EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112729/2018

Held in Glasgow on 18, 19, 20 and 21 February 2019

Employment Judge: Lucy Wiseman
Members: Mr I Ashraf
Mr K McKenna

Mrs Lesley Leckenby	**Claimant** **In Person**
Advisory, Conciliation and Arbitration Service	**Respondent** **Represented by:** **Mr R Turnbull - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided:-

- to dismiss the complaint of unfair dismissal (in terms of section 98 Employment Rights Act);
- to dismiss the complaint of having been subjected to detriment on the grounds of having made a protected disclosure (in terms of section 47B Employment Rights Act);
- to dismiss the complaint of having been dismissed on the ground of having made a protected disclosure (in terms of section 103A Employment Rights Act);
- to dismiss the complaint of breach of contract and
- by consent of the parties, to find the complaint of an unauthorised deduction from wages well founded and to order the respondent to pay to the claimant the sum of £116.90.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 23 July 2018 alleging she had made a protected disclosure and, as a result of doing so, false allegations had been made against her which led to her dismissal. The claimant also brought claims in respect of an unauthorised deduction of wages and breach of contract.

2. The complaint of unauthorised deduction of wages was settled during the hearing, and the respondent agreed to pay the sum of £116.90 to the claimant.

3. The respondent entered a response to the claim in which they admitted the claimant had been dismissed for reasons of conduct. The respondent denied the claimant had made a protected disclosure and denied this was the reason for the dismissal.

4. We heard evidence from Ms Deborah Thomson, Helpline Manager, who carried out an investigation and Ms Zoe Riddle, Area Director, who took the decision to dismiss. We also heard evidence from the claimant, Ms Alison Fraser, a friend and Mr Alexander Leckenby, the claimant's husband.

5. We were referred to a jointly produced set of documents. We, on the basis of the evidence before us, made the following material findings of fact.

Findings of fact

6. The claimant commenced employment with the respondent on the 26 November 2013. She was employed as a Helpline Adviser, and reported to an acting line manager, Ms Kirsty Simpson.

7. The claimant worked 30 hours per week, and earned £1520.34 net per month.

8. The respondent operates a practice of recording and monitoring phone calls for the purposes of training. The line manager will listen to at least two randomly selected calls per month for each helpline operator. If the calls are not up to standard (that is, graded poor or fail), the line manager will meet with the employee to discuss the calls and identify any training issues.

9. The claimant was advised on the 26 January 2017 that two of her calls had failed. Ms Simpson gave the claimant an opportunity to listen to and review the calls. The claimant was unable to listen to the calls due to technical issues, and so she spoke with Ms Debbie Thomson, Helpline Manager, who had been her team leader for some years previously. Ms Thompson let the claimant listen to the calls on her laptop. The claimant considered the scores awarded to the calls were unreasonably harsh, and she became upset because of this. The claimant's upset was exacerbated by the fact she was experiencing some personal issues at this time (the claimant had been withdrawn from anti-cancer treatment).

10. On the 2 February another two calls were identified by Ms Simpson as being below standard. The claimant again became upset when advised of this, and so it was agreed the coaching time with Ms Simpson would be postponed until the 21 February.

11. The claimant met with Ms Simpson prior to the 21 February, when Ms Simpson advised the claimant that the line manager for whom she had been covering, was going to return to work. Ms Simpson went on to discuss the manager's return to work, and the claimant understood from this discussion that she was being asked by Ms Simpson to spy on the manager, and keep notes of everything said.

12. The claimant met with Ms Simpson on the 3 March for call coaching. The claimant listened to the two calls in question and felt they had been scored harshly. The claimant did accept she had felt some sympathy for the caller, but did not agree she had breached impartiality. Ms Simpson disagreed and informed the claimant the call was an automatic fail because of a breach of impartiality. The claimant became very upset and told Ms Simpson she was feeling bullied by her.

13. Ms Simpson told the claimant that was a very serious accusation and referred her to the grievance policy.

14. The claimant commenced a period of sickness absence on the 6 March 2017. The claimant was signed off with work-related stress.

15. The respondent obtained an occupational health report dated 3 May 2017 (page 63). The report confirmed the medical opinion as follows:

"Ms Leckenby has developed psychological symptoms which appear to have arisen in response to her perceptions of issues in her employment. I did not find evidence of a serious mental health problem, rather she is displaying a response to a situation that has put her under strain. Specifically, Ms Leckenby described some perceived difficulties in her relationship with her acting manager, prior to her sickness absence. She also indicates a perceived lack of support and stress that use of normal call coaching processes were not being followed following review of calls in January 2017."

16. The OH report confirmed the solution to the situation was not medical, but rather the respondent required to engage with the claimant regarding the perceived issues.

17. The claimant's period of sickness absence was managed by Ms Debbie Thompson. Ms Thomson made weekly "keeping in touch" telephone calls to the claimant.

18. The keeping in touch calls were lengthy (up to an hour long) and the claimant was often very upset during the calls. The issues being discussed during the calls included not only the claimant's health, but the failed telephone calls and whether the claimant was going to pursue a grievance against Ms Simpson.

19. The claimant felt under pressure to submit a formal grievance because Ms Simpson would not engage in an informal process to resolve matters. The claimant raised a formal grievance on the 25 July (page 374). The grievance focussed on the failed calls and the conversation with Ms Simpson where the claimant felt she was being asked to spy on the returning manager. The claimant described in her grievance that she had found this conversation *"absolutely shocking"* and that *"it was a witch hunt which I was expected to be part of. Ms Simpson's language and demeanour convinced me that something serious was going on behind the scenes .."*.

20. The claimant included details in her grievance regarding the scoring of the calls and that she believed the calls had not been scored fairly.

21. The claimant's grievance hearing took place on the 9 August and a note of that hearing was produced at page 378.

22. The outcome of the grievance was issued by letter of the 14 September (page 388). Ms Pauline Burton, Acting Area Director, concluded she believed the claimant was unhappy that her calls were scored as unacceptable, and she further believed the claimant's grievance and absence stemmed from this. Ms Burton referred to the fact the claimant had had health concerns and personal bereavements which may have impacted on her performance at work, and on her ability to deal with the situation. Ms Burton found no evidence of bullying or overbearing management. She noted the claimant had indicated she would return to work once the matter had been investigated and Ms Burton intended to involve HR to ensure working relationships could be mended.

23. Ms Burton agreed to the claimant's request to have the calls scored again by someone in another region. Ms Burton had the calls scored by a Helpline Manager in Newcastle. Ms Burton informed the claimant the calls were scored in a similar fashion by the manager in Newcastle, and the same concerns were raised regarding the calls. Ms Burton acknowledged the claimant's calls in the past had been of acceptable or good quality, and considered that perhaps there were other factors contributing to the deterioration of the claimant's work. Ms Burton referred to matters such as health concerns and a number of bereavements in the early part of the year.

24. Ms Burton also confirmed that Ms Simpson had rejected the claimant's interpretation of their conversation. Managers had been told to give assistance to Ms Ansell upon her return to work and ensure she felt supported. Ms Burton found the claimant had not been asked to keep notes on Ms Ansell, and concluded this allegation by the claimant was concerning and inflammatory.

25. The claimant, by letter of the 26 September, appealed against the grievance outcome (page 394). The appeal was heard by Mr Frank Blair, Director, on the 19 October. A note of the appeal hearing was produced at page 398.

26. Mr Blair informed the claimant he wished to put a return plan in place for the claimant to return to work confidently and with support mechanisms. He asked the claimant if this was something she would consider. The claimant confirmed she would speak to her GP about it. The claimant did so and informed Mr Blair the GP was very concerned about her entering into any agreement considering she was unfit to do so or to return to work. Mr Blair issued a letter dated 16 November (page 409) in which he confirmed there were no grounds for overturning the original grievance outcome.

27. The claimant was in the habit of phoning Ms Thomson after each visit to her GP during the period of absence. The claimant visited her GP on the 26 September 2017, and, on her return home, telephoned Ms Debbie Thomson to advise she had been seen by a locum GP who had wanted to sign her off for 8 weeks, but the claimant had objected because she wanted a 4 week note because medication is prescribed for 4 weeks. The claimant confirmed her husband would drop off the fit note.

28. The claimant took a copy of the fit note and then handed it to her husband to deliver to the ACAS offices in Glasgow. The fit note was in a sealed envelope and was handed to Ken Robinson, who in turn handed it to Carol Smith. Ms Smith kept the sealed fit note in a locked cabinet until passing it to Ms Thomson upon her return to work on Friday 29 September.

29. Ms Thomson was surprised when she saw the fit note (page 78) because, based on the telephone conversation with the claimant, she was expecting to see a fit note for four weeks. The fit note handed in was for a period of 8 weeks and four days (from 25/09/17 to 23/11/17). Ms Thompson spoke with HR to get their view of the end date of the period of absence because the figures representing the month were not entirely clear. Ms Thomson also telephoned the GP surgery to confirm the length of the fit note. She was informed the fit note had been issued for a four week period from 25/09/17 to 23/10/17.

30. Ms Thomson sent the claimant a text message (page 83) saying the dates were not clear and asking what date the claimant intended to return to work if she was fit enough to do so. The claimant responded stating *"Hi Debs you probably remember me saying he wanted me off for 8 weeks and I said no but looking at the fit note he seems to have decided on 8 weeks and I do need to go back although the fit note does not make that part clear. Does that help?"*

31. Ms Thomson was concerned about the fact the claimant had previously advised the fit note would be for 4 weeks, but then one had arrived for 8 weeks and 4 days. Ms Thomson had expected the claimant, when asked, to say the fit note was for 4 weeks, but she had confirmed it was for 8 weeks. Ms Thompson was suspicious the figure 10 for October on the fit note had been changed to 11 for November.

32. Ms Thomson, by letter of the 5 October (page 87) invited the claimant to attend a fact finding meeting. The letter informed the claimant that upon receipt of the latest fit note there was some concern regarding the end date of the period for which she had been signed off, because it appeared the end date had been altered.

33. Ms Thomson met with the claimant on the 10 October. The claimant was accompanied by her trade union representative. A note of the meeting was produced at page 92. The claimant, at the meeting, agreed the numbers forming the 11 for November did look like they could have been altered, but she insisted she had not altered the numbers. The claimant also questioned what motive she would have had in altering the numbers.

34. Ms Thomson obtained the claimant's permission to write to the GP practice (page 103). Ms Thomson requested the GP provide written confirmation of the end date of the fit note; a copy of the original fit note; details of the GP who examined the claimant that day; confirmation of the date which was handwritten on the fit note and any notes of the discussion regarding the end date.

35. The GP practice responded by letter of the 7 November (page 109). The letter confirmed the name of the locum GP who had seen the claimant on the 26

September, and confirmed a handwritten fit note had been issued. The claimant's notes confirmed the fit note was issued for a period of 4 weeks from 25 September to 23 October.

36. The GP also confirmed the claimant had provided her with a photocopy of the original fit note. The GP agreed with the claimant that the written date looked ambiguous and could easily have been mistaken for 23 November 2017. The GP confirmed the claimant had been seen again on the 24 October and issued with another 4 week fit note.

37. Ms Thomson prepared an Investigation report and timeline (page 110). Ms Thomson concluded there was sufficient evidence to support that the fit note had been amended.

38. The claimant was invited by letter of the 11 December 2017 (page 121) to attend a formal disciplinary hearing.

39. The disciplinary hearing took place on the 27 December 2017. The hearing was chaired by Ms Zoe Riddle, Area Director and the claimant attended and was represented by Mr Craig Dunlop, trade union representative. A note of the meeting was produced at page 166.

40. The claimant accepted during the disciplinary hearing that she could see the difference between the original fit note and the one provided by Ms Thomson. The claimant insisted she had not altered the date on the fit note and maintained the alteration had taken place after the fit note had been handed in to the respondent. The claimant also maintained the whole issue was further evidence of bullying and that it had only come about because she had raised a grievance about bullying against Ms Simpson who was the best friend of Ms Thomson.

41. Ms Riddle decided, given the claimant's position was that the fit note had been altered after it arrived with the respondent, that it would be appropriate to have an independent investigation carried out to look into what happened to the fit note when it was handed in to the respondent.

42. Mr Andrew Way, a manager from ACAS Wales, was appointed to carry out the investigation to establish whether the fit note had been handled securely and properly. Mr Way interviewed Ms Thomson, Ms Carol Smith and Mr Ken Robinson (page 196).

43. Mr Way produced an Investigation Summary (page 197). He concluded all policies and procedures had been followed by all concerned in handling the fit note. The fit note had been received from the claimant's husband by Ken Robinson. Mr Robinson had passed the fit note to Ms Carol Smith, who had retained it in a locked cabinet until handing it to Ms Thomson on Friday 29 September. Mr Way was satisfied that at no point was the fit note found to be in the hands of anyone other than those authorised to handle it. There was no evidence to suggest the fit note was altered or amended by any members of staff involved, nor were any instructions given by any of those parties to anyone to make an alteration.

44. Ms Riddle reconvened the disciplinary hearing on the 13 January 2018 and a note of that meeting was produced on page 199. The claimant maintained her position and explained to Ms Riddle that when Ms Thomson had text her about the return to work date, she had looked at her copy of the fit note and thought it was for 8 weeks.

45. The claimant made a request for Ms Thomson to attend the disciplinary hearing to answer questions about whether she had changed the fit note. Ms Riddle acknowledged this was an unusual request, but she put the matter to Ms Thomson.

46. Ms Thomson was absent but agreed to attend a reconvened disciplinary hearing on the 28 February to answer the claimant's questions. A note of this meeting was produced at page 287.

47. Ms Riddle, in reaching her conclusion regarding this matter, considered whether this was a case of GP error. She dismissed this because the GP confirmed the fit note issued was for a period of 4 weeks. The original fit note issued by the GP (page 77) clearly stated 23/10/17. Ms Riddle deduced from this that the alteration must have occurred after the fit note left the GP.

48. The amended fit note was produced at page 76. The month denoted by the figure 10 looked like it had been changed to 11 by filling in the zero.

49. Ms Riddle also considered whether the fit note had been changed within ACAS. She was satisfied Mr Way's investigation demonstrated the fit note had been in a sealed envelope until it reached Ms Thomson. Ms Riddle had the benefit of seeing Ms Thomson be questioned by the claimant, and had found Ms Thomson's responses to be credible. Ms Riddle was satisfied Ms Thomson and Ms Simpson were not best friends, and that they had had professional differences.

50. Ms Riddle also considered the claimant's allegation that the alleged misconduct had been invented because she had raised a grievance against Ms Simpson. Ms Riddle noted Ms Simpson had not been involved in handling the fit note. Further, the grievance and grievance appeal had been heard and not upheld.

51. Ms Riddle concluded the claimant, or someone on her behalf and with her knowledge, altered the fit note, and that this was done between the claimant receiving the fit note and sending it to Ms Thomson. Ms Riddle had regard to the fact the claimant agreed the fit note had been altered and the fact the claimant told Ms Thomson it looked like the fit note was for an 8 week period. Ms Riddle reasoned the claimant knew the fit note was for 4 weeks and therefore the response referring to 8 weeks was odd.

52. Ms Riddle considered the claimant would have motive for making the alteration because it would give her more time off work; more sick pay; more time to deal with the grievance appeal and to delay returning to work in circumstances where the OH report had stated she would be able to return to work after the grievance had been heard.

53. Ms Riddle had regard to the claimant's length of service and unblemished record, but she concluded the offence of altering the fit note (fraudulent change to a document) was so serious as to merit gross misconduct. Ms Riddle confirmed the decision in a letter dated 15 March 2018 (page 312).

54. The claimant appealed against the decision to dismiss. The letter of appeal was produced at page 325. The appeal hearing took place on the 24 April and a note of the meeting was produced at page 332.

55. The appeal was heard by Mr Frank Blair, Director. He issued his decision to dismiss the appeal in a letter dated 1 May 2018 (page 334).

56. The claimant has, since dismissal, remained unfit for work. The claimant remains on medication and continues to be reviewed by her GP on a regular basis. She has not been in receipt of benefits, and has not been seeking work.

Credibility and notes on the evidence

57. There were no real issues of credibility in this case. The claimant agreed the month on the fit note looked like it had been changed, but maintained she had not changed it, and had no motive for doing so in circumstances where she continued to be signed off as unfit for work and in receipt of fit notes. The claimant believed someone within ACAS had changed the fit note and that this had been done because the claimant had raised a grievance complaining about Ms Simpson whom, she argued, was Ms Thomson's best friend.

58. We found the respondent's witnesses to be both credible and reliable witnesses. Ms Riddle explained the decisions she made and the reasons for them in a very clear and straightforward manner. We were impressed by the fact Ms Riddle asked for further investigations to be carried out to establish what happened to the fit note when it was handed in to the ACAS office. Ms Riddle also dealt with all of the points raised by the claimant: for example, whether Ms Thomson and Ms Simpson were best friends, and whether any weight should be attached to the fact Ms Thomson said she had been handed the fit note by Mr Robinson, rather than Ms Smith.

59. Ms Thomson was also a straightforward witness. She had been accused by the claimant of changing the fit note and was, for this reason, obviously more direct with the claimant and less tolerant in her responses. This however did

not undermine her evidence. Ms Thomson clearly explained what she had done and why in an honest and straightforward manner.

60. There was one issue of credibility in the evidence of Ms Thomson and the claimant. Ms Thomson told the tribunal that initially Ms Simpson had not been agreeable to an informal meeting of the parties, chaired by Ms Thomson to try to resolve matters. However, Ms Simpson's position changed, but when Ms Thomson told the claimant such a meeting could take place, the claimant took issue with Ms Thomson not being a trained mediator. The claimant's version of events was that Ms Thomson offered mediation and, because she had done that, the claimant raised the fact Ms Thomson was not a trained mediator.

61. We preferred Ms Thomson's evidence regarding this matter. Ms Thomson accepted she was not a trained mediator and for this reason she did not, and would not, offer mediation. We considered there may have been scope for some confusion in the conversation, particularly if a meeting "like mediation" was referred to. We considered however this was not a material issue in terms of the case, although it was of regret that an opportunity to get parties round the table and to resolve matters was missed.

62. The claimant's witnesses did not add much to the claimant's evidence. Mr Leckenby agreed there were *"clear differences"* with the fit note. He confirmed he had not changed it, and described the claimant as one of the most honest people he knows.

63. Mr Leckenby and Ms Fraser both spoke about the weekly phone calls made by Ms Thomson to keep in touch with the claimant. They each confirmed the length of the phone calls had been too long and that the claimant had been very upset during the calls. We accepted their evidence regarding these points. We return to this point below because we considered the balance between keeping in touch and causing stress to the employee was lost in this case and this was something Ms Thomson, as an experienced manager, ought to have realised and addressed.

Respondent's submissions

64. Mr Turnbull noted the claimant pursued claims in respect of unfair dismissal in terms of section 98 Employment Rights Act; automatic unfair dismissal in terms of section 103A Employment Rights Act; subjected to detriment because of having made a protected disclosure in terms of section 47B(1) Employment Rights Act; unlawful deduction of wages (settled for the sum of £116.90) and breach of contract in respect of the implied term of mutual trust and confidence.

65. Mr Turnbull invited the tribunal to find the respondent's witnesses credible and reliable, and to prefer their evidence in any dispute. This was in contrast to the claimant who had a tendency to say what she believed would be helpful to her claim rather then what was in fact true. The claimant's evidence had also been difficult to follow and she had not been able to remember things. The evidence of the witnesses for the claimant did little to help determine the issues before the tribunal.

66. Mr Turnbull submitted the reason for the claimant's dismissal was conduct, which is a potentially fair reason for dismissal in terms of section 98(2) Employment Rights Act.

67. The respondent carried out a fair investigation when Ms Thomson investigated the alteration to the fit note, and when Mr Way investigated what had happened to the fit note after it was handed in to the ACAS offices. The claimant challenged the fairness of Ms Thomson carrying out the investigation. Mr Turnbull invited the tribunal to find there was no issue with Ms Thomson investigating this matter in circumstances where she had authority to conduct the investigation and in circumstances where it was not until the disciplinary hearing that the claimant argued Ms Thomson made the change to the fit note.

68. The claimant challenged Ms Thompson's decision to start an investigation, and the format of the investigation. Mr Turnbull invited the tribunal to find the respondent had a legitimate concern regarding the fit note and that it was reasonable to investigate this. The respondent acknowledged there was a reference in the disciplinary procedure to involving a person with specialist

expertise in cases of fraud. The respondent did not do this because the facts of the case did not merit it.

69. Mr Turnbull reminded the tribunal that at the point in time when Ms Thompson investigated the issue, the claimant had not accused Ms Thompson of changing the fit note. There was, accordingly, no reason to stop Ms Thompson from conducting the investigation. Furthermore, Ms Thompson did not conclude the claimant made the change: she only gathered the facts.

70. The claimant also raised the issue of not having seen the witness statements gathered by Mr Way. Mr Turnbull referred to the case of **Hussain v Elonex 1999 IRLR 420** where the Court of Appeal held there is no universal requirement of natural justice or general principle of law that an employee must be shown copies of witness statements. It is a matter of what is fair and reasonable in each case. Mr Turnbull submitted the claimant had been aware of the substance of the case against her and that was sufficient.

71. The claimant had focussed on the fact Ms Thompson stated the fit note had been passed to her by Ken, when in fact Ken had passed it to Carol Smith, who handed it to Ms Thompson. Mr Turnbull referred the tribunal to the investigation carried out by Mr Way and to the conclusions reached. He submitted Ms Thompson's response was not sufficient to undermine her position.

72. Ms Riddle, it was submitted, genuinely and reasonably held the belief the claimant was guilty of the alleged misconduct. She reached the view after having concluded the fit note had been changed. Ms Riddle concluded the change to the fit not was not due to locum error. This was based on:- (i) the GP practice confirmed the fit note was for 4 weeks; (ii) most previous fit notes had been for 4 weeks; (iii) the claimant told Ms Thomson in a phone call that it would be a 4 week fit note and (iv) Ms Riddle knew a fit note for 8 weeks and 4 days would be highly unusual.

73. Ms Riddle also concluded Ms Thomson had not changed the fit note. This was based on (i) noting how Ms Thomson had responded to the claimant's cross examination; (ii) her belief Ms Thomson did not have motive to change

the fit note; (iii) her belief there was animosity by the claimant towards Ms Thomson and (iv) the text message sent by the claimant to Ms Thomson.

74. Ms Riddle was also satisfied that no-one else in the respondent organisation had an opportunity to change the fit note. This was a reasonable conclusion based on the investigation of Mr Way.

75. Mr Turnbull submitted Ms Riddle had reasonable grounds upon which to sustain her belief that the claimant altered the fit note, based on the claimant's text message to Ms Thomson in response to the question of when she was due to be back at work. The response was, in effect, presenting the fit note as an 8 week line, and the claimant was happy to take advantage of that. It was submitted that Ms Riddle reasonably believed that someone who had not changed the fit note would have replied "4 weeks" or "it may look like an 11 but should be a 10, it is a 4 week line".

76. Mr Turnbull submitted that whilst the decision was quite nuanced, with no smoking gun, Ms Riddle's conclusions fell within the band of reasonable responses which a reasonable employer might have adopted.

77. Mr Turnbull reminded the tribunal that it was agreed by the parties that the fit note was changed.

78. Ms Riddle took the claimant's length of service and unblemished record into account, as well as the fact the claimant did not accept any culpability or express any regret.

79. Ms Riddle, having formed the belief the claimant changed the fit note, took mitigating circumstances into account, but concluded dismissal was still appropriate. Ms Riddle believed the claimant had not accepted responsibility for her misconduct, and did not express any regret: rather, the claimant had tried to blame others.

80. Mr Turnbull submitted the decision to dismiss fell within the band of reasonable responses. Ms Riddle did consider whether a sanction short of dismissal may have been appropriate but given the very serious nature of the

misconduct, she concluded there had been a breach of trust and that dismissal was appropriate.

81. Mr Turnbull invited the tribunal to find the dismissal fair, and to dismiss the claim.

82. Mr Turnbull submitted the tribunal had no jurisdiction to consider the whistleblowing complaint (detriment in terms of section 47B Employment Rights Act) because it was out of time. Mr Turnbull noted a detriment claim had to be presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates.

83. The claimant believed she had been subjected to a detriment through the low score marking by Ms Simpson in March 2017. The last detriment relied on appeared to be October 2017. The claim was presented on the 23 July 2018. Mr Turnbull submitted the claim in respect of these alleged detriments had been presented late and the claim should be dismissed. The claimant had not argued that it had been not reasonably practicable to present the claim in time.

84. The claimant also argued she had made a protected disclosure in her letter of grievance dated 25 July 2017. The disclosure concerned a plot to remove her manager from post. Mr Turnbull submitted the respondent accepted the disclosure conveyed facts, but argued that it had not been made in the public interest.

85. Mr Turnbull continued that in the event the tribunal was satisfied a protected disclosure had been made, the tribunal had to look at the causal link between the disclosure and the detriment and/or dismissal. The employee had to prove, in terms of section 47B, that they had made a protected disclosure and that the detrimental treatment was on the ground of having made the protected disclosure.

86. Mr Turnbull referred to the cases of **Aspinall v MSI Mech Forge Ltd UKEAT/891/01** and **London Borough of Harrow v Knight 2003 IRLR 140** and submitted the tribunal had to be satisfied that the sole or principal reason for the dismissal was the protected disclosure.

87. Mr Turnbull noted he had had difficulty identifying the detriments relied on by the claimant, but it appeared to be (i) her call scores; (ii) the keeping in touch calls and (iii) pressure to lodge a grievance.

88. Mr Turnbull submitted the calls were scored in March 2017 before the claimant made a protected disclosure and, accordingly, it was not possible to succeed with an argument that the low score was because the claimant had raised the grievance. In any event, Mr Turnbull reminded the tribunal the claimant agreed the calls were not her best calls and could have been improved upon which, he submitted, was the whole purpose of call monitoring.

89. The tribunal had, it was submitted, heard no evidence of a causal connection between the length/number/nature of the keeping in touch calls and the disclosure. The claimant's own position was that the length of calls reduced following her grievance. The respondent had no indication the claimant had been upset by the calls, which had taken place to try to resolve issues and return the claimant to work. Ms Fraser and Mr Leckenby had both given evidence to the effect they had tried to encourage the claimant to end the call when she became upset, but she refused to do so.

90. The only evidence before the tribunal regarding the lodging of the grievance, was that Ms Thomson told the claimant that she had the option of lodging the grievance to try to resolve the issues which were preventing her from returning to work. The respondent denied pressure had been put on the claimant, and Mr Turnbull invited the tribunal to note the claimant's own evidence which was that she had taken advice from a friend who had recommended she raise the grievance.

91. Mr Turnbull invited the tribunal to dismiss this aspect of the claim, and to dismiss the claim that dismissal occurred because of the protected disclosure. Mr Turnbull submitted the tribunal had not heard any evidence to link the protected disclosure to the dismissal. The motivation for the dismissal came from the facts disclosed by the investigations.

92. Mr Turnbull also invited the tribunal to dismiss the breach of contract claim. The claimant sought to argue the respondent had, without reasonable and

proper cause, conducted itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between the respondent and the claimant. Mr Turnbull submitted the claimant had not met the burden of proof required to demonstrate this. There was proper cause to subject the claimant to an investigation of the allegations. The allegations were made in good faith based on the suspicion the fit note had been changed and there was no intention on the part of the respondent to repudiate the contract.

93. Mr Turnbull invited the tribunal to dismiss the claim. If the tribunal found the dismissal unfair, he submitted compensation should be reduced because of ***Polkey*** and contributory conduct. If the whistleblowing claim was upheld, the claimant had not given any evidence regarding injury to feelings and had not produced any medical evidence to support her position. In the circumstances a minimum award of £1000 should be made.

Claimant's submissions

94. The claimant did not wish to address her submissions. She handed a written submission to the tribunal and invite us to read it. The claimant believed her grievance to be a protected disclosure in terms of section 43B(b), (c) and (d). The claimant believed the respondent had failed in their legal obligation to safeguard the wellbeing of an employee and ensure fair treatment of employees. This occurred during a covert campaign to remove a manager from her post. The health and safety of the manager was affected. The claimant considered the disclosure to have been in the public interest because of the standing of ACAS as a public body which should operate to the highest standards of integrity and good practice.

95. The detriment suffered by the claimant was a campaign of harassment which culminated in the accusation of dishonesty which led to dismissal. The harassment comprised:

- an excessive number of calls were reviewed (usually two calls per month were reviewed, but the claimant had six calls reviewed in five weeks);

- the call scores were wholly inconsistent with her previous call scores;
- once on sick leave the keeping in touch calls were lengthy and unpleasant, and the claimant was pressured to raise a grievance;
- on the day the grievance was to be presented, the phone calls were incessant and
- the disciplinary process was started.

96. The claimant referred to the implied duty of trust and confidence and submitted the allegations made against her had been made in bad faith and destroyed trust and confidence.

97. The claimant submitted the dismissal was unfair because of a number of flaws in the process and because the respondent had demonstrated bias throughout. The claimant raised the following points regarding the investigation and the disciplinary hearing:

- the text sent by Ms Thomson on the 29 September was deliberately deceitful because it purported to seek information in circumstances where Ms Thomson had already commenced enquiries regarding a change to the fit note;
- the allegation of amending the fit note was never put to the claimant;
- Peter McGuigan, HR, made a statement during the investigation that the fit note had been amended. This was evidence of bias;
- Ms Thomson was manipulative and misleading in her approaches to the claimant, and she continued to contact the claimant's medical practice when she had no consent to do so;
- The claimant's text on the 29 September was an honest attempt to answer Ms Thomson's question;
- No evidence was produced at the tribunal to demonstrate the claimant had ever relied on the fit note to secure absence from

work of more than four weeks. The claimant's doctor continued to be comfortable issuing a successive series of fit notes up to the date of dismissal. The respondent failed to show how the claimant could gain financially or otherwise from amending the fit note;

- The original copy of the fit note (page 82) was ambiguous;
- Ms Thomson stated in a text dated 29 September that Ken (Robinson) had passed her the fit note. Ms Thomson's evidence was that she had been passed the fit note by Carol and
- Mr Way's investigation was shoddy and incomplete and the inconsistencies regarding who had been in the office on which dates and when they had possession of the fit note had not been resolved.

98. The claimant also believed there had been unconscious bias by the respondent during the process, because there was a bias towards supporting the conclusion already reached.

99. The respondent had also breached their own policy because they had not been fair and acted without bias and, given the seriousness of the allegation, they had not appointed two investigating officers.

100. The claimant concluded by submitting she felt she had been treated very unjustly by the respondent. She had been bullied, accused of dishonesty, dismissed, suffered financial loss and was in a position where her future employment prospects were severely tainted. In addition to this, the claimant's health, well-being and self-confidence had been severely affected, and she continued to take medication to cope with the stress of the situation.

Discussion and Decision

Did the claimant make a protected disclosure?

101. We decided it would be appropriate to firstly determine whether the claimant made a protected disclosure when she submitted her grievance on the 25 July

2017 (page 374). We had regard to the terms of section 43 Employment Rights Act.

102. A "protected disclosure" means a qualifying disclosure as defined by section 43B-H. A "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making it, is made in the public interest and tends to show one or more of the matters set out in section 43B(1)(a) – (f).

103. The claimant asserted her grievance disclosed information, which she believed was in the public interest, and which disclosed that a person was failing to comply with a legal obligation and that the health and safety of an individual was being endangered.

104. The grievance set out details of the calls reviewed and failed, and details of the (alleged) discussion with Ms Simpson. The claimant stated she understood she was being asked to be part of a witch hunt.

105. We, in considering whether this was a protected disclosure, must firstly determine whether there has been a disclosure of information. We were satisfied there had been a disclosure of information: the claimant set out details of the (alleged) conversation with Ms Simpson, when it had taken place and what she had understood from the discussion.

106. We next asked whether, in the reasonable belief of the claimant, the disclosure was made in the public interest. We decided the disclosure was not made in the public interest and we reached that conclusion because the claimant's motivation in raising the grievance was purely personal. The vast majority of the grievance concerned the failed calls. This was the background to the conversation with Ms Simpson and the claimant's comment that she felt "bullied". The grievance was raised because the claimant had to address the standoff created with Ms Simpson, and not because she wanted to blow the whistle on an alleged conspiracy against Ms Ansell.

107. We finally asked whether the belief that the disclosure tended to show a breach of a legal obligation and/or that the health and safety of an individual

was being endangered was reasonable. We, in considering this issue, noted the test of reasonable belief is subjective: was it reasonable for the claimant to believe it? We may, when considering this, have regard to individual characteristics. There was no dispute in this case that the claimant had a number of personal issues to cope with at around this time. The claimant had health issues (withdrawal of cancer treatment which she had been on long term); family bereavements and calls which, for the first time in her career with the respondent, had been classed as fails. The claimant's reaction to having failed calls appeared to this tribunal to have been extreme, particularly when she was assured by Ms Thomson that these things happen, and encouraged to put it behind her and move on. The claimant was incapable of doing so.

108. We noted that in addition to this the claimant already had issues with Ms Simpson. The claimant had a deadline for submission of an Open University module and had planned her work accordingly. Ms Simpson then gave the team an instruction to complete a piece of work. The claimant asked for an extension but Ms Simpson refused this and told the claimant to comply with a reasonable management instruction. The claimant in her grievance described Ms Simpson as having a *"cool demeanour"* towards her which left her feeling uncomfortable.

109. We inferred from this that the claimant's belief that the disclosure tended to show a breach of a legal obligation and that the health and safety of an individual was being endangered was not reasonable. The claimant was in a state of heightened anxiety and against that background her belief was not reasonable. The claimant sought to argue that her position was supported by the fact Ms Ansell was moved from the manager role. The difficulty with that argument was that there was no evidence to suggest why Ms Ansell moved role or whether, for example, it was voluntary.

110. We concluded, for the above reasons, that the grievance was not a protected disclosure.

Was the claimant subjected to detriment on the ground she made a protected disclosure

111. We did however consider it appropriate to continue to consider whether – if we are wrong in our conclusion, and there was a protected disclosure – the claimant was subjected to detriment and if so, whether the detriment/s occurred because the disclosure was made. We reminded ourselves that in terms of section 47B Employment Rights Act, a worker has the right not to be subjected to any detriment by any act, or any failure to act, by his employer on the ground that the worker has made a protected disclosure.

112. The detriments identified by the claimant were (a) an excessive number of calls pulled for review and marked as fails; (b) the keeping in touch phone calls whilst off sick and (c) the commencement of the disciplinary process which led to her dismissal. We had regard to each of these points in turn and asked whether the alleged acts amounted to a detriment and, if so, whether the detriment occurred on the ground the claimant made a protected disclosure. We noted the term "detriment" has a broad meaning and covers a wide range of unfavourable treatment.

113. We noted there was no dispute regarding the fact the respondent operates a call monitoring procedure whereby telephone calls are recorded and at least two phone calls per employee are randomly selected each month for review. We considered there was insufficient evidence for the tribunal to make a finding that an excessive number of calls had been pulled for review. It appeared the respondent would have been justified in reviewing four of the claimant's calls over the period January and February. The respondent in fact reviewed five calls. We could not, in the absence of any other evidence, find this amounted to "excessive".

114. There was also no dispute regarding the fact the claimant had previously had reviewed calls rated as satisfactory or above, and the calls in January and February were the first calls which had been rated as poor or fail. We considered that in order for this rating to amount to a detriment, there would have to be some basis for finding the score had been unreasonably awarded. We could not make such a finding in circumstances where there was evidence firstly that the claimant had personal issues which may have affected her phone calls and secondly where the rating was reviewed by another manager

and by an independent manager, who both agreed the calls had been poor. We were therefore not persuaded the claimant had been subjected to a detriment.

115. We should state that if we had found there to have been a detriment, this aspect of the claimant's claim would have failed in any event because the calls were selected for review and rated prior to the claimant's grievance/protected disclosure being made. The calls were pulled for review in January – March. The claimant's grievance was raised in July. Accordingly, even if an excessive number of calls had been pulled for review and rated as poor or fail, the fact of the protected disclosure having been made could not have been the reason for this.

116. We next considered the keeping in touch calls made by Ms Thomson. There was no dispute weekly phone calls were made by Ms Thomson to the claimant as part of the absence management procedure. There was also no dispute regarding the fact the phone calls were lengthy (up to one hour in duration) and the claimant was upset during the calls. We acknowledge making keeping in touch calls is part of the respondent's absence management procedure, but we considered the length of the calls made by Ms Thomson to be unnecessary, particularly in circumstances where the claimant was clearly upset and distressed during the calls. Ms Thomson suggested the claimant had not been upset by the calls but by discussing the scoring of her calls. We considered that even if that was correct, it would have been reasonable for Ms Thomson to bring the call to an end. We concluded these calls did amount to a detriment.

117. We next asked whether the claimant was subjected to this detriment on the grounds that she made a protected disclosure. The claimant commenced a period of sickness absence in March, following which the keeping in touch calls were made. The grievance/protected disclosure was not raised until July, and there was no dispute regarding the fact the number of calls reduced following the grievance being raised. We concluded the detriment could not have occurred on the ground of the protected disclosure having been made because the detriment pre-dated the protected disclosure.

118. We finally considered whether commencement of the disciplinary process was a detriment and if so, whether it occurred on the ground of the protected disclosure having been made. The disciplinary process commenced with an investigation started by Ms Thomson on the 29 September: it post-dated the grievance raised in July.

119. The claimant sought to argue the commencement of the disciplinary process was unjustified, but we could not accept that position. We have set out below, our conclusion that the respondent carried out as much investigation as was reasonable in this case, had sufficient grounds upon which to sustain their belief the claimant had changed the fit note and that the respondent did believe the claimant had done so. We were satisfied the respondent had reason to initiate the investigation and that reason arose from the fact of suspicion surrounding the length of the fit note and the amendment to the date.

120. We concluded the commencement of the disciplinary process was justified. We further concluded that in those circumstances, the claimant was not subjected to a detriment.

121. We should state that if we are wrong in our conclusion and the claimant was subjected to a detriment arising from the fact disciplinary proceedings were commenced, we would have concluded the detriment did not occur on the ground the claimant made a protected disclosure. We could not accept the claimant's argument that Ms Thomson had amended the fit note in order to have the claimant disciplined because she had raised a grievance against her best friend Ms Simpson. There was no evidence to support that contention. We say that because Ms Riddle was entitled to rely on Mr Way's investigation regarding what happened to the fit note once it arrived at the ACAS offices, and Ms Riddle was entitled to conclude Ms Thomson had not amended the date on the fit note and that Ms Thomson and Ms Simpson were not best friends (see below).

122. We, in conclusion, decided:-

(i) the claimant did not make a protected disclosure and

(ii) even if she did make a protected disclosure, she was not subjected to detriment on the ground of having made a protected disclosure because:-

(a) two of the three alleged detriments were not detriments;

(b) but even if they were all detriments, the reviewed calls and keeping in touch calls occurred prior to the protected disclosure having been made and

(c) there was no causal link between the commencement of the disciplinary process and the protected disclosure.

What was the reason for the claimant's dismissal: was the claimant dismissed for making a protected disclosure in terms of section 103A Employment Rights Act?

123. We next turned to consider the complaint that the claimant was dismissed because she made a protected disclosure. We have already decided (above) that the claimant did not make a protected disclosure. However, if we are wrong in that decision, and the claimant did make a protected disclosure, we considered whether the claimant was dismissed because she made a protected disclosure. We referred to the terms of section 103A Employment Rights Act which provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

124. We were referred to the case of **Aspinall v MSI Mech Forge Ltd EAT 891/01** where the EAT held that the words "on the ground that" mean that the employee must be able to prove a causal connection between the fact of making a protected disclosure and the decision of the employer to subject him to a detriment. Subsequently in the case of **London Borough of Harrow v Knight 2003 IRLR 140** the EAT stated the question to be addressed was whether the protected disclosure formed part of the motivation (conscious or unconscious) of the employer in subjecting the employee to detriment.

125. We also had regard to the case of **Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065** where it was stated that the causation exercise

for tribunals is not legal, but factual. A tribunal should ask *"why did the alleged discriminator act as he did? What consciously or unconsciously was his reason?"*

126. This approach was expressly approved by the EAT in **Trustees of Mama East African Women's Group v Dobson EAT/0212/05** where it was stated that establishing the reason for dismissal in a section 103A claim requires the tribunal to determine the decision-making process in the mind of the dismissing officer. This requires the tribunal to consider the employer's conscious and unconscious reason for acting as it did.

127. The claimant sought to argue that the fit note had been amended by Ms Thomson and the case against her had been fabricated because she had made a protected disclosure when she raised her grievance. We, in considering the claimant's argument, decided it would be appropriate to consider firstly whether there was any justification for starting the investigation and secondly how the employer dealt with the claimant's assertion that the fit note had been amended once it arrived at the ACAS offices.

128. Ms Thomson told the tribunal that she first saw the fit note dated 26 September on Friday 29 September when she returned to the office. She was expecting the fit note to be for a period of four weeks because previous fit notes had been for that length of time and the claimant had told Ms Thomson the locum GP had given her a fit note for four weeks. Ms Thomson was, accordingly, surprised when she saw the fit note appeared to be for a period of over 8 weeks. She was suspicious about the end date on the fit note because it looked like it had been altered from 10 (October) to 11 (November).

129. Ms Thomson tested her suspicions by asking HR for comment regarding the end date on the fit note. She also sought advice from a senior manager prior to commencing her fact findings. Ms Thomson also phoned the claimant's GP surgery to enquire for how long a period the fit note had been given. Ms Thomson was advised a four week fit note had been given to the claimant.

130. Ms Thomson contacted the claimant by text to enquire when, if she fit enough, she would return to work. The claimant replied *"you probably remember me*

saying he wanted me off for 8 weeks and I said no but looking at the fit note he seems to have decided on 8 weeks and I do need to go back although the fit note does not make that part clear…" Ms Thomson had been expecting the claimant to say the fit note was for 4 weeks. The claimant did not say this: she confirmed the fit note was for 8 weeks.

131. The claimant described Ms Thomson's test as "deceitful" because she had not disclosed to the claimant the real purpose of sending the text. We could not accept the claimant's position. We accepted Ms Thomson's evidence that she had been trying to gently test the situation prior to formalising matters, and we considered this was an entirely reasonable manner in which to proceed at that stage.

132. We concluded from these facts and the apparent conflict between the GP saying the fit note had been issued for 4 weeks, and the claimant saying it had been issued for 8 weeks and where the date on the fit note was suspicious, that the respondent had reasonable grounds upon which to decide to carry out an investigation.

133. The claimant accused Ms Thomson of amending the date on the fit note because the claimant had raised a grievance against her best friend Ms Simpson. We, in considering this argument, noted Ms Riddle addressed it by having Mr Way investigate what had happened to the fit note once it had been handed in to the ACAS offices by the claimant's husband.

134. Mr Way carried out the investigation requested by Ms Riddle. There was no evidence to suggest Mr Way knew of the claimant's grievance/protected disclosure. Mr Way interviewed Ms Thomson, Ms Smith and Mr Robinson. He concluded that at no point was the fit note found to be in the hands of anyone other than those authorised to and have necessity to handle it, and that there was no evidence or reason to believe the fit note was altered or amended by any members of the staff involved nor were any instructions given by any of those parties to anyone to make any alteration.

135. The claimant, in her submission, was critical of Mr Way's investigation and conclusions, but those criticisms were not put to Ms Riddle in cross examination and so no weight can be attached to them.

136. Ms Riddle not only had the benefit of Mr Way's investigation report, she also had the benefit of seeing Ms Thomson be questioned by the claimant during the disciplinary hearing. Ms Riddle heard the claimant's questions, heard Ms Thomson's responses and saw Ms Thomson's reaction to being questioned. Ms Riddle concluded, based on Mr Way's report and on having seen Ms Thomson's be questioned by the claimant, that Ms Thomson had not amended the date on the fit note. We considered this was a conclusion which it was reasonable for Ms Riddle to reach.

137. The claimant argued Ms Thomson amended the date on the fit note because the claimant had raised a grievance against her best friend Ms Simpson. This was put to Ms Riddle, who confirmed Ms Thomson and Ms Simpson were not best friends: Ms Riddle described them as work colleagues who had had professional differences. We preferred the evidence of Ms Riddle regarding this matter because the claimant had no evidence to support her assertion.

138. We, in conclusion, decided the respondent had reasonable grounds for deciding to carry out an investigation, and had reasonable grounds for rejecting the claimant's assertion that Ms Thomson had amended the fit note.

139. We set out (above) that the tribunal must, when determining whether a causal link between the protected disclosure and the dismissal has been established, consider the employer's conscious and unconscious reason for acting as it did. We had regard to the fact that whilst the claimant pointed the finger at Ms Thomson, she made no suggestion why Ms Riddle may have decided to dismiss her because of the grievance/protected disclosure. There was no suggestion Ms Riddle sided with or supported Ms Thomson; there was no suggestion Ms Riddle was annoyed about the grievance or wanted to punish the claimant for raising it: there was in fact, no evidence from the claimant to suggest why Ms Riddle might have dismissed her because of raising the grievance/protected disclosure.

140. We decided, for all of these reasons, that the claimant had failed to establish any causal link between the protected disclosure and the dismissal. We accordingly decided to dismiss the complaint brought under section 103A Employment Rights Act.

Unfair Dismissal

141. We had regard to the terms of section 98 Employment Rights Act, which set out the approach a tribunal must take when determining whether a dismissal is fair or unfair. There are two stages: firstly, the employer must show the reason for the dismissal, and that it is a reason falling within section 98(1) or (2). If the employer is successful at the first stage, the tribunal must then determine whether dismissal for that reason was fair or unfair having regard to the terms of section 98(4).

142. The respondent asserted the reason for dismissal was conduct. The claimant disputed this and argued she had been dismissed for making a protected disclosure. We have set out above our reasons for rejecting the claimant's argument. We decided, having regard to those reasons, and our conclusions set out below, that the respondent has shown the reason for the dismissal was conduct, which is a potentially fair reason for dismissal falling within section 98(2)(b) Employment Rights Act. The issue for this tribunal to determine is whether dismissal for this reason was fair or unfair in the circumstances.

143. We were referred to the case of **British Home Stores Ltd v** Burchell (above) which confirmed the employer must demonstrate they genuinely believed the employee guilty of the misconduct in question, that they had reasonable grounds upon which to sustain their belief and that they had carried out as much investigation into the alleged misconduct as was reasonable.

144. The claimant challenged the fact Ms Thomson carried out the investigation in circumstances where she had first raised concern regarding the fit note. We accepted Mr Turnbull's submission to the effect there is no rule that the person who makes the allegation cannot investigate it. It is for the tribunal to determine whether, on the facts of a particular case and after having regard

to the nature of the allegations made, the manner of the investigation, the size and capacity of the employer's undertaking and all other relevant circumstances, a fair procedure was followed.

145. We, in considering the claimant's challenge, noted this matter started when Ms Thomson opened the fit note, expecting it to be for four weeks, and saw it was for 8 weeks. Ms Thomson thought the end date on the fit note looked ambiguous, so she sought the views of HR to get their opinion. Ms Thomson also checked with the claimant's GP surgery regarding the length of the fit note, and text the claimant to clarify when, if she was fit to do so, she would return to work. Ms Thomson, having made these preliminary checks, informed her manager and was authorised to conduct the investigation.

146. We have set out above our conclusion that an investigation was justified in circumstances where there was concern regarding the length of the fit note and whether an amendment had been made to end date.

147. The claimant, having suggested Ms Thomson was not neutral in the investigation, did not go on to explain how this impacted on her. There was no suggestion, for example, that the claimant had been prevented from raising points of her defence, or that Ms Thomson had disregarded matters she should have taken into account, or relied on matters she should have disregarded. There was no suggestion Ms Thomson should have interviewed others or failed to investigate points raised by the claimant.

148. Ms Thomson investigated matters by meeting with the claimant on the 10 October and contacting the claimant's GP surgery. Ms Thomson's investigation report concluded *"based on the information during my investigation, I believe there is sufficient evidence that the Fit Note has been amended and this should be tested at a disciplinary meeting."*

149. We noted the claimant's position during the investigation was that she agreed the month of the end date on the fit note looked like it had been amended: the claimant did not know how this could have happened.

150. We, having had regard to all of the above points, concluded the fact Ms Thomson raised the concern did not, of itself, debar her from investigating the matter. We considered we were supported in that view by the fact the claimant had not, at that stage, accused Ms Thomson of amending the fit note. The claimant challenged Ms Thomson's neutrality, but we were entirely satisfied, given the investigation carried out by Ms Thomson, the fact she had no part in the decision-making process at the disciplinary stage and the fact everything done by Ms Thomson was reviewed by Ms Riddle, that we could not accept the claimant's argument.

151. We were further satisfied Ms Thomson carried out as much investigation into the matter as was reasonable in the circumstances of the case.

152. We next turned to consider whether there were reasonable grounds upon which to sustain the respondent's belief that the claimant had amended the date on the fit note. The claimant's position was that she had not altered the fit note and therefore, if it had been altered, someone else must have done it, for example, Ms Thomson. Ms Riddle responded to this suggestion by having a further investigation carried out to establish what had happened to the fit note after it had been handed in to the ACAS office, and by agreeing to ask Ms Thomson to attend the disciplinary hearing to allow the claimant to question her.

153. The claimant, in her submission, challenged Mr Way's investigation because of inconsistencies: for example, Ms Thomson, in a text message to the claimant referred to having been passed the fit note by Mr Robinson, whereas in her evidence, Ms Thomson said the fit note had been passed to her by Ms Smith.

154. We did not consider this inconsistency was sufficient to undermine Mr Way's investigation. He interviewed the three people who had been involved in handling the fit note and was satisfied procedures for dealing with the fit note had been met, and that it had remained in a sealed envelope until being opened by Ms Thomson on the 29 September.

155. We concluded Ms Riddle, having identified the need for this investigation, and having received the report from Mr Way which was not challenged at the time, was entitled to rely on it. Ms Riddle, based on the investigation report of Mr Way, had reasonable grounds upon which to conclude that at no point was the fit note found to be in the hands of anyone other than those authorised to and have necessity to handle it, and that it had remained in a sealed envelope until opened by Ms Thomson.

156. Ms Riddle agreed to the claimant's request to have Ms Thomson attend the disciplinary hearing so she could be questioned about amending the fit note. Ms Riddle concluded Ms Thomson had not amended the fit note for five reasons: (a) she had the benefit of seeing Ms Thomson respond to the claimant's questions during the disciplinary hearing; (b) Ms Thomson was not the subject of the claimant's grievance; (c) Ms Thomson and Ms Simpson were not best friends, and Ms Riddle was aware they had professional differences; (d) Ms Thomson had no motive to change the fit note and (e) if Ms Thomson had wanted to get the claimant into trouble, there were better/easier ways to achieve it.

157. We, in addition to the above points, also had regard to the fact that Ms Thomson had been expecting to receive a four week fit note from the claimant, in line with the previous fit notes and because the claimant had told her – prior to producing the fit note – that the locum GP had wanted to give her a fit note for 8 weeks, but she had disagreed and told him she wanted one for four weeks. We considered that against that background, it would have been very odd for Ms Thomson to have amended the date on the fit note. Furthermore, the claimant's response to Ms Thomson's text on the 29 September referred to having been given a fit note for 8 weeks. If Ms Thomson had made the change to the fit note, the claimant would not have known this.

158. We concluded, for these reasons, that Ms Riddle had reasonable grounds upon which to sustain her belief that Ms Thomson did not amend the fit note.

159. Ms Riddle considered whether the amendment could have been made at the GP surgery. There was no dispute regarding the fact the claimant had been

seen by a locum GP on the 26 September, who had given her a fit note for 4 weeks. The original fit note (of which the claimant had taken a copy) showed the month of October as a 10, whereas the fit note in the possession of the respondent showed the month of November as an 11, with the second 1 looking like a 0 had been filled in to make it look like a 1.

160. Ms Riddle, in addition to the above, drew upon her own experience of dealing with fit notes, to note the duration of the fit note (8 weeks and 4 days) was highly unusual.

161. We concluded, having had regard to the information before Ms Riddle, that she had reasonable grounds upon which to conclude the GP had not amended the fit note.

162. Ms Riddle, in considering the claimant's position (that whilst agreeing the fit note looked like it had been amended, it had not been her who had amended it) had regard to the fact (i) she believed the fit note had not been amended by Ms Thomson or the GP; (ii) the claimant had told Ms Thomson the GP had wanted to give her a fit note for 8 weeks but she objected and so one for 4 weeks had been issued; (iii) when Ms Thomson text the claimant to enquire about the end date of the fit note, the claimant said it looked like she had been given a fit note for 8 weeks and (iv) the fit note received by Ms Thomson had been amended.

163. We concluded that based on the information before her, and the fact Ms Riddle had reasonable grounds upon which to sustain her belief the fit note had not been altered by the GP or Ms Thomson, Ms Riddle had reasonable grounds to sustain her belief the claimant had altered the fit note.

164. The claimant invited Ms Riddle to consider why she would have done this in circumstances where she may be signed off for a further period by the GP in any event. Ms Riddle, in considering this matter, had regard to the fact the claimant's grievance had been rejected. The grievance appeal was lodged the same day as the claimant visited the locum GP. The OH report confirmed a prompt return to work was anticipated after the matters raised in the grievance had been dealt with. The claimant, however, did not want to return

to work: she was still not happy with the scoring of her calls or how she had been dealt with by Ms Simpson. Ms Riddle also had regard to the fact that with an 8 week fit note the claimant could avoid having to return to the GP or contact her manager for a longer period of time.

165. Ms Riddle concluded the claimant had reason to amend the fit note and we were satisfied she had reasonable grounds upon which to sustain that belief.

166. We, in conclusion, decided Ms Riddle had reasonable grounds upon which to sustain her belief the claimant amended the fit note.

167. We next considered whether the sanction of dismissal was fair in the circumstances. We were referred to the case of **Iceland Frozen Foods Ltd v Jones** (above) where the EAT set out the correct approach for tribunals to adopt in answering the question posed by section 98(4) as follows:

"(1) the starting point should always be the words of section 98(4) themselves;

(2) in applying the section a tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct a tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

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

(5) the function of the tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

168. We, in considering whether the respondent's decision to dismiss the claimant fell within the band of reasonable responses, had regard to the fact we were

satisfied the respondent had carried out as much investigation into the matter as was reasonable in the circumstances and that Ms Riddle had reasonable grounds upon which to sustain her belief that the claimant had amended the fit note. The respondent classed this as gross misconduct. The letter of dismissal referred to Chapter 7 of the ACAS Disciplinary procedure which defined gross misconduct as an issue serious enough to render the future working relationship untenable and warrants dismissal without previous warning. It included reference to "theft, fraud, corruption and deliberate falsification of records". Ms Riddle believed the matter of dishonestly and wilfully amending a medical certificate was so serious as to constitute gross misconduct.

169. We were satisfied Ms Riddle had regard not only to the serious nature of the misconduct, but she also had regard to mitigating factors, and considered whether a lesser sanction could be imposed. Ms Riddle concluded there had been a breach of trust which compounded the seriousness of what the claimant had done.

170. We decided, having had regard to all of the above points, that the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. The dismissal was fair.

Breach of contract

171. The claimant argued the respondent had, by its actions, breached the implied duty of trust and confidence. We dismissed this claim because we were satisfied (for the reasons set out above) that the respondent had a justifiable basis for commencing an investigation and proceedings to a disciplinary hearing. The respondent followed a fair procedure. There was, accordingly, no breach of contract.

Unauthorised deduction of wages

172. The respondent agreed to pay the claimant the sum of £116.90 in respect of flexitime accrued but not paid at the termination of employment.

Employment Judge:	Lucy Wiseman
Date of Judgement:	09 April 2019
Entered in Register,	
Copied to Parties:	10 April 2019