below.

The Issues

7. The Tribunal clarified the issues with the parties at the commencement of the hearing. The background to this matter and the primary issues are set out in a case management Order dated 11 October 2019 (“the Order”) which is at pages 48 to 52 of section 1 of the bundle. This case management hearing was conducted after a preliminary hearing had taken place in which the claimant’s complaint of disability discrimination was dismissed on jurisdictional grounds.
8. The Tribunal confirmed with the parties on 7 January 2020 that the issues to be determined by the Tribunal are broadly as identified in the Order save that, notwithstanding that it is stated in the Order that they were no procedural issues, Mr Dilworth who was acting as the claimant’s “McKenzie friend” in this case, identified a number of alleged procedural matters, including which he contended constituted breaches of the ACAS Code of Practice 1 :Disciplinary and grievance procedures (2015) (“the ACAS Code”), as referred to below.
9. The alleged procedural issues relate to the following: - (1) the alleged failure by the respondent to adopt/ follow a clear remit for the investigation (2) that the allegations in respect of the period prior to the claimant’s meeting with DG on 2 February 2018 should have been disregarded and (3) that Mrs Cumberland and/or Mr Gill should not have been involved as the disciplinary officer and/or investigating officer. The respondent made the point that these matters had not been raised previously. The respondent denied the allegations but did not object to them being determined by the Tribunal.
10. There was a further potential issue relating to the references in the claimant’s witness statement to alleged inconsistency of treatment in comparison with a senior manager. The claimant however confirmed, having been given an

opportunity to consider the position, that this was not being pursued as an allegation of unfairness.

11. it was established during the clarification of the issues that the claimant accepts that (a) she was guilty of the alleged conduct and which was levelled against her/ does not raise any challenge to the veracity of such allegations and (b) accordingly accepts that the reason for her dismissal was such conduct for the purposes of section 98 (1)/(2) of the Employment Rights Act 1996 ("the Act").

FINDINGS OF FACT

The claimant

12. The claimant was employed by the respondent from 2 April 2006 until her summary dismissal on receipt of a letter of dismissal on 24 May 2018, which is the effective date of termination for the purposes of the Act. The claimant was employed by the respondent as an administrator at the time of her dismissal.

The claimant's terms and conditions of employment

13. The claimant was issued with a statement of terms and conditions of employment around the time of the commencement of her employment. The statement of terms and conditions which the claimant signed on 18 April 2006 are pages 102-107 of the bundle. The Tribunal has noted in particular the references to : - (a) the respondent's disciplinary procedure (paragraph 12) (b) the respondent's dignity at work and operating procedure (paragraph 15) and notice provisions (which in summary mirrored the statutory provisions) (paragraph 9). There was no evidence before the Tribunal to indicate that the claimant was issued with any later terms and conditions of employment.
14. The claimant was not subject to any disciplinary action prior to the events in question.

The respondent's policies and procedures

15. The respondent's disciplinary procedure which was in force from 2016 is at pages 90-96 of the bundle. The Tribunal has noted in particular :- (a) the formal disciplinary procedure (paragraph 4) and (b) the formal disciplinary sanctions (paragraph 5) including the provisions relating to gross misconduct in respect of which it is stated that the normal consequence of such conduct would be dismissal without notice and (c) the examples of gross misconduct which included physical or verbal assault towards another employee, gross insubordination, refusal to obey the reasonable orders of an immediate supervisor, deliberate acts of harassment or bullying and behaviours counter to the respondent's dignity at work policy.
16. The respondent's dignity at work policy which was in force at the relevant time is at pages 84 – 89 of the bundle. The Tribunal has noted in particular the provisions at paragraphs 4 and 5 (including the provisions for informal

resolution of matters) and appendix 1 (including the examples of bullying and harassing behaviour).

17. The respondent's policies and procedures were available to staff on the intranet. The claimant confirmed in her evidence that she was aware that the respondent's policies and procedures were available on such server.

Background to the events in question

18. Prior to the events in question the claimant and CP were work colleagues and friends. The claimant shared with CP critical views of the management of the respondent from time to time when they worked alongside each other.
19. In or around November 2017 there was a restructuring within the respondent and a change in culture.
20. As part of the restructuring, CP made a successful application for a team leader position within the respondent. Such appointment caused resentment amongst some of the members of the team including the claimant and KB (an unsuccessful applicant for the post).

The email dated 24 January 2018

21. On 24 January 2018, the claimant's line manager BD issued, against the background of concerns relating to negative comments and office gossip within the team, a collective email to members of his team (including the claimant) (a) reminding staff of the respondent's behaviours framework and (b) instructing staff that team work was vital going forward including that they all committed to such guidelines and drew a line under recent events. BD further reminded staff of key responsibilities including the requirement to be respectful and professional in all interactions with clients, colleagues and external stakeholders. This email is at pages 24-25 the bundle.

The complaint by CP

22. On 31 January 2018 CP raised concerns with BD and DG (an energy projects coordinator at the respondent) about the alleged conduct of the claimant towards her. This email is at pages 1-2 of the bundle. In brief summary, CP advised BD/ DG that she had been incredibly upset to hear from several people within the office that the claimant had been talking about her in a nasty and derogatory way over the previous couple of weeks following CP's successful interview for a team leader position including that (a) CP didn't deserve to be appointed to the post (b) a member of staff had subsequently spoken to CP in private informing her of his distress by reason of such comments (c) that such comments had continued after BD had issued his email (dated 24 January 2018) reminding staff of the need to work within the behavioural framework including to be respectful and professional in all interactions. CP requested guidance and support in addressing the issue and expressed the hope that it could be sorted out.

The meeting between DG and the claimant on 2 February 2018

23. DG met with the claimant at around 9 am on 2 February 2018 to discuss CP's complaint. The meeting lasted for approximately half an hour. There are no notes of the meeting however, the Tribunal has had regard in particular to the oral evidence of the claimant and the contents of the subsequent email from DG to the claimant (timed at 11.22 am that day) at pages 5-6 of the bundle.
24. The claimant agreed that the email at pages 5-6 of the bundle was a broadly accurate account of what was discussed save that she denied that BG had advised her that any continuance of such conduct would result in disciplinary action. The Tribunal is however, satisfied, on the balance of probabilities, that the email from DG to the claimant at pages 5- 6 is a broadly accurate account of the matters discussed including that the claimant was told in clear terms that any continuance of such conduct would result in disciplinary action.
25. When reaching this conclusion, the Tribunal has taken into account in particular, that the email was sent shortly after the meeting and also that the reference to possible disciplinary action is consistent with the fact that DG attached a copy of the respondent's disciplinary procedure to his email for the claimant to review, sign and return confirming her understanding of the policy. DG's email also records that the claimant had declined the offer of speaking to CP on a face to face basis because the claimant did not consider that it would be beneficial – which was not disputed by the claimant.

The claimant's text to MK

26. Immediately after the meeting with DG, the claimant sent a text to her work colleague MK in which she stated "That fuckin bit (which the Tribunal understands to mean bitch) has put in a complaint about me". The screenshot of the text which is timed at 9.39 am is at page 3 of the bundle.

The email from the CP to DG on 2 February 2018

27. CP emailed DG at 11.09 am on 2 February 2018 advising him that she was really upset to learn that after DG had spoken with the claimant that day regarding her complaint she had heard the claimant talking to another employee CC about the meeting and that CC had subsequently told CP that the claimant had said that she could not believe that CP had made the complaint about her and that there were snakes in the office. The email from CP also stated that CC had told her that she and a further employee MK had previously raised concerns about the claimant's conduct with BD about a week ago. CP asked DG to advise her on the best way forward and expressed disappointment that the discussion with the claimant that day had not been sufficient to address the issue and stop the claimant's nasty behaviour towards CP. This email is at page 4 of the bundle.
28. DG sent his email to the claimant regarding the meeting earlier that day (as referred to at paragraphs 24 -25 above) at 11.22 am on 2 February 2018.

Email to LB

29. Later that morning DG sent an email to his manager LB advising her of what had happened following his meeting with the claimant that morning. This email is at page 7 of the bundle. In summary, DG stated that he was very disappointed that the claimant had demonstrated the same behaviour towards CP following his meeting with her that day and suggested that in the circumstances the matter be dealt with in line with the disciplinary procedure and behavioural framework. This email was also copied to other managers/HR within the organisation including Mrs Cumberland and BD.
30. On the morning of 2 February 2018 the claimant complained to DG that CP had made remarks about the claimant being childish which she stated had greatly upset her.
31. The claimant subsequently went off sick on 2 February 2018 and did not return to work prior to the termination of her employment.

The subsequent investigation

32. A formal investigation into the matter was subsequently undertaken by DG in the light of BD's absence from the office.
33. The respondent's notes of DG's investigation meetings with CC, MK, PC and CP are at pages 9 – 23 of the bundle. In very brief summary:- (a) CC stated in her interview that the claimant had made derogatory comments regarding CP and further that following the meeting with DG on the morning of 2 February 2018 the claimant had asked the people around her in an aggressive tone who were the snakes? (b) MK stated in his interview that he had heard the claimant making repeated derogative comments about CP following her application for promotion which he found very distressing and that he and CC had spoken to BD to advise him of what was going on. MK also disclosed in his interview the contents of the text which he had received from the claimant on the morning of 2 February 2018 following her meeting with DG (as referred to above) which he said he had found very upsetting and to which he had not responded (c) PC stated in her meeting that whilst she had heard the claimant express the view that CP should not have got the job she had also heard BD and KB making highly critical comments about CP and her appointment in preference to KB including that the interaction between KB and BD could often be a bitch fest.
34. LB meet with BD on 12 February 2018 as part of the investigation. The respondent's notes of that meeting are at pages 24 - 28 of the bundle.

The investigation meeting with the claimant on 20 February 2018

35. DG conducted an investigation meeting with the claimant on 20 February 2018. The claimant was accompanied by Mr Dilworth a union representative. The respondent's note of the meeting is at pages 31-34 of the bundle. The claimant handed in a further sicknote at the meeting which stated that she

was unfit for work because of work related stress. The claimant confirmed that she had seen the complaint from CP.

36. The claimant was informed that the meeting was part of a formal investigatory process which might lead to disciplinary proceedings, the respondent invited the claimant to explain her views on what had occurred and informed the claimant that the respondent would thereafter review the evidence to determine whether the matter should be pursued as a disciplinary matter. In brief summary, the claimant (a) stated that having being at the respondent for 12 years she was so angry about the way in which she had been treated and could not understand why the matter had not already been resolved (b) denied that she had made any direct comments about CP between 15 January and 2 February 2018, including the alleged comment that CP did not deserve the job, or that she had said anything derogatory about CP to MK. The claimant also stated that she had overheard CP make comments about her being childish following the conversation with CC on the morning of 2 February 2018. Mr Dilworth stated on behalf of the claimant that (a) the claimant denied that she had said anything inappropriate to CP (b) he felt that the matter had been blown out of proportion and (c) that the claimant was shocked by the complaints and the allegations were false. The claimant further stated that she felt that she was being unfairly singled out compared to other people.

The disciplinary proceedings

37. The respondent decided, having reviewed the evidence, that the matter should proceed to a disciplinary hearing. The respondent wrote to the claimant by letter dated 6 April 2018 inviting to her to a disciplinary hearing on 12 April 2018 (the letter was not originally included in the bundle however the Tribunal was subsequently provided with a copy). The claimant was advised of the nature of the allegations which she faced were that, "You acted in an unprofessional manner and outside of the expectations of Citizens Advice Plymouth Dignity in the Workplace Policy, when you are alleged to have made derogatory comments to other colleagues direct, to the wider office and via a text message about your colleague CP between the dates of Monday 15th January and Friday, 2nd February 2018.
38. The claimant was advised of the arrangements for the hearing and provided with a copy of the statements and other documents referred to in the letter. The claimant was also advised in that letter of the possible outcomes from the disciplinary hearing including that it could range from no formal action, a written warning for misconduct to dismissal for gross misconduct without notice. A copy of the relevant policies were included as part of the documentation and the claimant was advised of her right to be accompanied at the hearing

The hearing on 12 April 2018

39. Mrs Cumberland, the respondent's Business Manager, who was accompanied by a representative from HR, conducted a hearing on 12 April 2018. The claimant was in attendance. The claimant was represented by Mr Dilworth. The respondent's notes of the meeting are at pages 40 to 48 of the

bundle. In brief summary, the allegations were confirmed at the commencement of the hearing and the claimant confirmed that she had received the relevant documentation. The claimant was also advised of the potential outcomes.

40. The claimant's case was largely conducted by Mr Dilworth on her behalf. Mr Dilworth raised a number of procedural issues including in particular he challenged (a) the investigation including as he contended that that there was no clear investigation plan/ outcome and (2) the respondent's reliance on any allegations which pre- dated the meeting with DG on 2 February 2018, which he said had already been dealt with and should not therefore be addressed at the hearing/ taken into account.
41. The respondent stated that it considered that it was appropriate to have regard to all of the evidence when reaching a decision regarding the claimant's conduct however in the light of Mr Dilworth's continued concerns, it was decided that the hearing would be adjourned so that the respondent could consider further the matters which had been raised by him on behalf of the claimant.
42. After giving the matter further consideration, the respondent decided that it was appropriate to continue with the hearing including that it was appropriate to include the incidents which had occurred prior to the meeting on 2 February 2018 as part of the overall process.
43. The respondent accordingly took steps to reconvene the disciplinary hearing. The first rescheduled meeting was postponed at the claimant's request because of her continuing sickness.
44. A further letter was sent to the claimant dated 8 May 2018 resuming the hearing on 15 May 2018. This letter is at pages 51 of the 52 of the bundle.

The hearing on 15 May 2018

45. The claimant did not attend the disciplinary hearing because of her continuing illness. The claimant however submitted the written statement at pages 53 - 55 of the bundle. The claimant made no admissions in that statement regarding her conduct.
46. The respondent continued with the hearing in the claimant's absence. The respondent's notes of the disciplinary hearing are at pages 58 to 64 of the bundle. The Tribunal is satisfied that the respondent gave consideration to the matters referred to in those notes including that Mrs Cumberland undertook an analysis of the allegations as set out at pages 62 to 65 of the bundle.

The outcome meeting on 22 May 2018

47. The respondent subsequently conducted a formal outcome meeting on 22 May 2018. The claimant was not in attendance. Mrs Cumberland's conclusions/ decision are set out at pages 67- 68 of the bundle. The Tribunal has noted the matters which were taken into account by Mrs Cumberland

including that (a) she had concluded that the claimant had shown no remorse or understanding of the impact of her actions on CP and (b) that the claimant's conduct constituted a clear breach of the respondent's dignity at work policy and (c) having reviewed the respondent's disciplinary procedure which clearly listed bullying as an example of gross misconduct the appropriate sanction was dismissal without notice.

The letter of dismissal dated 23 May 2018

48. The respondent subsequently sent the claimant a letter of dismissal dated 23 May 2018 which is at pages 69-70 of the bundle which, on the balance of probabilities, was received by the claimant on 24 May 2018. The letter advised the claimant that she was dismissed without notice in accordance with the terms of the respondent's disciplinary procedure and the dignity at work policy on the grounds that the respondent had concluded that the claimant's conduct constituted a verbal assault towards another employee which was gross misconduct. The effective date of termination for the purposes of the Act is therefore 24 May 2018. The claimant was advised of her right of appeal.

The claimant's appeal

49. The claimant appealed the decision to dismiss her by letter dated 29 May 2018 which is at pages 71 – 73 of the bundle. In brief summary, the claimant denied the allegations including that (a) she had been spreading rumours or gossip (b) contended that anything that she had said had been taken out of context (c) contended that she had been singled out and (d) also made reference to the respondent's alleged failure to investigate properly the allegation that CP had accused the claimant of being childish on the morning of 2 February 2018. The claimant did not make any complaint about Mrs Cumberland's involvement in the disciplinary process.

The appeal hearing on 21 June 2018

50. The claimant was invited to, and attended, an appeal hearing on 21 June 2018 which was conducted by Ms Symonds who was accompanied by a representative from HR. The claimant was represented by Zoe Wate a union representative. The respondent's notes of the appeal meeting are at pages 76 to 80 of the bundle.

51. In brief summary, the claimant apologised if she had upset anyone but said that it was not her intention to do so and denied that she was guilty of any malicious gossip. The claimant / her representative relied in particular, on the bullet points recorded at page 78 of the bundle setting out the reasons why they did not consider that the dismissal was reasonable/ fair namely, in summary :- (a) the claimant had been employed for 12 years with a previously good disciplinary record and (b) the failure by the respondent to comply with the ACAS Code which normally required first and final warnings and (c) that no warnings were given at the informal stage or at the disciplinary hearing by which the risk of dismissal if her behaviour did not change was clearly set out.

The dismissal of the claimant's appeal

52. The claimant's appeal was subsequently dismissed by Ms Symonds on the grounds set out in her letter dated 13 July 2018. This letter is at pages 81 to 83 of the bundle. Miss Symonds addressed in the letter the matters that had been raised by the claimant's representative at page 78 bundle as referred to above.
53. The respondent confirmed that the claimant's dismissal for gross misconduct was upheld.

SUBMISSIONS

54. The Tribunal has had regard to the oral submissions which were made by Mr Dilworth on behalf of the claimant and by Mr Challacombe on behalf of the respondent at the conclusion of the oral evidence.

THE LAW

55. The Tribunal has reminded itself in particular, of the following matters: -
- (1) The starting point is section 98 (1) of the Act. It is for the respondent to establish the reason for dismissal or, if more than one, the principal reason for the claimant's dismissal, including that it had a genuine belief in such reason and that it was for one of the potentially fair reasons permitted by section 98 (1) / (2) of the Act.
 - (2) If the respondent is able to establish the reason for the claimant's dismissal, the Tribunal has to determine whether such dismissal was, in all the circumstances of the case, fair or unfair having regard to the matters set out in section 98 (4) of the Act. This includes whether the respondent's belief that the claimant was guilty of the alleged misconduct was based on reasonable grounds and after undertaking reasonable investigations and whether the Respondent acted fairly or unfairly in all the circumstances in treating the reason for dismissal as sufficient for dismissal. The burden of proof is neutral at this stage.
 - (3) When considering the above, the Tribunal has to determine whether the overall procedure adopted by the respondent and also the decision to dismiss the claimant/to reject her appeal, considered together, fell within the range of responses of a reasonable employer and it is not entitled to substitute its own decision. When determining the fairness of the procedure adopted by the respondent the Tribunal has to have regard to the overall disciplinary/ appeal process including whether the respondent adhered to its own policies and the provisions of the ACAS Code.
 - (4) Dismissal for a first offence may be justified, notwithstanding the lack of any previous misconduct, including where (a) the act of misconduct is so serious that dismissal is a reasonable sanction (b), where the rules make it clear that particular conduct will lead to dismissal and/or (c) where the employee has made it clear that he/she is not prepared

to alter their attitude so that a warning is unlikely to lead to any improvement.

- (5) A finding of gross misconduct does not automatically justify dismissal and it is important to consider any mitigating factors which might justify a lesser sanction for reasons specific to the employee or the incident in question.
- (6) If the Tribunal considers that there were defects in the process which were sufficiently serious to render the claimant's dismissal unfair, the Tribunal is required to consider for the purposes of any award of compensation (if it is possible to do so on the evidence available), what is likely to have happened if a fair procedure had been followed including the percentage chance that the claimant would thereafter have been fairly dismissed for the purposes of any compensatory award pursuant to section 123 (1) of the Act.
- (7) If the Tribunal finds that the claimant has been unfairly dismissed, the Tribunal is also required to determine whether there should be any reduction/further reduction in any basic and/or compensatory award pursuant to sections 122 (2) and/or 123 (6) of the Act by reason of the claimant's contributory fault. The Tribunal has reminded itself that contributory fault covers a wide range of conduct and can include culpable, blameworthy, foolish or otherwise unreasonable behaviour. The Tribunal has also reminded itself however, that for the purposes of determining any contributory fault it has to be satisfied that the claimant was, on the balance of probabilities, guilty of any such conduct, that it caused or contributed to the dismissal and that it is just and equitable to reduce any award.

The Claimant's complaint of wrongful dismissal

56. The Tribunal has reminded itself that it is required to apply a contractual test namely, that it is for the respondent to establish, on the balance of probabilities, that the claimant was guilty of gross misconduct. In order to amount to gross misconduct, it must be an act which fundamentally undermines the contract namely, repudiatory conduct by the employee going to the root of the contract. Moreover, the conduct must be a deliberate and wilful breach of the contractual terms or amount to gross negligence.

THE CONCLUSIONS OF THE TRIBUNAL

The complaint of unfair dismissal

57. The Tribunal has considered first the complaint of unfair dismissal.

58. The Tribunal has addressed the issues identified at paragraph 4 of the Order which were clarified/amended as indicated above at the commencement of the hearing.

Paragraph 4.1 of the Order

59. The Tribunal has considered first the reason for the claimant's dismissal. The claimant accepted that the reason for her dismissal was conduct as confirmed by Mr Dilworth at the commencement of the hearing. The Tribunal is, in any event, satisfied on the evidence that the respondent has established for the purposes of section 98 (1)/ (2) of the Act that the reason for the claimant's dismissal was her conduct relating to CP between 15 January 2018 and 2 February 2018 as identified at the disciplinary outcome meeting (pages 67 - 68 of the bundle) and in the associated letter of dismissal (page 69- 70 of the bundle).

Paragraph 4.2 of the Order

60. The Tribunal has gone on to consider next paragraph 4.2 of the Order namely, did the respondent hold a genuine belief in the claimant's misconduct on reasonable grounds, and following as reasonable an investigation as was warranted in the circumstances, that the claimant was guilty of the alleged misconduct. It is recorded at paragraph 4.2 of the Order that the claimant did not challenge the fairness of the procedure which led to her dismissal. As stated above however, Mr Dilworth confirmed at the commencement of the Hearing on behalf of the claimant that she did challenge certain procedural aspects of the investigation/ the conduct of the wider process. It was however, confirmed by the claimant on the first day of the Hearing that she accepted that she had committed the acts of misconduct which had been alleged against her.

61. The Tribunal has therefore considered the three allegations of procedural unfairness which Mr Dilworth has raised on behalf of the claimant as identified at paragraph 9 above.

62. The Tribunal has considered first the matters which have been raised by Mr Dilworth relating to the investigation. Mr Dilworth makes complaint that (a) there was no investigation plan/remit for the investigation and (b) that the investigation was carried out by DG rather than the claimant's line manager BD. The respondent contends that it carried out a reasonable investigation in all the circumstances and denies any unfairness/ breach of the ACAS Code.

63. The Tribunal is not satisfied, that there has been any procedural unfairness in respect of the investigation including that that there has been any breach of the ACAS Code for such purposes. When reaching such conclusion, the Tribunal has taken into account in particular that there is no requirement in the ACAS Code to have an investigation plan/ remit (paragraph 5) and that the requirements of the ACAS code with regard to the investigatory process are generic. The Tribunal is further satisfied that the investigation which was undertaken by the respondent was, in all the circumstances of the case, in any event appropriate and within the range of responses of a reasonable employer including that (a) the respondent undertook formal investigations

with all of the key people involved as part of that process including the claimant and (b) the claimant was made aware of the allegations against her and was given a proper opportunity to respond during the investigatory process. Further, the Tribunal is not satisfied that there was any procedural unfairness in respect of DG's involvement (rather than BD's) as investigating officer. When reaching this conclusion the Tribunal has taken into account that the claimant has not given any good reason why she was disadvantaged by DG's involvement and further that it would, in any event, have been inappropriate for BD to have been the investigating officer in the light of his direct involvement in the events in question.

64. The Tribunal has therefore gone on to consider the second allegation of alleged procedural fairness namely, in respect of the respondent's decision to consider the claimant's conduct towards CP which had occurred prior to the claimant's meeting with DG on the morning of 2 February 2018.
65. After giving the matter careful consideration, the Tribunal is satisfied that it was, in all the circumstances, fair and within the range of reasonable responses for the respondent to have regard as part of its investigation and further also its subsequent disciplinary process, to the incidents which occurred prior to meeting with DG on 2 February 2018. When reaching this conclusion, the Tribunal is satisfied that it was proper for the respondent to have regard to the overall picture and accordingly that there was no procedural unfairness in the respondent's decision to proceed with the allegations for the whole of the period between 17 January 2018 and 2 February 2018.
66. Finally, the Tribunal has considered the procedural concerns which Mr Dilworth has raised regarding Mrs Cumberland's (the dismissing officer's) alleged prior involvement in the matter. When considering this allegation the Tribunal has had regard to paragraph 6 of the ACAS Code (which in summary states that where practical different people should carry out the investigation and disciplinary process).
67. The Tribunal is not satisfied that any prior involvement by Mrs Cumberland in the matter was in breach of the ACAS Code and/or has, in any event, rendered the claimant's dismissal unfair for the purposes of section 98 (4) of the Act.
68. When reaching this conclusion, the Tribunal has taken into account in particular that (a) no concerns were raised by Mr Dilworth on behalf of the claimant at the first disciplinary hearing on 12 April 2018 concerning Mrs Cumberland's involvement as disciplining officer (b) there is no evidence in the documentation with which the Tribunal has been provided to indicate that Mrs Cumberland's involvement in this case prior to the disciplinary hearing was more than minimal and (c) that Mr Dilworth has not provided any details of the grounds upon which he contends that Mrs Cumberland's involvement in the matter has rendered the claimant's dismissal unfair.
69. Further, having considered the procedure overall (including at the investigation, disciplinary and appeal stages), the Tribunal is (a) not satisfied

that there were any procedural breaches of the ACAS Code and further and (b) is however satisfied having regard to the findings at paragraphs 32- 52 above that the procedure adopted by the respondent was fair and within the range of responses of a reasonable employer for the purposes of section 98 (4) of the Act.

Paragraph 4.3 of the Order

70. The Tribunal has therefore gone to consider what is, in reality, the issue at the heart of this case namely, whether the decision to dismiss the claimant was a fair sanction which was within the range of responses of a reasonable employer for the purposes of section 98 (4) of the Act.
71. When considering the fairness of the sanction, the Tribunal has reminded itself that it is not for the Tribunal to decide what it would have done but to determine whether the decision to dismiss the claimant was, in all the circumstances of the case and having regard to all of the matters identified in section 98 (4) of the Act, within the range of responses of a reasonable employer.
72. The Tribunal is satisfied after giving the matter careful consideration that, in all the circumstances of this case, the respondent's decision to dismiss the claimant (rather than to proceed by way of a written warning) was within the range of responses of a reasonable employer for the purposes of section 98 (4) of the Act
73. When reaching this conclusion, the Tribunal has taken into account in particular, the following matters namely: -
 - (1) The provisions of paragraphs 19 – 24 of the ACAS Code which envisage that in cases of misconduct, an employee will normally receive a first and/or final warning that any further misconduct is likely to result in dismissal prior to dismissal. No written warnings were issued to the claimant in this case. The Tribunal has also given careful regard to the contentions which were made on behalf of the claimant at the appeal hearing (paragraph 51 above and page 78 of the bundle) and by Mr Dilworth with regard to the application of the above provisions. The Tribunal has however weighed such matters against the matters referred to below.
 - (2) The terms of the respondent's dignity at work policy including the definitions of unacceptable conduct and responsibilities of staff referred to in the policy (paragraph 16 and pages 84 -86 of the bundle)
 - (3) The terms of the respondent's disciplinary procedure including that it made clear that conduct contrary to the respondent's dignity at work policy would be considered as gross misconduct (paragraph 15 page 95 of the bundle).

- (4) The above policies were available on the intranet and the claimant acknowledged that she was aware of their availability on such server (paragraph 17 above).
- (5) Paragraph 23 and 24 of the ACAS Code which (a) states that disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct (which included the claimant's conduct) and (b) recognises that some acts termed as gross misconduct may be so serious as to justify dismissal without notice for a first offence.
- (6) That DB reminded all staff including the claimant in his email dated 24 January 2018, at page 24 of the bundle, that the previous negative conduct had to stop and further the expectations of all staff going forwards.
- (7) This instruction was repeated by DG at his meeting with the claimant on 2 February 2018. The Tribunal is satisfied (paragraph 24 above) that DG made it clear to the claimant at that meeting that her conduct to date had been unacceptable and that if there was any repeat of such conduct it would result in disciplinary action. The Tribunal is further satisfied that by that time the claimant would, or should, have appreciated that any further repeated of such conduct was likely to be regarded as a very serious matter in the light of both the terms of the respondent's policies referred to above and the contents of DG's meeting with the claimant on 2 February 2018.
- (8) Notwithstanding that the claimant was clearly told by DG at the meeting on 2 February 2018 that her conduct was unacceptable and would result in disciplinary action if any further conduct occurred she repeated such conduct immediately following that meeting namely, she made the highly derogatory comment to CC about snakes in the office and also, very shortly thereafter, sent the text (which is at page 3 of the bundle) to MK which actions caused distress to both CP and MK.
- (9) The allegations were denied by the claimant throughout the investigation and disciplinary process, including (a) that the allegations were denied by the claimant and her representative Mr Dilworth when he represented her at the disciplinary hearing on 12 April 2018 (b) they contended at that hearing that the allegations were false and (c) the focus of the claimant's defence was on alleged inappropriate actions by her colleagues /procedural issues rather than any acknowledgement of any inappropriate behaviour on her part.
- (10) Further, there was no admission by the claimant of any wrongdoing prior to the appeal stage when the claimant gave a limited apology at the appeal hearing (page 76 of the bundle).

The claimant's wrongful dismissal claim

74. Finally, the Tribunal has gone on to consider the claimant's wrongful dismissal claim in respect of notice. When determining this claim the Tribunal is required to apply a contractual test to the above findings of fact. As indicated previously above, the Tribunal has to determine, whether, viewed objectively, it is satisfied on the balance of probabilities, that the claimant's conduct constituted gross misconduct namely, repudiatory conduct involving a deliberate and wilful breach of the contractual terms which went to the root of the contract.
75. Having given the matter careful consideration, the Tribunal is satisfied, applying the above objective test, that the claimant's conduct amounted to gross misconduct entitling the respondent to dismiss her without notice.
76. When reaching such conclusion, the Tribunal has taken into account in particular:- (a) the terms of the respondent's dignity at work policy and disciplinary policy (paragraphs 73 (2) and (3) above) which makes it clear that conduct in breach of the respondent's dignity at work policy would be considered as gross misconduct (b) the claimant accepted that she was aware that the respondent's policies and procedures were on the respondent's intranet (paragraph 17 above) (c) the nature of the claimant's conduct (as analysed by the dismissing officer Mrs Cumberland at page 62 of the bundle) (d) the claimant admitted at the commencement of this hearing the veracity of the misconduct alleged against her (paragraph 11 above) and (e) the claimant's conduct immediately following the meeting with DG on the morning of 2 February 2018 (paragraphs 26 and 27 above) notwithstanding that DG had made it clear at that meeting that the claimant's previous conduct was unacceptable and the likely consequences of any such further conduct. In all the circumstances the Tribunal is satisfied that, viewed objectively overall, the respondent was entitled to conclude that the claimant had committed gross misconduct namely a deliberate and wilful breach of her terms of employment which went to the root of her contract of employment with the respondent entitling them to dismiss her without notice.
77. The claimant's claims are therefore dismissed.

Employment Judge Goraj

Date: 24 February 2020.

Reasons sent to parties on: 25 February 2020

FOR THE OFFICE OF THE TRIBUNALS

Online publication of judgments and reasons

The Employment Tribunal (ET) is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>

The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in anyway prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness