EMPLOYMENT TRIBUNALS

Claimant: Mrs M Williams

Respondent: Mersey Care NHS Foundation Trust

Heard at: Liverpool **On:** 12 and 13 December 2019
16 January 2020

Before: Employment Judge Buzzard

REPRESENTATION:

Claimant: Mr J Hughes, Solicitor
Respondent: Mr M Hatfield, Solicitor

JUDGMENT having been sent to the parties on 30 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

Claims

1. The claimant pursued two claims:

1.1. Unfair dismissal; and

1.2. Wrongful dismissal, due to a lack of notice of dismissal.

Issues & Relevant Law

2. Unfair Dismissal

2.1. The parties in their submissions were in agreement regarding the legal tests which apply to the determination of the unfair dismissal claim. These tests are summarised below.

2.2. It is not denied by the respondent that the claimant was dismissed. Accordingly, the first question is what the reason for the dismissal was. s98 (1) Employment Rights Act 1996 ("ERA") states:

> *"In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."*

2.3. Thus it is for the respondent to present evidence to establish to the Tribunal the reason for the dismissal, and, if established, that the reason falls within the scope of s98(1)(b) ERA.

2.4. In the case before us the respondent submits the reason for dismissal was that the claimant committed an act of gross misconduct. Subsection (2) (b) states:

> *"A reason falls within this subsection if it –*
> *…..*
> *(b) relates to the conduct of the employee,*
> *….."*

2.5. If the respondent establishes that the reason for the dismissal was within the scope of s98(1)(b) ERA the question then becomes, is the dismissal fair? s98(4) ERA states (as applicable to conduct dismissals):

> *"…where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

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

2.6. There is a substantial body of case law that assists Tribunals in application of this section.

2.7. Firstly, in **Iceland Frozen Foods v Jones** [1982] IRLR 439 the EAT summarised the correct approach to adopt in applying the s98(4) test, giving the following key guidance:

2.7.1. The starting point should be the wording of s98(4) itself;

2.7.2. In applying s98(4) the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal considers the dismissal to be fair;

2.7.3. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its own view of what is the right course to adopt for that employer;

2.7.4. In many cases (though not all) there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; and

2.7.5. The function of the Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

2.8. There is further specific guidance on the application of s98(4) in conduct dismissals. Notably the case **British Home Stores v Burchell** [1978] IRLR 379 set out a four-stage test for application in a case where a claimant denies misconduct prior to dismissal (as is the case here):

2.8.1. the employer must have a genuine belief in guilt;

2.8.2. the employer must have carried out a proper investigation.

2.8.3. the employer must have reasonable grounds upon which to base that belief; and

2.8.4. dismissal for the misconduct alleged must lie within a band of sanctions open to a reasonable employer.

2.9. The first of these tests, the need for the respondent to have a genuine belief, is linked to, and overlaps with, the burden placed on the respondent to establish a potentially fair reason for dismissal, which is in this case argued to be conduct. The latter tests carry a neutral burden of proof, making these issues of the Tribunal to determine. It is clear from a significant body of further

guidance (for example **Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23) that the band of reasonable responses applies to each of these tests, not just the question of the sanction.

2.10. In addition, ACAS have published codes of practice which apply to disciplinary situations, with accompanying guidance. The Tribunal has to be mindful of these and any failure by the employer to achieve the appropriate minimum standards in their handling of misconduct allegations when considering the band of reasonable responses available to the respondent at each stage of the process.

2.11. In the present case the claimant argues that there was not a genuine belief in her guilt. This is a question of fact for the Tribunal to determine on the basis of the evidence presented.

2.12. In relation to the second limb of the **British Home Stores v Burchell** test, the claimant argues that there was a failure to carry out a proper investigation. Specifically, the submissions made on her behalf were that the respondent failed:

2.12.1. to interview all the relevant witnesses;

2.12.2. to view the CCTV; and

2.12.3. to conduct a breathalyser test of the claimant.

2.13. When considering whether any disciplinary investigation was unfair there is again a substantial body of guidance available from the EAT. This guidance can be summarised, as in **Gratton v Hutton** (2003 unreported), as considering the question to be whether the investigation undertaken could reasonably be viewed, applying the range of reasonable responses, as sufficient. It is not correct that the question is whether further investigation could reasonably have been done. There is absolutely no obligation on employers' investigations to leave no stone unturned in a disciplinary investigation. It is against the standard of whether the investigation was one which a reasonable employer could have considered sufficient that the respondent's investigation must be measured.

2.14. In relation to the third limb of the **British Home Stores v Burchell** test the claimant submitted that the respondent did not have a sufficient basis upon which to base their belief in the claimant's guilt. In effect, at the disciplinary hearing, in the light of the evidence heard, they could not reasonably have concluded the claimant was guilty. The claimant's argument was that the respondent reached a decision which was not supported by the evidence at the disciplinary hearing. In an overlap with the question of genuine belief, the claimant also argues that the conclusion that she was guilty was influenced by an adverse prejudice against her, a prejudice for which there were potentially ulterior motives. Finally, the claimant argued that the person who the respondent states made the decision to dismiss was in fact acting on the

instructions of another, the term “dead hand” being used by the claimant’s representative in this regard.

2.15. Finally, in relation to the final limb of the **British Home Stores v Burchell** test the claimant argues that the dismissal of her was a sanction outside the range of reasonable responses. Specifically, the claimant referred to:

2.15.1. mitigation which was not given proper consideration and weight; and

2.15.2. other individuals that she believed had not been dismissed for alcohol related disciplinary offences.

3. Wrongful Dismissal

3.1. The claimant’s claim of wrongful dismissal does not stand or fall with her unfair dismissal claim. The claim is that the respondent dismissed her without notice.

3.2. The respondent will only be entitled to dismiss without notice if the claimant had committed a fundamental breach of contract. This means that the claimant had committed an act of gross misconduct, such that she was not able to then seek to enforce any term of her contract, including her notice entitlement.

3.3. The respondent sought only to rely on the alleged misconduct that the claimant had been dismissed for.

3.4. When assessing whether the claimant had committed an act of gross misconduct and fundamentally breached her contact of employment, the civil standard of proof applies. This means that the claimant’s conduct is established by application of the balance of probabilities. Unlike the claimant’s unfair dismissal claim, determination of this does permit the application of hindsight, taking into consideration matters which were not before the disciplinary or appeal hearing insofar as they are relevant.

Preliminary Issue

4. At the outset of the hearing the claimant's representative made an application that part of the respondent’s witness statements should be redacted. The application was that the redacted evidence should not be permitted to be presented to the Tribunal.

5. This application was refused. It was not possible to fairly assess the relevance of evidence without having seen that evidence and understood the context of the evidence. There was a dispute between the parties regarding the relevance of the evidence which the claimant wanted to have redacted. The claimant's representative was clearly directed that if he believed the evidence was not relevant his option was to simply not refer to it again.

6. As matters transpired the disputed evidence was heard, and was then referred to by both parties' representatives in submissions.

7. The claimant's representative chose to re-assert his submission that the evidence should be disregarded, not just that it was irrelevant or should be given little weight. The respondent's representative did not accept that it should be disregarded.

8. Given the fact that a dispute about the relevance of the evidence has been pursued by the parties, at the instigation of the claimant's representative through to submissions, that dispute cannot be overlooked in these reasons. This is unfortunate, as it was made clear by the claimants' representative that the claimant would prefer that evidence not to be recorded in the decision reached.

9. The evidenced in question was contained in specified paragraphs of the written witness statements of Toni Manley and Sylvia Stanton.

10. Relevance of the disputed evidence of Toni Manley:

10.1. In relation to Toni Manley, the evidence all related to her past interactions with the claimant. The disputed paragraphs dealt with what was termed the claimant's "*unsatisfactory prior attendance record*". The evidence was that the claimant's attendance was first raised as an issue in 2009. It was stated that this was raised again, more formally, in 2010, when some discussion about whether it was appropriate for the claimant to be accepting additional shifts whilst having an unsatisfactory attendance record is identified. The statement goes on to refer to the claimant still having unsatisfactory attendance issues which Toni Manley was addressing in 2011.

10.2. Where an individual who had been closely involved in a disciplinary process has a past which involves interactions with the employee being disciplined this has the potential to be relevant. In this claim the claimant's claim is in part based on an assertion that the respondent reached decisions that were not supported by evidence. This would suggest a potential bias if correct. In fact, the claimant's representative forcefully submitted that there was widespread bias in the respondent organisation against the claimant. Such a suggestion makes relevant evidence related to past issues of a disciplinary type between the claimant and Toni Manley beyond credible argument. The claimant argues a widespread pattern of damaging lies about the claimant, for one reason or another, and therefore the question of bias is live, pertinent and highly relevant.

11. *Relevance of the disputed evidence of Sylvia Stanton*

11.1. The claimant's representative forcefully put the submission that Sylvia Stanton was the "*dead hand*" behind the claimant's dismissal. She was the person who had truly decided the claimant should be dismissed. It is absolutely clear that if somebody is alleged to have, behind the scenes, been the driving force behind someone's dismissal, full evidence of the prior interactions that individual has had with the claimant is relevant.

11.2. In addition to past interactions, the disputed evidence of Sylvia Stanton related (in part) to when the claimant notified the respondent organisation that she had alcohol problems. The claimant's case included evidence referring to, and submissions in relation to, the fact that she had made that disclosure.

11.3. The claimant's claims include a wrongful dismissal claim. The respondent relies on an allegation that the claimant attended work under the influence of alcohol as a fundamental breach of contract, such that the claimant is not entitled to enforce her entitlement to notice. Accordingly, full evidence of the claimant's problems with alcohol given the alleged misconduct relates to alcohol, is something that must be relevant.

11.4. The claimant's position is that she has had problems with alcohol for many years following on from tragic events which occurred at work. Sylvia Stanton's disputed evidence covers how the claimant informed the respondent of that, and then what she believes occurred from the respondent's perspective to assist the claimant in work and coping with her problem, following her declaration.

Evidence

12. The claimant gave oral evidence on her own behalf. In addition, the claimant's trade union representative, Tony Lynch, and the claimant's partner, Mr Williams, gave oral evidence on the claimant's behalf. For the respondent evidence was given by Toni Manley, the investigating officer, Sylvia Stanton, an HR Manager with the respondent, and Lynn Hughes who chaired the disciplinary hearing. In addition to oral evidence there was a sizeable bundle of documents in evidence.

13. The key factual findings relevant to the claimant's claims are set out below. Those findings are recorded as they relate to the issues raised in the claimant's claims, not as a chronological narrative. Where no reasons are given for a factual finding this is because there was no credible dispute over that fact between the parties. Where a credible dispute arose over a relevant fact the reasons for the finding in relation to that fact are set out. It is noted that there were a significant number of relevant facts that were not in dispute, and a number of disputed facts that did not appear to be relevant to the claims made.

Background to claims

14. The background factual basis of the claimant's history was not factually in material dispute. The claimant worked for the respondent as a nurse from 24 January 1978 until her dismissal on 5 December 2017.

15. The claimant had a history of problems with alcohol, which in the past had caused the respondent to take steps related to unsatisfactory attendance. The claimant's problems with alcohol appear to have started after she witnessed a patient deliberately set fire to herself causing her death.

16. The claimant's dismissal arose from an incident that occurred after she started her shift on the night of 16 April 2017. The claimant had always worked night

shifts for the respondent. The claimant asserted that she had been under "constant pressure" to stop working permanent night shifts.

17. The claimant attended work at or around 7:30pm on 16 April 2017, having been given a lift to work by her husband. The claimant was due to attend a meeting that night where a colleague was due to apologise to the claimant regarding an incident which had occurred on 9 April 2017.

18. Later on, on the evening of 16 April 2017 the claimant was suspended from duty and sent home from work by the Ward Manager, Nicola Woods. The claimant allegedly had attended work under the influence of alcohol and behaved inappropriately. The claimant never returned to work.

19. The respondent undertook an investigation, taking numerous witness statements, and conducted an investigation meeting with the claimant on 27 July 2017. Following this an investigation report was produced on 12 September 2017. The claimant then attended a disciplinary hearing on 14 November 2017, which was adjourned to resume and conclude on 21 November 2017. The claimant was given written notification of her dismissal for gross misconduct by letter dated 5 December 2017.

20. For the entire period between her suspension on 16 April 2017 and her dismissal on 5 December 2017 the claimant remained suspended on full pay.

21. The claimant confirmed by letter dated 13 December 2017 that she would not appeal against her dismissal, setting out four reasons which in summary amount to a lack of faith that the appeal would, in her view, be any fairer that the disciplinary process. The respondent confirmed to the claimant that any appeal would be heard by an independent appeals officer and extended the deadline for the claimant to submit an appeal to 3 January 2018. The claimant did not submit an appeal.

Submissions

22. The claim was initially listed in the week ending 13 December 2019. Unfortunately, the claim was only partially heard that week. In discussion regarding how many additional days would be needed to dispose of the hearing, it was suggested that if the parties were content to prepare written skeleton submissions that would expedite matters such that a single additional day would suffice.

23. The respondent's representative, as had been agreed at the part-heard interval, prepared skeleton written submissions. The claimant's representative chose not to prepare the agreed written skeleton submissions and instead made oral submissions on the day. As matters transpired, the hearing was concluded in the single additional listed day.

24. The oral submissions made on behalf of the claimant identified a number of material arguments in support of her claims. These are, for ease, discussed below individually and in turn with the findings, evidence and conclusions reached.

Findings on evidence and conclusions

25. *Respondent Witness' Credibility*:

25.1. The claimant's representative made a submission that Lynn Hughes' and Sylvia Stanton's evidence, presented by the respondent, was not credible and should be discounted.

25.2. The basis of the submission regarding credibility was that the witnesses had, prior to preparation of the respondent's case in defence of these proceedings, not mentioned their belief that the claimant had been under the influence of alcohol during a disciplinary meeting. Specifically, it was suggested that she had attended the first part of her disciplinary hearing under the influence of alcohol. The submission made was that because this had not been raised previously, and given the potentially damaging nature of the conduct, it should not be believed. Further, if the evidence of the respondent's witnesses in relation to this is not believed, it casts doubt on the credibility of the other evidenced presented by these witnesses.

25.3. The submission made on behalf of the claimant was not persuasive. If the respondent, at the disciplinary hearing, had sought to introduce additional allegations that the claimant had been drinking, that could not have been fairly done at the hearing itself. There was no evidence regarding whether, at an appeal hearing, had the claimant appealed, the respondent would have addressed the issue at that point. The claimant did not pursue an appeal.

25.4. There was no evidence regarding whether the respondent would have taken disciplinary action against the claimant, if she had not been dismissed, for allegedly attending a disciplinary meeting under the influence of alcohol.

25.5. The fact that Sylvia Stanton and Lynn Hughes chose to deal at the disciplinary hearing only with the disciplinary allegations raised and investigated is not improper. Their evidence that the claimant's state of intoxication during the disciplinary hearing was no part of the reason for her dismissal, is accepted by the Tribunal. There was no evidence to suggest the contrary. The claimant's position is that she was not intoxicated, and as such it is unsurprising that she does not seek to argue it had any such influence.

25.6. The claimant pursues a claim of wrongful dismissal. The determination of whether the claimant may have attended a disciplinary hearing intoxicated is potentially relevant when deciding, with the benefit of hindsight, that the claimant had committed a fundamental breach of contract. It would not, however, be something which the claimant's disciplinary hearing would be required to consider.

25.7. Accordingly, it is not correct that the mere fact the allegation was raised at the disciplinary hearing renders the allegation now as suspicious. No clear evidence, other than contradictory oral assertions between the claimant and the respondent's witnesses, was produced to assist with determining whether

the claimant was intoxicated at the disciplinary hearing. For this reason, the claimant's submission that the evidence of Lynn Hughes and Sylvia Stanton should be found to be generally lacking in credibility is not accepted.

26. *Defective Investigation - CCTV Evidence*:

26.1. Part of the evidence which the respondent relied on in support of their conclusion that the claimant had attended work under the influence of alcohol was her alleged behaviour on the night in question.

26.2. The evidence of both parties was that the respondent has CCTV which covers some of the areas where the claimant was alleged to have been behaving in a way consistent with being under the influence of alcohol. There was, however, some dispute over the full scope of the areas covered. There was no apparent dispute that at least the reception area was covered by the CCTV system, and that some of the alleged behaviour had occurred in that area.

26.3. It is beyond doubt that, had the CCTV been available and viewed, that would have been helpful. The respondent did not dispute this, but asserted that having not been immediately secured, the CCTV had subsequently been overwritten by automatic operation of the system used. This, like many CCTV systems, records in a loop, such that unless positive steps are taken to save the recording it will not be retained.

26.4. There was conflicting evidence about how long the recording would be retained before being overwritten. Lynn Hughes' understanding was that it would overwrite after two weeks. Tony Lynch, the claimant's union representative, thought it may be as long as 30 days, but he was unclear and uncertain in his evidence. His evidence was that the duration of the loop had changed over time.

26.5. The evidence of Toni Manley was that when she, as part of her investigation, sought CCTV footage none was available from the night in question. She confirmed that she had not initially been aware that there were CCTV cameras covering the relevant areas. She was very clear that by the time she attempted to view any CCTV footage it had been overwritten.

26.6. The claimant's representative submitted that the fact that the CCTV footage had not been secured rendered the investigation and subsequent dismissal of the claimant unfair. This was not a persuasive submission. It is not the case that unless such evidence is secured there cannot be fair disciplinary action taken against an employee. Whilst it is part of the overall picture, such a failure cannot be a bar to disciplinary action. It is not a correct position to take that the moment that CCTV was overwritten the respondent was then left unable to conduct a fair disciplinary hearing.

27. Defective Investigation - Breathalyser Testing:

27.1. The claimant argued that the respondent had acted unfairly by failing to breathalyse her on the night that the incident occurred. The claimant's

position was that the equipment which would be needed to do this was available on site. There was no suggestion from the claimant that the respondent had refused to do such a test on the night.

27.2. The respondent's witnesses were clear. Whilst there was equipment to potentially perform such tests, that equipment was only for testing service users. They were clear that the respondent had no policy or practice which would either allow or justify breath testing of staff.

27.3. Had the claimant been breathalysed that night there would be clarity as to whether the claimant had been drinking alcohol. This does not, however, mean that a failure to perform a breathalyser test on the claimant renders her dismissal unfair.

27.4. The incident occurred during a night shift. The claimant's representative invited the conclusion that despite there being no policy in place to breath test staff for alcohol it was unfair for a decision not to me made that night to perform a breath test. This submission is not persuasive. To take such a step is not something which it is reasonable for the staff on duty that night to be expected to take. Regardless, the absence of a breath test in such circumstances is not found to make the claimant's dismissal unfair.

28. Defective Investigation – witnesses not interviewed

28.1. The claimant's representative argued in submissions that a number of potential witnesses to the events which caused the claimant to be dismissed were not interviewed by the respondent as part of the disciplinary investigation. Three potential witnesses were referred to by the claimant. These were:

i. two members of bank staff, whom the claimant was not able to identify; and

ii. a fellow employee of the respondent.

28.2. There was no dispute from the respondent that these potential witnesses had not been interviewed as part of the investigation. In relation to the bank staff the respondent was not certain who the claimant referred to, but it was confirmed they were not employed directly by the respondent. The respondent's evidence was that the colleague of the claimant had been on long term leave for personal reasons at the time of the investigation. This was not disputed by the claimant. The minutes of the disciplinary hearing record that at the outset the claimant's representative raised a concern that the fellow employee had not been interviewed, and he was identified as Simon McLeod. The notes record that the claimant was informed that Simon McLeod had been absent for personal reasons during the course of the investigation.

28.3. The evidence, which was not disputed on this point, showed the respondent had interviewed a wide range of potential witnesses who had been present on the night of this incident. The account of these witnesses were in evidence

before the Tribunal, and had formed part of the documents provided with the investigation report, dated 12 September 2017, prior to the disciplinary hearing. Investigatory interviews were carried out with:

i. Dawn Dacosta – Deputy Ward Manager who was the Nurse in Charge on 16 April 2017, interviewed on 16 May 2017 and 6 July 2017.

ii. Nicola Woods – the night coordinator of the twilight shift on the 16 April 2017, interviewed on 16 May 2017;

iii. Tracy Kenny – A nursing assistant on duty on the night of the 16 April 2017, interviewed on 16 May 2017;

iv. Ray Murray – a security officer on duty on the night of the 16 April 2017, interviewed on 18 May 2017;

v. Vinnie Laverty – a staff nurse on duty on the night of the 16 April 2017, interviewed on 18 May 2017;

vi. Umbero Ibrahim – a staff nurse on a 7:30am-8pm shift on the 16 April 2017, interviewed on 6 July 2017;

vii. Richard Lawson – a deputy ward manager on shift on 17 April 2017, interviewed on 7 July 2017; and

viii. Ann Marie Foster – an assistant practitioner on a 7:30am-8pm shift on the 16 April 2017, interviewed on 6 September 2017.

28.4. None of these witnesses gave evidence which contradicted a broadly consistent account of the events and the claimant's conduct on the night of 16 April 2017. It is noted that some had limited recollection of the relevant details, or were not actually on duty and present at a relevant time. Of these witnesses, Ray Murray, Nicola Woods, Tracy Kenny and Vinnie Laverty all attended the claimant's disciplinary hearing, where they answered questions put by the claimant and/or her representative.

28.5. It is noted that the terms of reference for the investigation included a list of persons who should be interviewed. All were interviewed, save for an Adam Drage. No evidence was presented as to why Adam Drage had not been interviewed. There was however, within the investigation report and the bundle before the hearing a copy of an email from Adam Drage dated 16 April 2017. This email describes a call from the claimant's husband sometime after the claimant had left her work on the night of 16 April 2017. It does not suggest that Adam Drage was in a position to provide any relevant evidence regarding the claimant's conduct on the night of 16 April 2017 prior to her departure from work

29. Unfair Hearing – "Dead Hand" Submission

29.1. A forceful submission was made that the decision to dismiss the claimant was not actually made by Lynn Hughes, who was the dismissing officer. The submission was that the decision had been made by Sylvia Stanton, who had been acting behind the scenes and driving the decision. Sylvia Stanton was referred to in the submissions of the claimant's representative as the "*dead hand*" behind the decision to dismiss the claimant.

29.2. The evidence that both Lynn Hughes and Sylvia Stanton presented was very clear and consistent throughout cross examination, namely that Lynn Hughes made the decision to dismiss the claimant.

29.3. The notes of the disciplinary meetings show that Sylvia Stanton did on a significant number of occasions interject in the discussion. This was identified as suggesting that she was running the meeting. The fact that Sylvia Stanton interjected in the meeting is not an indicator of who made the decision. There is nothing wrong or unusual with a dismissing officer who simply observes the majority of a disciplinary hearing, relying on others to ensure the evidence they needed was before them and only interjecting if they thought there was a need to do so. The mere fact that the HR Manager took charge, at times, of the way the evidence was put at the meeting is not an indication of unfairness. There is no obligation that the decision maker should take control of the disciplinary hearing, only allowing others to speak with their express consent.

29.4. It was not clear that the claimant's representative actually suggested in submissions that there existed any direct evidence that Lynn Hughes had not made the decision at the disciplinary hearing. No direct evidence was presented at hearing. The submissions made suggested this should be inferred from indirect evidence.

29.5. It was submitted that Sylvia Stanton, as part of interfering significantly and taking over the running of the disciplinary hearing, had stopped the claimant asking questions. In support of this, reference was made to the notes of the disciplinary hearing. These were re-read in full after hearing the submissions. At no point do these record the claimant at any point being stopped by anybody, including Sylvia Stanton, from asking a relevant question, or indeed the claimant's representative asking a relevant question on her behalf. There were occasions when the claimant and others were directed to deal with certain points. There are also points recorded where Sylvia Stanton did indicate that a question being asked was not relevant to the disciplinary allegations. Without listing each point in turn, which would be excessive and inappropriate here, the questions being asked at these points were clearly beyond the remit of the disciplinary issues being dealt with.

29.6. The claimant's own position, in her evidence during cross examination, was quite clear. She said, when it was put to her that she behaved aggressively and talked over people at the disciplinary hearing, that she had not. She

persuasively asserted that she had been asking questions, that she had merely been making sure she asked all the questions she wanted to ask. This does not suggest any belief that she was stopped from asking questions.

30. Unfair Hearing - The Reliance Placed on the evidence of Ray Murray:

30.1. Ray Murray provided an initial statement in relation to the events on the evening of 16 April 2017. Ray Murray's initial statement was provided on 18 April 2017. In his initial statement Ray Murray states that the claimant was shouting and using abusive language. It is correct that Ray Murray makes no reference in that initial statement to the claimant smelling of alcohol.

30.2. Ray Murray, as part of Toni Manley's investigation, was invited to a formal investigation meeting, as were a number of other witnesses, on or around 18 May 2017. At that meeting Ray Murray repeated his assertions that the claimant had been swearing and that she had been aggressive in her behaviour on that evening. He also added information suggesting that he could smell alcohol on the claimant on the evening of 16 April 2017.

30.3. The claimant's representative made a forceful submission that the respondent's investigating officer had failed to probe that question with sufficient supplementary questions to test the veracity of Ray Murray's assertion that the claimant smelt of alcohol, given he had not stated this in his initial statement.

30.4. The formal investigation interview record suggests that a number of clear and open questions were put to Ray Murray and other witnesses. There is nothing in these questions which suggests that an agenda was being pursued.

30.5. Ray Murray attended the disciplinary hearing. At the disciplinary hearing he was asked probing and pointed questions. He was asked the questions which the claimant's representative suggested the respondent had failed to ask him at the investigation stage. Accordingly, regardless of whether the claimant is correct that Ray Murray should have been asked those questions during the investigation, when the Lynn Hughes made her decision it was with the benefit of actually hearing Ray Murray answer those questions in person.

31. Witnesses: prejudiced against the claimant

31.1. The claimant also argued that Ray Murray's evidence had been driven by a prejudice against her. The details of this only emerged during her evidence for these proceedings. The claimant asserted that Ray Murray had not merely been mistaken, but had told lies about her. The reason for this was stated to be a prejudice against the claimant.

31.2. The nature of Ray Murray's alleged prejudice was explored in the claimant's cross examination. The claimant explained that the prejudice was connected to Ray Murray's acquaintance with another individual. It was stated by the claimant that she had presented evidence against, or made negative

statements about, the husband of this individual during a previous disciplinary investigation.

31.3. This explanation of why the claimant believed Ray Murray was lying was not referred to by the claimant or anyone else during the disciplinary hearing. It is unclear how the respondent could have taken into account such an assertion if they were unaware of it. The claimant had a clear opportunity at the disciplinary hearing to explain why she believed Ray Murray was lying. She clearly indicated she did not think Ray Murray was telling the truth, but gave no explanation of the source of the prejudice causing the alleged dishonesty.

31.4. It is correct that only Ray Murray refers to the claimant smelling of alcohol, but that is not the only evidence which the decision maker states was relied upon in reaching the conclusion that the claimant had been drinking. Ray Murray, in addition to saying the claimant smelt of alcohol, said she had behaved in an unusual way, sitting down in reception, "*effing and blinding*". There were also a number of other witnesses who gave evidence to the disciplinary hearing:

31.4.1. Tracy Kenny described the claimant's behaviour that night. She described the claimant as, amongst other things, behaving out of character and being red-faced.

31.4.2. Nicola Woods stated that the claimant's face looked red and described the behaviour of the claimant. That description, given during the disciplinary hearing, was such that the claimant's union representative summarised Nicola Woods as having a perception that the claimant was under the influence of alcohol.

31.4.3. Vinnie Lafferty stated that the claimant was shouting the odds, had flown off the handle and was irrational.

31.5. The claimant's position is that all of these witnesses, as with Ray Murray, were lying. Her evidence was clear. She never swears. She did not shout. She was not behaving unusually on the night of 16 April 2017.

31.6. The claimant clearly stated under cross examination that as well as Ray Murray, Tracy Kenny held a grudge against her. In relation to Vinnie Lafferty the claimant suggested that he may have been lying because he had been forced that night to apologise to the claimant for his conduct a few days earlier.

31.7. In relation to Nicola Woods the claimant in cross examination was simply unable to give any cogent reason why Nicola Woods would be telling lies.

32. *Unfair Hearing – Conclusion of guilt not reasonable*:

32.1. The claimant's representative submitted that the respondent's conclusions that the claimant had attended work under the influence of alcohol on the evening of 16 April 2017 was not a conclusion which could reasonably have

been reached based on the available evidence. This submission was supported by a number of points made during submissions:

32.1.1. It was submitted that it was simply not logical that the claimant would have attended work having drunk alcohol. This was because she had a past record of not attending work after drinking, on occasions where she was supposed to be in work and had drunk alcohol the claimant had previously phoned in and asked for short notice leave to avoid attending work. The respondent was aware the claimant had a problem with alcohol and that the claimant had previously done this. Very little evidence was presented in support of this submission. There was evidence that the claimant was due to attend a specifically arranged meeting during the shift in question on 16 April 2017. This was suggested by the respondent to be a reason why she would not be able to request short notice leave that night. In addition, the respondent submitted that the claimant had used a significant amount of leave that year and it was unclear whether she had sufficient leave to make a short notice leave request that night. This was again suggested as a reason for her not to make a request on the night in question.

32.1.2. The claimant's position is she did not swear, she did not shout and she did not behave aggressively on the night in question. These were behaviours described by the witnesses as being displayed by the claimant and being out of character for the claimant. The claimant's evidence regarding these alleged behaviours in one way or other contradict all of the respondent's witnesses at the disciplinary hearing. The claimant did not at any point in the disciplinary process explain why the evidence of these witnesses should not be trusted.

32.1.3. The fact that Ray Murray's evidence had not initially included a claim that the claimant smelt of alcohol on the night in question was raised in submissions. This is noted. However, it is also noted that Ray Murray's evidence consistently stated the claimant had behaved aggressively and had sworn on the night in question.

32.2. Taking into account all the evidence before the disciplinary hearing it cannot be concluded that the respondent could not reasonably reach a conclusion that the four witnesses' descriptions of the claimant's conduct on the night in question were correct. The conclusion that they were not all telling similar lies about the claimant must be a conclusion that could reasonably be reached. If this is accepted, the conclusion that evidence suggested the claimant had been under the influence of alcohol is one which must fall within the range of reasonable conclusions at the hearing.

33. Procedural Defect – No Appeal / prejudged

33.1. The claimant did not appeal against her dismissal. The reasons the claimant gave for not pursing her appeal was that she did not have confidence that the appeal would be impartial. This was despite the claimant being sent a letter by a director of the respondent organisation specifically addressing that concern. This letter stated quite clearly that her appeal would be heard by

someone who was not from the same team. It would be an independent person who had no prior involvement in the claimant's disciplinary hearing.

33.2. The claimant made it very clear in her evidence that she believed individuals bore a grudge against her, not the respondent organisation. Given that she had assurances that different individuals would handle the appeal, it was difficult to understand why the claimant did not have any confidence that the independent person would not be biased.

34. Procedural Defect – Delay

34.1. Procedurally the claimant also submitted, although it was not particularly highlighted in the evidence presented, that there had been an unfair delay in the disciplinary process.

34.2. The chronology is not in dispute. The incident occurred on 16 April 2017. The dismissal hearing started on 14 November 2017. It was adjourned and resumed on 21 November 2017 (albeit some of the documents suggest this may have been 23 November 2017, nothing of any significance turns on the precise date). The claimant was told the outcome of the process, which was her dismissal, in a letter dated 5 December 2017.

34.3. Throughout the period from the evening of 16 April 2017 to 5 December 2017 the claimant was suspended on full pay.

34.4. Various reasons were offered for the delays during that period. Whilst there was some merit for some of these, the evidence did not suggest that the respondent had sought to deal with the claimant's disciplinary process with the level of priority, urgency and importance that a reasonable employer could have adopted. The claimant was left for eight months languishing whilst suspended before a decision was made. That is not something that any reasonable employer should do and is not fair. Accordingly, the claimant was unfairly dismissed.

35. Dismissal as a Sanction – Too Severe

35.1. The claimant's representative in relation to sanction made two arguments:

35.1.1. that others had been treated differently, and

35.1.2. that dismissal was too severe a sanction in any event.

35.2. To support an assertion that there was a lack of consistency with the treatment of others the claimant must present evidence of this different treatment. The respondent presented no evidence that would assist the claimant in establishing that there was any inconsistent treatment.

35.3. The claimant presented evidence that a colleague who had been stopped by the police on the way to work for drunk driving, and convicted, had not been

dismissed. It was conceded that that person had never attended work that day, or indeed on any occasion attended work under the influence of alcohol.

35.4. The claimant referred in her evidence to another individual who had allegedly been treated differently. The claimant under cross examination stated that all she knew about that case was "*what was being talked about*"; in effect recounting workplace gossip.

35.5. In relation to the final individual, a gentleman, there were again few details in the claimant's evidence. It was clear that she believes there are other individuals who have had issues with alcohol but who have not been dismissed. The claimant may well be correct, but there was simply a lack of evidence that there alleged misconduct had been in materially similar circumstances. The fact that they were not dismissed coupled with an assertion that there was involvement in some way with the consumption of alcohol is not sufficient to establish similar circumstances on which a conclusion of inconsistency could be based.

35.6. In relation to the severity of the sanction in general, it is important to understand that at this stage the strength or weakness of the evidence against the claimant is not relevant. This is a stage where, in effect, the respondent has reached a conclusion that the claimant is guilty. The question is whether having been found guilty the sanction is outside the range of reasonable responses. There is no "gradation" of guilt or similar concept that would feed into the sanction decision. It is not relevant that the respondent may have concluded that, whilst they were certain on balance that the claimant was guilty, they are less certain than they could have been in different circumstances. The relevant question is whether a reasonable employer could dismiss somebody working in the claimant's role for attending work under the influence of alcohol?

35.7. It is difficult to see how it could be said that no reasonable employer could dismiss someone in the claimant's role for attending work under the influence of alcohol. Even taking into account the claimant's length of service, even taking into account the root cause of the claimant's problems with alcohol it cannot be said that no reasonable employer in that position would decide to dismiss. The claimant herself, in her statement that when she was under the influence of alcohol in the past had sought to avoid going into work, clearly shows she has an understanding that it is not acceptable conduct. It is not safe or appropriate. Accordingly, dismissal is not a sanction that lies outside the range of reasonable responses.

Remedy for Unfair Dismissal

36. Given the claimant's dismissal was unfair, the respondent's submissions on remedy need to be addressed. The respondent's submission was that the delay in the process did not change the outcome of the process. Had the claimant's disciplinary process been conducted in a time frame that was one which a reasonable employer could adopt, the likely difference would be that the claimant was dismissed several months sooner. On this basis it is submitted she would

have received less pay, because she would not have remained suspended on full pay for as long.

37. Nothing in the evidence or submissions provided a credible basis to conclude the outcome would have been any different with less delay. Accordingly, it would not be just or equitable, applying the principles of **Polkey v A E Dayton Services,** to award the claimant compensation for her unfair dismissal.

Wrongful Dismissal

38. If the claimant was not guilty of gross misconduct then she would have been entitled to contractual notice of dismissal. The standard of proof to apply when determining whether the claimant was guilty of gross misconduct is the balance of probabilities. This is the same standard as was properly applied at the disciplinary hearing.

39. The only difference between the decision at the disciplinary hearing, and the application of that test now, is that additional evidence produced after the dismissal must be considered.

40. The only additional evidence that was presented in the Tribunal that could assist the claimant, which was not at the disciplinary hearing, is the claimant's explanation of why some of the witnesses should not be believed. It is noted this does not apply to all witnesses, specifically the claimant had no credible basis to explain that Nicola Woods' evidence was untrustworthy.

41. Evidence about somebody called "*Paddy*", which related to sometime after the claimant had left work on the night in question was disregarded. It is entirely credible that even if the claimant had not been under the influence of alcohol when she arrived at work, as an individual who has a problem with alcohol, she may well have, after leaving work, taken a drink.

42. However, based upon the witness evidence presented it is more likely, on the balance of probabilities, that the respondent's conclusion that the claimant attended work under the influence of alcohol is correct rather than incorrect. It follows that the claimant, based on that finding, committed an act of gross misconduct which is a fundamental breach of her contract of employment. Accordingly, the claimant was not entitled to contractual notice of dismissal, and her wrongful dismissal claim therefore must fail.

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Employment Judge Buzzard
Date: 22 April 2020

REASONS SENT TO THE PARTIES ON
28 April 2020

FOR THE TRIBUNAL OFFICE

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