EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4117200/2018

Held in Glasgow on 30, 31 January and 1, 4, 5 and 6 February 2019

Employment Judge: Lucy Wiseman

Mrs Joan Boyle	**Claimant** **Represented by:** **Ms J Forrest - Solicitor**
BMI Healthcare Ltd	**Respondent** **Represented by:** **Mr G Millar - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that the claimant was unfairly dismissed. The respondent shall pay to the claimant a basic award of £15,240 and a compensatory award of £31,088.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 29 August 2018 alleging she had been unfairly dismissed. The claimant asserted the respondent had dismissed her in order to avoid paying a substantial redundancy payment, and that there were substantive and procedural flaws in the procedure followed by the respondent.

2. The respondent entered a response admitting the claimant had been dismissed for reasons relating to misconduct, but denying the dismissal was unfair.

3. I heard evidence from Mr Greg Gane, HR Business Partner, who was present during the investigation; Ms Agnes Sloan, Executive Director, who took the decision to dismiss; Mr Jason Rosenblatt, Director of HR, who heard the appeal and from the claimant.

4. I was also referred to a large folder of documents. I, on the basis of the evidence before me, made the following material findings of fact.

Findings of fact

5. The respondent owns and operates a number of private hospitals and healthcare facilities in Great Britain. One such private hospital is Carrick Glen in Ayr.

6. The claimant commenced employment at Carrick Glen hospital on the 6th April 1992. The claimant's employment transferred to the respondent in 2011 (by way of the Transfer of Undertakings (Protection of Employment) Regulations 2006). The claimant has a period of 26 years' continuous service.

7. The claimant is a Registered General Nurse, but held the position of Quality and Risk Manager. The claimant worked 30 hours per week and earned a salary of £32,555.

8. The claimant's letter of offer of employment was produced at page 86. The letter set out the terms and conditions of employment, which included a section entitled General Obligations. This section provided that during the claimant's employment, she had *to "comply with all company policies and standards, specifically (but not restricted to) the Code of Business Conduct and Information Security Policies"*. All of the respondent's policies and procedures were available to employees on the Intranet.

9. The Business Conduct policy was produced at page 61; the Information Security policy at page 50, the Disciplinary policy at page 71 and the Redundancy policy at page 85A.

10. The claimant had, prior to joining BMI Healthcare Ltd, been supported through the Independent Nurse Prescribers course, and carried out a range of cosmetic procedures both at the hospital and in her own clinic, Quest, which was established in 2004. The clinic was registered, and provided aesthetic procedures such as dermal fillers, chemical peels, thread vein treatment, small skin tag removal and micro-needling.

11. The claimant is the Director of Quest clinic and she employs a receptionist. The clinic rooms are hired out to Consultants and other health care professionals.

12. The respondent and staff were well aware of the claimant's clinic because it was discussed regularly internally and at meetings of Health Improvement Scotland.

13. The claimant reported to Ms Alison Smith, Executive Director at Carrick Glen.

14. Carrick Glen hospital had, for some time, not been doing well, and rumours of closure had circulated. On the 6th December 2017 the Chief Executive Officer, Ms Karen Prins and the Regional Director for the North, Mr Chris Buckingham, attended a meeting with the staff at Carrick Glen hospital, to inform them the hospital was closing.

15. The claimant was on annual leave on the 6th December, but heard the news from a friend. The claimant also received a text message from a colleague (page 109a) dated 7th December stating she had *"just seen the email from Alison Smith. Sorry to hear about the closure of Carrick Glen."* The claimant was also informed of the closure by Ms Alison Smith, Executive Director, upon her return to work on the 7th December.

16. A press statement was left at the reception desk of the hospital with a script for staff to follow if there were enquiries regarding the hospital. The press statement (page 298) contained various scripts to be followed depending on who was making the enquiry. The statement spoke of "re-purposing" the hospital, but also referred to GPs who had heard the hospital was closing.

17. A Medical Advisory Committee (MAC) meeting took place on the evening of the 6th December and the notes of that meeting were produced at page 95. Ms Smith, Executive Director was in attendance at the meeting. Ms Smith reported to the meeting (attended by medical doctors and consultants) that a decision had been made to "re-purpose" the hospital, and that there would be negotiations with the landlord.

18. Ms Smith, following the meeting, sent an email dated 7 December to Ms Winifred McClure (page 101) to give a "heads up" that following a visit by the CEO the previous day, they had been informed that Carrick Glen will close whenever certain discussions had occurred.

19. Ms Smith also sent an email to the Medical Society Members (page 109) in which she confirmed that although various options had been considered for the hospital, it had been decided there was no future for the business. Ms Smith referred to the visit of the CEO and confirmed "the hospital will be closing".

20. The Consultants who used Carrick Glen for their private practice were concerned regarding the future for conducting their private practice, in circumstances where the closure of Carrick Glen hospital meant they would lose the ability to consult locally. The Consultants were aware the claimant operated a clinic which was Health Improvement Scotland registered, and they approached her for information regarding her clinic and facilities.

21. The claimant, having been asked continually for information regarding her clinic, decided to write to a number of Consultants to provide this information. The letter, produced on Quest Clinic headed paper (page 165) and dated 9 January 2018, was sent *to "make you aware of a possible alternative location for your private practice"*. The letter described the facilities available, the fee structure and information regarding those already practising from the clinic. The letter concluded by asking Consultants to contact her if they wished to apply for practising privileges in the clinic.

22. The claimant informed Ms Smith that Consultants had been asking for information about her clinic and that she intended to write to them to provide information. Ms Smith told the claimant she could not be involved because she was BMI. Ms Smith did not tell the claimant not to send the letter and at the time she considered it would be an opportunity to bring business to BMI. Ms Smith subsequently explained she felt she had let the claimant down because she hadn't told her not to send the letter, but described that she had been in "closure mode".

23. The claimant sent the letter to six Consultants for whom she felt the clinic could be an alternative location. The clinic does not have the facilities required by some specialisms, for example, Orthopaedic, so the claimant did not write to those Consultants. The six Consultants were, with one exception, all people who had asked her for information.

24. The claimant's intention in sending the letter was to offer a possible alternative location for private practice in circumstances where Carrick Glen was closing. Her clinic would enable Consultants with a private practice to consult with patients locally, and continue to refer to Ross Hall Hospital in Glasgow, which is a BMI flagship hospital. The claimant described this as maintaining a "BMI footprint in Ayrshire".

25. Mr Buckingham, Ms Alison Smith and Mr Greg Gane, HR, met with staff on the 17th January 2018 to advise them the ward areas and theatres at Carrick Glen hospital would close, and the senior management team would reduce: the hospital would however remain open for out-patient services.

26. Mr Buckingham and Ms Smith met with the claimant (and a number of other employees) to advise her role was at risk of redundancy. The claimant received a letter dated 17th January (page 167) confirming the proposals would have an impact on her current role and inviting her to attend a first consultation meeting on the 23rd January.

27. Ms Smith, accompanied by Mr Gane, met with the claimant on the 23rd January, and a note of the meeting was produced at page 171. The claimant was advised that the proposal to cease admission of surgical and medical patients, and the closure of the ward and theatre, meant her position was at risk of redundancy. Ms Smith confirmed the consultation period would conclude on the 15th February and a second consultation meeting would be held on that date. Ms Smith also confirmed there was currently no suitable alternative employment available because of the distance involved in travelling to Ross Hall Hospital.

28. The claimant was provided with a calculation of her redundancy payment and payment in lieu of notice (page 173). The respondent pays an enhanced redundancy package. The claimant's redundancy payment was calculated to be £46,328.44, and the notice in lieu was £7,512.72.

29. The claimant was, by letter of the 5th February (page 188) invited to an Investigation meeting concerning suspected breaches of her contract of employment. The letter referred to clauses 10, 11 and 12 of the contract. The letter explained the basis for concern was that *"it appears that by letter dated 9 January 2018 you wrote to Dr RN, Consultant Physician, stating "I thought I would take this opportunity to get in touch with you and make you aware of a possible alternative location for your private practice." You summarised the letter stating "please let me know if you are interested in further discussions or viewing the clinic with a view to applying for practising privileges in the clinic".*

30. The letter went on to say that as an employee the claimant had a duty to act in good faith and to demonstrate fidelity and loyalty to BMI, and an obligation to act in BMI's best interests. The respondent suspected that by contacting Dr RN in the manner referred to above, the claimant had breached her contractual and common law duties and had also made use of confidential information for the benefit of Quest clinic which was her own private medical aesthetic practice.

31. The investigation meeting took place on the 13th February. Mr Paul Clark, Director of Operations at Ross Hall Hospital, chaired the meeting. Mr Gane attended to provide HR support. The claimant attended with her trade union representative Ms Barbara Sweeney. A note of the meeting was produced at page 196.

32. The claimant was asked whether she had sought permission to send the letter to Dr RN. The claimant explained she had not. She explained she had been approached by a number of consultants concerned about their clinics. She had sent the letter "on the back of Carrick Glen closing". The claimant told Mr Clark she had been a loyal employee for 26 years, that she had referred patients from her clinic to Ross Hall, and that she had an informal referral system.

33. There was some discussion about the number of letters that had been sent. The claimant named two or three Consultants, but subsequently provided Mr Clark with a list confirming the names of the six people to whom she had written. Five people on the list had approached the claimant for information regarding her clinic. One Consultant (Dr RN) had not approached the claimant for information. The claimant had written to Dr RN because she had sent a letter to another Consultant with the same specialism as Dr RN and she had thought it only fair to send a letter to Dr RN also.

34. Mr Clark wanted to know if the claimant thought that by writing the letter she had (a) associated her role with Quest clinic, with her role at BMI and/or (b) created a conflict of interest. The claimant denied this, although acknowledged she could now see how they might think it a conflict. The claimant denied Quest clinic was being offered as an alternative to Carrick Glen. The claimant had offered her clinic as "somewhere for the consultants to go after Carrick Glen closes." The claimant acknowledged that in hindsight she should have had a discussion with BMI before sending the letter; and that if she had waited a few weeks then she would have known Carrick Glen was not closing, and she would not have sent the letter. The claimant told Mr Clark

she had thought it would be of benefit to BMI, and with hindsight she had been stupid and naïve.

35. Mr Clark concluded the meeting by thanking the claimant for her honesty and confirming he had other witnesses to interview.

36. The claimant also attended her final consultation meeting on the 13th February. The claimant, and her representative Ms Sweeney, met with Ms Smith. A note of the meeting was produced at page 206. Ms Smith informed the claimant the consultation outcome would be paused until the result of the investigation.

37. Mr Clark interviewed Ms Smith on the 13th February and a note of that meeting was produced at page 201. Mr Clark wanted to know if anyone within BMI had advised Ms Smith, the claimant or anyone within Carrick Glen that the hospital would be closing. Ms Smith responded, “yes” and told Mr Clark she had “deep discomfort in this”. Ms Smith recounted the visit of Ms Prins, Chief Executive, and Mr Buckingham. She confirmed Ms Prins had used the word “re-purposing”, but Mr Buckingham had used the word “closing”. Ms Smith had genuinely thought the hospital was closing and no-one had mentioned anything to her about a “footprint remaining” until 15th January.

38. Ms Smith confirmed she had been aware of the claimant’s letter but not that it had been sent out. Ms Smith explained she was aware two Consultants had approached the claimant. Mr Clark asked “was this because BMI could not provide the service” and Ms Smith responded “it was not to take away business”.

39. The interview with Ms Smith concluded abruptly because Ms Smith became very upset.

40. Mr Clark interviewed Dr RN on the 19th February and a note of that meeting was produced at page 214. Dr RN confirmed the letter, addressed to him, had been left for him at Carrick Glen. Dr RN gave the letter to Ms Mhairi Jeffries,

Executive Director of Ross Hall Hospital. Dr RN confirmed he thought Carrick Glen was closing, and that he had been approached by two businessmen asking him if the hospital was closing.

41. Mr Clark interviewed Ms Mhairi Jeffries on the 19th February and a note of the meeting was produced at page 216. Ms Jeffries confirmed Dr RN had handed the letter from the claimant to Ms Jeffries' PA on the 11th January. Ms Jeffries escalated the matter to Mr Buckingham.

42. The claimant emailed Mr Clark on the 5th March (page 224) to remind him that it had been almost three weeks since their meeting and he had not yet provided a copy of the meeting notes. Mr Clark responded by sending a copy of the notes and asking the claimant to sign and return one copy. The claimant considered the notes of the meeting were inaccurate and lacking in a number of respects, and so she emailed Mr Clark on the 15th March (page 225) to set out these points. The points noted by the claimant as having been omitted included (a) the fact the claimant did not consider the information confidential because it was already in the public domain; (b) the fact she already had an informal referral pathway and referred to Carrick Glen and Ross Hall directly. She had quoted figures and procedures; (c) the fact the clinic has space for consultations but no diagnostic equipment and accordingly this engendered direct referrals to Ross Hall for these; (d) the fact the claimant had expressed remorse that the letter had gone out, and if she had waited a few weeks she would have known the hospital was no longer closing and would be continuing as an out patient department, in which case the letter would not have been sent; (e) the fact she had offered an alternative location with the best of intentions because she thought it was in BMI's interest to have a local clinic with an affinity to BMI that would provide a conduit to Ross Hall from the area, and therefore continuing the current practice when Carrick Glen hospital closed, believing at the time that this was going to happen in the near future.

43. Mr Clark produced an Investigation Report (page 227). The Report set out details of who had been interviewed as part of the investigation, and a summary of the outcome of the claimant's interview. There were ten

appendices to the Report, which included the notes of the interviews with Ms Smith, Dr RN and Ms Jeffries.

44. The claimant was advised by letter of the 28 March (page 236) that the outcome of the investigation was that there was a disciplinary case to answer.

45. The claimant was advised by letter of the 4th April (page 237) that she was required to attend a disciplinary hearing on the 12th April. The allegations were that by writing to Dr RN on the 9th January, the claimant had:-

- *breached contractual and common law duties whereby you informed private consultants in writing of confidential information regarding BMI Healthcare, particularly the status of BMI Carrick Glen hospital of which you were not at liberty to disclose and*
- *made use of BMI Healthcare confidential information to the benefit of Quest clinic which is your own private medical aesthetic practice, which in turn has the potential harm to the business and performance of BMI Healthcare and in particular BMI Carrick Glen hospital.*

46. The letter enclosed copies of the witness statements collected during the investigation; a copy of the claimant's contract; a copy of the Quest letter and copies of the BMI Business Conduct policy, the Information Security policy and the Information Governance policy.

47. The claimant asked for a number of documents to be included in the pack for the disciplinary hearing, including emails between herself and Mr Clark noting the errors and omissions from the note of the investigatory meeting, the email from Mr Buckingham to the North Region Executive Directors regarding the closure of Carrick Glen hospital and signed copies of the witness statements.

48. These documents were provided to the claimant and the date for the disciplinary hearing re-arranged to the 20th April.

49. Ms Agnes Sloey, Executive Director of Kings Park hospital, who had been asked to chair the disciplinary hearing, decided it would be appropriate, prior to meeting with the claimant, to re-interview Ms Smith. Ms Sloey met with Ms Smith on the 20th April, just prior to the disciplinary hearing. Ms Smith confirmed she had been aware of the Quest letter, but had not seen it and had not been aware it had been sent out. She told Ms Sloey that Ms Prins and Mr Buckingham had visited the hospital on the 6th December and had spoken about re-purposing the hospital. Ms Smith confirmed that when she met them she was clear *"the messaging was of closure".* She confirmed ten Consultants had asked her if BMI were setting up a clinic and she had told them "No". The claimant had told Ms Smith a lot of people had asked her about her clinic. Ms Smith told the claimant that she could have nothing to do with it because she was employed, and paid, by BMI.

50. The disciplinary hearing was attended by Ms Agnes Sloey, Executive Director of Kings Park hospital, and a note taker; and, the claimant and her representative Ms Sweeney. A note of the hearing was produced at page 251. The claimant was asked about her rationale for sending the letter and why the letter had been sent to Dr RN in circumstances where he had not asked the claimant for information. The claimant was also asked about her conversation with Ms Smith and why she had proceeded to send the letter.

51. The claimant accepted her letter had not referred to supporting BMI and onward referral to BMI. The claimant explained to Ms Sloey that she already had an established informal pathway and her thinking was that when Carrick Glen closed, the Consultants could use Quest clinic and continue referrals to Ross Hall. The claimant described it as "an extension instead of Carrick Glen". She had been trying to make sure there was a BMI footprint in Ayrshire. The claimant told Ms Sloey that a lot of people would not travel to Ross Hall in Glasgow for a consultation, so she thought that by offering a base at Quest, it would get more business in for BMI.

52. The claimant accepted she had not sought permission to send the letter, and explained it had simply not occurred to her in circumstances where Carrick Glen was closing.

53. The claimant also accepted there was no reference in the letter to Consultants moving their private practice only after Carrick Glen closed. The claimant explained she had not felt the need to clarify this because everything happened against the background of Carrick Glen closing. She re-iterated her position that if she had known the hospital was not closing, she would never have sent the letter.

54. Ms Sweeney's closing statement confirmed the claimant had no intention to take advantage of the situation. The claimant had been acting in good faith at the time and had no bad intentions. Ms Sweeney referred to the claimant's length of service and the fact that at the time the letter was sent Carrick Glen hospital was closing. The claimant had thought she was helping by sending the letter. Ms Sweeney referred to the fact it had been a stressful time and the claimant had been under consultation for redundancy at the same time.

55. Ms Sloey met with the claimant and Ms Sweeney again on the 27th April to give her decision. Ms Sloey, with regard to the first allegation, acknowledged the information in the claimant's letter was already known by the Consultants and that accordingly the claimant had not breached contractual and common law duties when she informed private consultants of confidential information. However, the claimant had, in the course of the investigation, told Mr Clark that the letter had been typed on the computer at the Quest clinic and the letter had been seen by the receptionist at the clinic. On this basis, Ms Sloey upheld the first allegation.

56. Ms Sloey did not believe the claimant had undertaken this course of action to benefit BMI by providing onward referrals to Ross Hall. She referred to the fact the letter had not said this, the claimant had not discussed a potential pathway with BMI and the claimant had ignored Ms Smith's position that she

could have nothing to do with it. Ms Sloey concluded the claimant had acted for the benefit of Quest clinic, and this was a conflict of interest.

57. Ms Sloey did not believe the claimant had shown any remorse for her actions. She had not said sorry, and instead had tried to justify her actions.

58. Ms Sloey concluded the claimant had, by her actions, destroyed trust and confidence because she had wilfully breached her contract. The claimant had put the benefits of Quest ahead of benefits for the respondent, and this had created a conflict of interest. Ms Sloey concluded the claimant had been guilty of gross misconduct, and she decided to summarily dismiss, but to make payment of notice.

59. Ms Sloey's decision was confirmed in writing by letter of the 27th April (page 262). Ms Sloey, in the letter of dismissal, set out the terms of the allegations of misconduct. Ms Sloey was unaware the terms of the second allegation, as set out in her letter, differed from the allegation investigated by Mr Clark, and set out in the letter inviting the claimant to the disciplinary hearing. The allegation had changed to *"Used confidential information which was shared with you in your capacity as Quality and Risk Manager at BMI Carrick Glen hospital and used this information in your capacity as owner and director of Quest Clinic to write to consultants offering an alternative for their private practice."*

60. The claimant appealed against the decision to dismiss (page 265). The claimant was notified by letter of the 22 May (page 277) that Mr Chris Marshall, Interim Regional Director, would hear the appeal. The claimant subsequently received a letter dated 31st May (page 278) advising the appeal would in fact be heard by Mr Jason Rosenblatt, Head of HR Operations.

61. The appeal hearing took place on the 17th July. Mr Rosenblatt attended with a note taker, and Mr Gane was also present to observe the hearing. The claimant attended with Ms Sweeney. A note of the hearing was produced at page 299. The claimant's representative prepared a Statement of Case for

the appeal hearing (page 287 – 297) setting out seven points of appeal focussing on (i) the decision being unduly harsh in the circumstances; (ii) the decision was not a reasonable response and (iii) the disciplinary panel had failed to give adequate consideration to mitigating circumstances.

62. Mr Rosenblatt decided to dismiss the appeal. He confirmed that decision by letter of the 20th July (page 306). Mr Rosenblatt acknowledged the claimant's position was that she believed the hospital was closing, but he did not believe her because email communications at the time referred to looking for third party providers, and the claimant had used the word "potential" in her letter to the consultants. He also rejected the claimant's argument that she had acted for the benefit of BMI, because the only benefit he identified was for the claimant via additional room rental.

63. Mr Rosenblatt rejected the claimant's suggestion BMI had acted to avoid payment of the redundancy payment to the claimant. He concluded the letter by stating it was clear the claimant had made a number of incorrect assumptions, particularly in relation to the potential closure of the hospital. He believed that ultimately the claimant's actions were for the benefit of Quest Clinic.

64. The claimant, following her dismissal, spoke to her Accountant to understand whether her business at Quest Clinic could support employing her. The claimant commenced employment with Quest Clinic on the 1st August 2018, working 20 hours per week. Her salary is £20,000 per annum. The claimant works this number of hours and receives this level of salary because the business could not support anything more. The claimant produced payslips for August (page 323), September (page 324), October (page 325) and November (page 326).

65. The claimant waited until the 1st August 2018 to commence employment because she received three months pay in lieu of notice.

66. The claimant did look online for alternative employment, but did not identify anything comparable in the area. The claimant cannot work full time or undertake shift work, and many of the vacancies available included this.

Credibility and notes on the evidence

67. I found the claimant to be a wholly credible and reliable witness. She gave her evidence in a straightforward and honest manner and stated on a number of occasions, as she had done throughout the disciplinary process, that if she had known Carrick Glen was not going to close, she would never have sent the letter. The claimant understood the loyalty expected of her by the respondent. She had owned and operated Quest clinic with the respondent's knowledge and permission, and without issue, for over 10 years, whilst working for the respondent.

68. The claimant, in her evidence to the tribunal, noted she was not a "teary" person. She kept herself under control whilst sitting through the respondent's evidence and did not become upset whilst giving her own evidence. The claimant had clearly been upset by these events, particularly after such lengthy service, but it appeared control was the claimant's way of dealing with these matters. The respondent's witnesses drew an adverse inference from the claimant's control/body language during the disciplinary process. I comment further on this point below, but I considered it an example of the respondent taking an adverse view of the claimant in circumstances where (i) no account was taken of the fact the claimant was an employee with 26 years' service who had been put at risk of redundancy at the same time as these events and (ii) Mr Rosenblatt expressly stated he had not wanted the claimant to be in tears, but he then seemed prepared to hold that against her.

69. I found the evidence of the respondent's witnesses to be not entirely credible or reliable for a number of reasons. I also found there were certain "themes" in the evidence of the respondent's witnesses and I formed the view that each witness held the line on these points regardless of the evidence, to which they were taken in cross examination, supporting a counter view.

70. One theme was the respondent's position the claimant had not given a straight answer when asked about the number of Consultants to whom she had sent the letter, and that an adverse inference regarding the claimant's honesty could be drawn from this. Mr Gane told the tribunal the claimant was not forthcoming about the number of Consultants to whom she had sent the letter. He said "she did not ever give a straight answer". The notes of the investigatory meeting show the claimant stumbled over the names and number involved. However, there was no dispute regarding the fact that at the end of the meeting, the claimant provided a list to Mr Clark of the six Consultants to whom she had written. Further, Mr Clark, at the end of the interview, thanked the claimant for her honesty.

71. Mr Gane omitted reference to the list from his evidence and had to be pushed in cross examination to admit the claimant had provided the list. There was, accordingly, no doubt about the number of Consultants to whom the claimant had written. The fact Mr Gane omitted the important fact of the list having been provided by the claimant, and the fact he had to be pushed to admit it had been provided, undermined the reliability of his evidence and any adverse finding made regarding the claimant's honesty based on this point.

72. Ms Sloey also questioned the claimant about the number of Consultants to whom she had written, and she drew an adverse inference from the claimant's (alleged) lack of a straight answer to Mr Clark. I considered Ms Sloey had no basis for drawing this adverse inference in circumstances where she failed to have regard to the fact the claimant had produced a list of the names of the Consultants to whom she had written, and there was subsequently no dispute regarding this matter. The claimant told Ms Sloey she had given a list of the names of the Consultants to Mr Clark, but Ms Sloey did not check this fact. Furthermore, Mr Clark had, in the Investigation Report, noted the claimant had sent the letter to six Consultants.

73. Another theme was the respondent's conclusion the claimant did not show remorse for what she had done. Mr Gane told the tribunal the claimant did not

show remorse. Mr Gane undermined his position however when he accepted, in cross examination, that the claimant had acknowledged wrongdoing and fault.

74. Ms Sloey also maintained the claimant had not shown remorse. Ms Sloey had wanted the claimant to say "sorry", and she would not accept the many points put forward by the claimant expressing her regret amounted to remorse.

75. Mr Rosenblatt was highly critical of the claimant because she did not show remorse. He told the tribunal that *"reflection does not equal remorse"*. Mr Rosenblatt wanted the claimant to say she *was "really sorry … there had been a misjudgement … that she had reflected on this .."* I formed the opinion that on the one hand Mr Rosenblatt was prepared to criticise the claimant for reflecting on her actions, but on the other hand, criticised her for not doing so. Mr Rosenblatt wanted the claimant to demonstrate *"by her body language"* that she was remorseful. He gave no explanation how the claimant might have done this, beyond saying he had not wanted to see tears. Mr Rosenblatt, having spoken at length about the issue of remorse, then told the tribunal that even if the claimant had shown remorse, it would not have changed his decision. This is a matter to which I return below.

76. Mr Gane's role during the investigation was to provide HR support to Mr Clark and to advise him *"on areas he needed to consider"*. Mr Gane could not tell the tribunal whether Mr Clark believed, or accepted, staff and Consultants thought the hospital was closing, or what weight he attached to this fact. Mr Gane did, however, confirm that it would have been helpful, at the investigatory meeting, to have had the minutes of the MAC meeting available because they demonstrated the words "re-purpose" and "close" were used interchangeably by the senior management team.

77. Ms Sloey accepted the staff and Consultants at Carrick Glen believed the hospital would be closing, but she told the tribunal that the closure of the hospital was not "relevant". Ms Sloey told the tribunal that staff had been told of the closure of the hospital but had also been told to *"keep it to their nearest*

and dearest". This was not supported by the evidence of any other witness, nor by the documents and the claimant was not cross examined about this matter. I considered Ms Sloey introduced this to try to bolster her decision regarding confidentiality.

78. Ms Sloey also accepted the alleged *"confidential information"* was not confidential in circumstances where the Consultants knew about the closure of the hospital. Ms Sloey also considered this fact was not crucial to her decision: she told the tribunal that even if the information was not confidential, it would not have changed her decision because the crux of the matter was the *"wilful breach of policy".* These are points to which I return below, but I considered Ms Sloey's approach to these matters demonstrated a flawed decision-making process, because she failed to have regard to the circumstances in which the letter was sent and failed to have regard to mitigation.

79. Mr Rosenblatt told the tribunal that he had spoken to Ms Sloey prior to the appeal hearing in order to understand her thought process in reaching her decision. I did not doubt Mr Rosenblatt did speak to Ms Sloey, but his evidence demonstrated that he was not aware of key points. For example, Mr Rosenblatt focussed heavily in the appeal on the issue of closure; the fact this was not certain because no date had been set for it and the fact the claimant had used the term "potential closure" in her letter. Mr Rosenblatt was not aware Ms Sloey had accepted staff and Consultants believed the hospital was closing and had proceeded on that basis.

80. Mr Rosenblatt was also unaware that Ms Sloey had accepted the information was not confidential in circumstances where the Consultants and external people/agencies knew about the closure. Mr Rosenblatt proceeded on the basis the information was confidential, and he upheld allegation 1 on the basis the information was confidential outside BMI even though this was not part of the allegation.

81. The allegations faced by the claimant were set out in the letters inviting the claimant to the investigation meeting and disciplinary hearing. The wording of the allegations is a matter I have set out in full below because there was a lack of consistency in the terms of the allegations. One particular issue related to the wording of the second allegation which changed between the disciplinary hearing and the disciplinary outcome. Ms Sloey stated she had not noticed the changed wording, and could not explain why this change had been made. I found this evidence lacked credibility in circumstances where Ms Sloey read out the disciplinary allegations at the disciplinary hearing and drafted the letter of dismissal.

82. Mr Rosenblatt also did not notice the wording of the second allegation had changed, but upheld the charge in its amended form, in any event. He was also unaware of which "common law" duties the claimant had breached, but upheld the allegation in any event.

83. I have acknowledged (below) that the claimant did not seek to argue that she did not know or did not understand what allegations she faced. However, there is an onus on the employer to set out precise charges. The evidence of Ms Sloey and Mr Rosenblatt demonstrated they had not paid attention to the wording of the allegations, and, when it was brought to their attention, they dismissed it as not being material.

84. I formed the view Mr Rosenblatt did not come to the appeal hearing with an open mind: it mattered not what the claimant said, Mr Rosenblatt was not going to uphold the appeal. I considered I was supported in that view by two facts: (i) when the claimant was asked what she wanted from the appeal, and responded that she wanted to have the decision overturned, to be reinstated and receive her redundancy payment, Mr Rosenblatt responded by stating *"this is a bit much to ask as she is no longer employed by BMI"*. Mr Rosenblatt, grudgingly accepted, at this hearing, that the effect of upholding an appeal is that the decision to dismiss is set aside, and the effect of the dismissal being set aside may be a return to work and, in the claimant's case, with her job having disappeared, and there being no suitable alternative employment, she

would receive a redundancy payment. Mr Rosenblatt, when it was suggested to him in cross examination that he knew if he overturned the decision to dismiss, the claimant would be redundant, did not answer the question. (ii) Mr Rosenblatt was asked if he accepted there would only be a conflict of interest if Carrick Glen did not close. Mr Rosenblatt was silent for a very long time before he very quietly suggested "it diminishes it" and made a vague reference to it may have something to do with the Group.

85. Mr Rosenblatt also suggested to the tribunal that it was not unusual to pay notice when an employee is summarily dismissed. I considered this suggestion was made to support Ms Sloey's actions, rather than actually reflecting the practice of the respondent.

Respondent's submissions

86. Mr Millar provided a written submission for the tribunal, and he spoke to the main points of his submission. Mr Millar submitted the claimant was dismissed on the grounds of her gross misconduct in that she (i) used information which although may not have been confidential, given the wide dissemination of information surrounding the closure or potential closure of Carrick Glen hospital to the staff, consultants and relevant external third parties, was sensitive; (ii) she used that sensitive information to benefit her own business, by soliciting or attempting to solicit the transfer of the consultant's practices from Carrick Glen to Quest and (iii) in doing so, her actions were in clear breach of her contract of employment, specifically clauses 10 and 11, as well as the respondent's Business Conduct Policy, in that she was acting not in the best interests of BMI Healthcare Ltd, but for her own business, Quest Clinic, in clear conflict of interest with her duties towards the respondent.

87. Mr Millar submitted that much had been made of Ms Sloey ignoring the context in which these events occurred. Mr Millar stated Ms Sloey had been party to the emails sent to Executive Directors regarding Carrick Glen, and so she had a general awareness of the position. She was happy to accept the

claimant and consultants genuinely believed Carrick Glen would be closing at some point in the future.

88. The claimant suggested that if the information was not confidential, all charges should be dropped. It was submitted this was an unnecessary focus on the issue of confidentiality.

89. The purpose of the investigation was to find the relevant facts. Ms Sloey accepted the claimant had written to six consultants, and accordingly, there had been no need for her to interview those consultants. In any event if the consultants had been spoken to, Mr Millar questioned what they could add. Plus, the problem for the claimant was that Dr RN did not approach her for information.

90. Mr Millar submitted the claimant had written the letter not with the benefit of BMI in mind. Ms Sloey was entitled to question whether what the claimant said was true, and key to this was the claimant's intention and motivation in sending the letter. It was submitted it was a bold attempt to solicit consultants from Carrick Glen to Quest.

91. Mr Millar submitted the fact the claimant wrote "potential closure" in the letter, and omitted reference to onward referral, an informal referral network, BMI footprint and the fact Dr RN did not approach her for information, were all problems for the claimant. The claimant accepted that what Ms Smith had said to her had caused her to have second thoughts, but she proceeded anyway.

92. Mr Millar submitted the claimant had misunderstood the issue. She had focussed on there being no crossover of treatments between Carrick Glen, save for thread veins, but that was not the issue. The issue was that when the claimant offered her clinic to the consultants as an alternative venue, that created a conflict of interest.

93. Ms Sloey was entitled to conclude the claimant deliberately chose to ignore the red flags raised by Ms Smith. The claimant referred to being stupid and

naïve, but Mr Millar submitted Ms Sloey had been entitled not to believe this. The claimant wanted to grow Quest clinic.

94. Mr Millar accepted the allegations could have been clearer, insofar as they could have been better worded, but there was no dispute regarding the fact the claimant knew of the allegations and that they related to the letter she had sent.

95. The Investigation Report was fair and balanced, even though the statements from the witnesses were unsigned and later amended. There was, it was submitted, a reasonable and thorough investigation.

96. Mr Millar submitted that BMI as a corporate entity had not known Quest existed, and against that background no negative inference should be drawn from the fact the claimant was questioned about the clinic and her ownership of it during the disciplinary process.

97. The decision to dismiss was justified and reasonable. Further, even if the claimant had shown remorse, she had sent the letter deliberately. The claimant's service and unblemished record were taken into account, but trust and confidence had been destroyed.

98. Mr Millar invited the tribunal to find the dismissal of the claimant fair. However, if the tribunal decided the dismissal was unfair, he submitted a reduction of compensation should be made based on the application of ***Polkey***, contributory conduct and failure to mitigate her losses. The claimant was the author of her own misfortune: she should not have written the letter and she should have sought permission and not ignored the red flags.

99. Mr Millar suggested alternative employment would have been available in the period from the 27 April to the 1 August, but the claimant had done nothing. The claimant had a payment in lieu of notice, her clinic and her grandchildren. She was happy to work 20 hours a week, starting on the 1st August: she had chosen to do this. Mr Millar invited the tribunal to note the claimant appeared to have received a dividend of £6000 from Quest.

Claimant's submissions

100. Ms Forrest also provided written submissions, and spoke to the main points. Ms Forerst referred to the case of **British Home Stores Ltd v Burchell**.

101. Ms Forrest submitted the investigation had not been even handed because it had focussed on information pointing to the claimant's guilt, rather than being balanced. The Consultants who received the letter had not been interviewed. Ms Sloey accepted the Consultants knew Carrick Glen was closing, but she should have investigated with them their concerns regarding their private practices in the circumstances and their knowledge of the closure.

102. Ms Sloey accepted the information was not confidential, but she did not check what the claimant told her about the MAC minutes or the email to HIS. Ms Forrest submitted Ms Sloey had been unduly influenced by HR. Mr Gane had been present during the investigation, he advised Ms Sloey in respect of her preparations for the disciplinary hearing and he was present at the appeal.

103. Mr Rosenblatt, who heard the appeal, knew of the claimant's case and her dismissal. He was not an impartial person to hear the appeal.

104. Ms Forrest submitted there were significant flaws in the investigation and the respondent had discounted points in the claimant's favour.

105. The claimant had always been clear that she had sent the letter because of the enquiries she received following on the announcement that Carrick Glen was closing. Dr RN had not made enquiries, but there was no dispute regarding the fact he was aware of the closure of the hospital. Ms Smith did not tell the claimant not to send the letter.

106. Ms Forrest submitted that at the point Mr Buckingham became aware of the claimant's letter, he knew Carrick Glen was closing, and this explained why he took no action on the letter. It was only after the position regarding Carrick Glen changed, that he took action. By then it was certain the claimant was at risk of redundancy.

107. Ms Forrest submitted inadequate consideration had been given to the background and context of these events. Ms Sloey agreed the information was not confidential, but she upheld the allegation in any event, based on the receptionist at Quest Clinic seeing the letter: however, this was not part of the charge against the claimant. The second allegation was not an allegation of gross misconduct. Ms Sloey accepted there had been no harm to Carrick Glen: none of the consultants had moved. It was submitted that given Ms Sloey's decision regarding allegation 1, it cast doubt on her decision regarding allegation 2.

108. Ms Sloey told the tribunal that even if everyone knew of the closure of Carrick Glen, it made no difference to her decision. It had been suggested Ms Sloey was entitled to take the letter at face value, but this ignored the facts and circumstances in which the events took place, and that could not be right.

109. Ms Sloey decided the claimant was guilty of gross misconduct, and she summarily dismissed. However, Ms Sloey decided to pay 12 weeks' notice. This, it was submitted, was not usual and not in accordance with the respondent's Disciplinary policy. Ms Sloey's suggestion that she did it "to be kind" should not be accepted.

110. Ms Forrest referred to a number of procedural flaws: (i) the claimant had not been suspended, but had been allowed to continue to carry out the full range of her duties; (ii) Mr Buckingham had a greater involvement in the investigation and decision to dismiss than the respondent suggested and (iii) allegations were put to the claimant that were not made against her.

111. There had also been a number of breaches of the ACAS Code of Practice: there had been a delay in inviting the claimant to an investigation; there had been a change to the wording of the allegations which Ms Sloey and Mr Rosenblatt did not notice and Mr Rosenblatt had not been an impartial appeal manager.

112. The appeal hearing did not, it was submitted, rectify the earlier errors. Mr Rosenblatt did not consider he had to go through the Statement of Case and address each of the points raised. Instead, he focussed on the broad points he had identified. Mr Rosenblatt did not consider the claimant's length of service or unblemished record, and he could not have considered mitigation without discussing it with the claimant.

113. Mr Rosenblatt's explanation of why he heard the appeal was not credible and Ms Forrest submitted there had been an ulterior motive in Mr Rosenblatt hearing the appeal. He knew the size of the redundancy payment the claimant had been about to receive, and when he heard the claimant, if successful, wanted to have the decision to dismiss reversed, and to return to work and receive her redundancy payment, he commented that that was a bit much.

114. Mr Rosenblatt accepted he had not been aware (i) Ms Sloey accepted the claimant and the Consultants believed the hospital was closing and (ii) the information was not confidential. He was also not aware the terms of the second allegation had changed.

115. Ms Forrest invited the tribunal to find the dismissal was outwith the band of reasonable responses. The claimant had 26 years unblemished service; she had owned Quest clinic for 10 years and there had never been an issue; the only reason the letter had been sent out was because the hospital was closing and she had been asked repeatedly by consultants for information; there had been a failure to consider the context in which the letter had been sent and a failure to consider the claimant's remorse. Ms Sloey and Mr Rosenblatt's position regarding a lack of remorse was not credible: the claimant was sorry and did reflect this. The respondent had not accepted their part to play in all this inasmuch as they told staff at the meeting on the 6th December that the hospital was closing.

116. Ms Forrest produced two schedules of loss. The first schedule invited the tribunal to award the balance of the redundancy payment the claimant would have received but for the dismissal. The loss of the redundancy payment was

a consequence of the dismissal, and Mr Rosenblatt accepted that if the appeal had been successful, the redundancy payment would have been paid because the claimant's role had disappeared and there were no suitable alternatives. It would be just and equitable to make this award. The claimant had a reasonable expectation of payment.

117. The second schedule of loss reflected the award of compensation sought by the claimant if the tribunal did not accept the first schedule. Ms Forrest argued the claimant had mitigated her losses: she was entitled to run her own business and had explained why she worked 20 hours per week. The claimant had explained why the roles produced by the respondent for this hearing were not suitable. The burden was on the respondent to show there had been an unreasonable failure to mitigate loss, and, it was submitted, they had not discharged that burden.

118. There was no dispute regarding the fact the claimant had written the letter, but the crucial fact was that it was against a background of the hospital closing. In those circumstances the claimant's conduct was not culpable or blameworthy.

Discussion and Decision

119. I had regard firstly to the terms of section 98 Employment Rights Act which sets out how a tribunal should approach the question of whether a dismissal is fair. There are two stages: first, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) or (2). If the employer is successful at the first stage, the tribunal must then determine whether the dismissal is fair or unfair. This requires the tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

120. I was referred to the case of **British Home Stores Ltd v Burchell 1979 ICR 303** where the Employment Appeal Tribunal (EAT) noted it is the employer who must show that misconduct was the reason for the dismissal, and stated: the employer must show:-

- it believed the employee was guilty of misconduct;
- that it had in mind reasonable grounds upon which to sustain that belief, and
- at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

The Investigation

121. I decided it would be appropriate to consider firstly whether the respondent had carried out as much investigation into this matter as was reasonable in the circumstances of the case. There were two facts not in dispute in this case. There was no dispute regarding the fact the claimant owned and operated Quest Clinic, and that she had done so with the respondent's permission and knowledge, for at least 10 years whilst employed with the respondent. Mr Millar suggested in his submission that "BMI as a corporate entity did not know Quest existed" and "no negative inference should be drawn from the fact" that during the disciplinary process, questions were asked about the clinic, permission to operate it and financial declaration being made to BMI. The difficulty with Mr Millar's submission however was that there was no evidence to support his position that BMI as a corporate entity did not know Quest existed. In fact it was quite the opposite: all of the evidence pointed to the fact the claimant owned and operated a clinic being well known amongst staff, managers, Consultants and external bodies such as HIS.

122. Mr Clark did ask the claimant a number of questions regarding the clinic, and, when reading the notes of the meeting, one could be forgiven for thinking this was the subject of investigation. However, Mr Clark appeared to accept the claimant's responses and explanation and accordingly this was not a material fact in the disciplinary process.

123. There was also no dispute regarding the fact the claimant did send a letter to six Consultants. Dr RN received a letter from the claimant. He gave it to Ms Jeffries, Executive Director, Ross Hall hospital, on the 11 January, and she

forwarded it to Mr Buckingham. Mr Buckingham decided, on the 5 February, to have the matter investigated. There was no evidence before the tribunal to explain why Mr Buckingham delayed dealing with the matter.

124. The onus on the employer is to carry out a full investigation and to gather all the available evidence. The ACAS Guide offers the advice that the more serious the allegations against the employee, the more thorough the investigation conducted by the employer ought to be. The Guide also makes clear that employers should keep an open mind when carrying out an investigation: their task is to look for evidence that weakens as well as supports the employee's case.

125. Mr Clark carried out the investigation for the respondent. He interviewed the claimant, Ms Smith, Ms Jeffries and Dr RN. Mr Clark produced an Investigation Report setting out what he had done and the findings he had made:-

"The claimant responded to all of Mr Clark's questions, and confirmed (i) she had been told the hospital was closing; (ii) she did not seek permission to send the letter to Dr RN; (iii) she sent the letter to six Consultants; (iv) Consultants had approached her concerned about their clinics. It takes time to set up clinics, practising privileges and references etc. She made clear that her clinic was "somewhere for the consultants to go after Carrick Glen closes"; (v) in response to a suggestion the letter read as an alternative to Carrick Glen, the claimant told Mr Clark "I think if I had waited a few weeks then I would have known that the clinic space would remain and I would not have sent the letter"; (vi) her intention in sending the letter was to provide a venue for consultations. The claimant acknowledged that in hindsight she should have had a discussion about this before sending the letter and (vii) it had never been her intention to take business away from BMI: it was to still have a footprint in the area and keep referring.

Ms Sweeney concluded the meeting by telling Mr Clark that if the letter was taken in the context in which it was meant, the claimant had 26 years' service

and had never tried to illicit business from BMI. The catalyst was following the meeting in December where staff were advised that the hospital would close. The Consultants approached the claimant because they were aware of the business she had. The claimant had acted in good faith".

126. Ms Forrest argued the investigation had been flawed because Mr Clark (and Ms Sloey) did not interview all of the Consultants to whom the claimant had sent the letter. There was no evidence to explain why Mr Clark had not interviewed the Consultants. Ms Sloey had not thought this necessary. The claimant argued this would have been helpful because the Consultants would have confirmed their knowledge/ belief the hospital was closing; that they had concerns for their private practice and that they (with the exception of Dr RN) had approached the claimant for information about her clinic and they could have explained why they had done so. It would also have allowed an opportunity for Mr Clark to check what he had been told by Ms Smith, and that was that the Consultants had spoken to her to voice their concerns and enquire whether BMI would open a clinic, and that Ms Smith told the Consultants there was no plan for this.

127. I, in considering the claimant's argument, had regard to the fact knowledge of the issue of the closure of the hospital was a fact for investigation by Mr Clark insofar as he wanted to know what staff had been told, what was their understanding and who had been told. This was also relevant in connection with the confidentiality of the information. I also had regard to the fact the ACAS Guide makes it clear that employers should keep an open mind when carrying out an investigation and look for evidence that weakens as well as supports the employee's case. In this context I considered a reasonable employer, carrying out a reasonable investigation, would have interviewed the Consultants and ascertained their knowledge and understanding at the relevant time. This would also have allowed an understanding of the Consultants' concerns, why they had approached the claimant and what they had hoped to achieve.

128. Mr Clark did not investigate/obtain the various emails and documents circulated regarding closure of the hospital. For example, he did not have Mr Buckingham's email of the 11 December to Northern Regional Executive Directors (page 143) where he said "repurposing the hospital appears to be the inevitable and only remaining option available to us meaning that BMI would cease to operate a hospital at Carrick Glen." Nor, did he have a copy of Ms Smith's email to Ms Winifred McClure, HIS, where she confirmed Carrick Glen was closing.

129. Mr Gane accepted that it would have been helpful to have had the notes of the MAC meeting for the investigation.

130. I reminded myself that the onus on the employer is to carry out as much investigation as is reasonable in the circumstances. The question to be asked is whether the investigation carried out by the employer fell within the band of reasonable investigations which a reasonable employer might have carried out (**Sainsbury's Supermarkets plc v Hitt**). I concluded Mr Clark failed to carry out as much investigation as was reasonable in this case because he failed to interview all of the Consultants who had received the letter from the claimant. I concluded this was a flaw because it would have provided an understanding of (a) the state of knowledge of the Consultants regarding the closure of the hospital, (b) their concerns regarding closure, (c) why they had approached the claimant and (d) what they had hoped to achieve by this. I considered that if Mr Clark had taken this action, it would have been an example of gathering facts which could have supported the claimant's position and her explanation for her actions.

131. Ms Sloey did not interview the Consultants, but she did address and remedy the flaw in the investigation to some extent by accepting the staff and Consultants believed Carrick Glen was closing, and by accepting the information regarding the closure was not confidential.

132. Ms Forrest submitted the Investigation Report prepared by Mr Clark was not even handed. She was critical of the fact part of the claimant's explanation

was listed as “other factors”, rather than being within the body of the report. I could not accept this submission because I considered the criticism was one of style rather than being biased.

133. Ms Forrest also invited the tribunal to find there had been undue influence by HR. I could not accept Mr Gane had unduly influenced Mr Clark or Ms Sloey. I deal below with Mr Rosenblatt and the appeal hearing.

134. I, in conclusion, decided the investigation carried out by the respondent was flawed because Mr Clark did not interview all of the Consultants to whom the claimant had written.

Reasonable grounds for belief

135. I next considered whether, based on the investigation, Ms Sloey had reasonable grounds to sustain her belief the claimant had done what was alleged. I firstly had regard to what the claimant was alleged to have done. The letter inviting the claimant to an investigation meeting (page 188) set out in full clauses 10, 11 and 12 of the claimant’s contract and a description of the alleged misconduct. It was stated:

“ (1) Clause 10 of your Contract provides that: you will not (except in the proper course of your duties under your contract of employment) disclose to any person outside the Company, or to any unauthorised person within the Company, either during or after the termination of your employment, any information relating to the Company or any Associated Company, its customers or suppliers, or any third party, which may have been obtained in the course of your employment without first obtaining the written permission of the Company or party concerned or unless ordered to do so by a court of competent jurisdiction.

You will keep with complete secrecy all confidential information entrusted to you, and will not use or attempt to use any such information in any manner which may injure or cause loss either directly or indirectly to the Company or

any Associated Company or its/their business, patients or customers, or may be reasonably likely to do so.

For the purposes of this clause, confidential information means any information that would be regarded as confidential by a reasonable business person including, but not restricted to any details about the Company's or any Associated Company's suppliers, distributors, customers, patients, trading results, contracts, marketing plans, technical processes, designs, client lists, strategic plans and all details relating to information on any of the Company's or Associated Company's databases."

(2) Clause 11 of your Contract states that during your employment you will:

** comply with all Company policies and standards, specifically (but not restricted to) the Code of Business Conduct and Information Security Policies, copies of which are contained on the enclosed cd;*

- *use all proper means in your power to maintain, improve and extend the business of the Company and its Associated Companies and to protect and further the reputation and interests of the Company and its Associated Companies ….*
- *Faithfully and loyally serve the company to the best of your ability;*
- *Act in a responsible and professional manner whilst discharging your duties. Honesty and politeness in dealing with other are essential requirements of employees.*

Further, clause 11 also states "failure to comply with any of these policies may result in disciplinary action being taken against you".

(3) Clause 12 of your Contract states: your employment may (also) be terminated without notice or pay in lieu of notice if you commit an act of gross misconduct, which may include without limitation one or more of the following causes:-

- *You fail to comply with any of the policies and procedures applicable to your employment;*
- *You commit any serious or persistent breach of any of the terms of this Agreement."*

136. The letter continued that *"the basis for our concern is that it appears that by letter dated 9 January 2018 you wrote to Dr RN, Consultant Physician, stating "I thought I'd take this opportunity to get in touch with you and make you aware of a possible alternative location for your private practice …. Please let me know if you are interested in further discussions or viewing the clinic with a view to applying for practising privileges in the clinic.*" As an employee you have a duty to act in good faith and to demonstrate fidelity and loyalty to BMI, and an obligation to act in BMI's best interests. We suspect that by contacting Dr RN in the manner referred to above, you have breached your contractual and common law duties and have also made use of confidential information for the benefit of Quest Clinic which is your own private medical aesthetic practice."

137. The letter informing the claimant of the outcome of the investigation (page 236) described the allegations as follows:

- *Breach of contractual and common law duties whereby you informed private consultants in writing of confidential information regarding BMI Healthcare, particularly the status of BMI Carrick Glen hospital of which you were not at liberty to disclose.*
- *Made use of BMI Healthcare confidential information to the benefit of Quest Clinic which is your own private medical aesthetic practice, which in turn has the potential [to] harm the business and performance of BMI Healthcare and in particular BMI Carrick Glen hospital.*

138. The letter of outcome of the investigation went on to describe the allegations as being a breach of the claimant's contractual obligations as set out in her

contract of employment, and a breach of the Business Conduct policy, the Information Security policy and the Information Governance policy.

139. The letter inviting the claimant to the disciplinary hearing (page 237) stated: *"The allegation is that by writing to Dr RN on 9th January 2018, you have …".* The letter then went on to set out the two points (above) and concluded by stating that as an employee of BMI, the claimant had a duty to act in good faith and to demonstrate fidelity and loyalty to BMI, and an obligation to act in BMI's best interests. The letter did not refer to the specific clauses of the claimant's contract of employment or the respondent's policies (although it enclosed those policies with the letter).

140. Ms Sloey, at the commencement of the disciplinary hearing, read out the allegations as set out in the letter inviting the claimant to the disciplinary hearing, and also read out clauses 10, 11 and 12 of the claimant's contract of employment.

141. Mr Millar, in his submissions, accepted the allegations could have been better worded, and by this he meant the allegations could have been clearer and simpler. I considered that submission was well made in circumstances where (a) there was a lack of consistency in referring to the clauses in the claimant's contract and the breach of its policies; (b) no-one appeared to know what "common law duties" meant, and whilst Ms Sloey confirmed she had looked up what this meant, she at no time defined which common law duties had allegedly been breached; (c) the allegations were framed that "by writing to Dr RN on the 9th January 2018" the claimant had breached contractual and common law duties and made use of confidential information. However, the allegation went on to refer to informing "private consultants" plural. There was no clarity regarding whether the "offence" was writing to Dr RN, and if so, what distinguished him from the other Consultants who received a letter. There was also no explanation why the reference to Dr RN was omitted when Ms Sloey referred to the allegations at the meeting on the 27 April 2018; and (d) the wording of allegation 2 changed (see below).

142. I acknowledge the claimant did not seek to argue she did not know what she was alleged to have done. She understood the allegations related to the sending of the letter, a conflict of interest and a lack of loyalty. However, the onus rests with the respondent to carry out an investigation and bring forward specific rather than general charges. The Court of Appeal in the case of **Strouthos v London Underground Ltd 2004 IRLR 636** stated it is important that the employee knows the full allegations against him/her and that disciplinary charges should be precisely framed and evidence limited to those particulars. This was particularly important in this case because (i) evidence was not limited to the particulars of allegation 1: the allegation was upheld on the basis of an employee of Quest seeing the letter even though that did not form part of the alleged misconduct; (ii) the wording of the second allegation changed, and neither Ms Sloey or Mr Rosenblatt noticed this or could explain why this had happened and (iii) Mr Rosenblatt did not know what "common law duties" the claimant was alleged to have breached, but he upheld the allegation in any event. I will return to consider each of these points in more detail below.

143. I next had regard to the allegations and to the question of whether there were reasonable grounds to sustain the respondent's belief the claimant had acted as alleged. The first allegation against the claimant was *"breach of contractual and common law duties whereby you informed private consultants in writing of confidential information regarding BMI Healthcare, particularly the status of BMI Carrick Glen hospital of which you were not at liberty to disclose."* Ms Sloey conceded at this hearing that the information – that is, the closure of Carrick Glen – was not confidential because "everyone knew". The information could not be confidential in circumstances where it was known about by staff, Consultants, external bodies and beyond.

144. Ms Sloey stated the claimant had disclosed information she was not at liberty to disclose; but this did not sit comfortably with the fact the Consultants already knew about the closure of the hospital.

145. I concluded Ms Sloey had no reasonable grounds for sustaining her belief that the claimant was guilty of the first allegation. I reached that conclusion because the misconduct alleged was that there had been a disclosure of confidential information to private consultants. Ms Sloey accepted the information was not confidential: there could not, accordingly, have been a disclosure of confidential information. Further, if the claimant did not disclose confidential information she did not breach her contract of employment or the policies as alleged.

146. Ms Sloey told the tribunal that (one of the reasons) she upheld the allegation was because the letter had been placed on the Quest computer and had been seen by the receptionist. Ms Sloey "felt it was wrong for the information to be put onto the Quest computer" and seen by a Quest member of staff. Ms Sloey accepted, however, that this was not part of the alleged misconduct in terms of allegation 1.

147. I concluded the fact the letter had been placed on the Quest computer and seen by a receptionist, was not a reasonable basis upon which to sustain a belief the claimant was guilty of allegation 1. I say this because the allegation was, specifically, that the claimant had "informed private consultants in writing of confidential information". The claimant did not inform private consultants of confidential information. The fact the claimant may have done something else not referred to in the allegation against her was not a reasonable basis for upholding the allegation.

148. Ms Sloey also told the tribunal that whilst she accepted the information was not confidential, this fact did not change her decision regarding this allegation because, she stated, "several policies had been breached wilfully". I considered this was an example of Ms Sloey adopting a flawed approach to her decision-making. I say this because Ms Sloey's task was to decide whether the claimant was guilty of the misconduct alleged. Ms Sloey focussed entirely on the fact she believed the sending of the letter was wrong and a breach of policy. Ms Sloey focussed on this and disregarded other facts she knew to be correct; the circumstances in which this incident had taken place,

the claimant's explanation for what she had done and the extent to which those facts and circumstances mitigated what the claimant had done (see below).

149. The second allegation was that the claimant *"made use of BMI Healthcare confidential information to the benefit of Quest Clinic which is your own private medical aesthetic practice, which in turn has the potential to harm the business and performance of BMI Healthcare and in particular BMI Carrick Glen hospital."* It was not possible to ascertain from Ms Sloey's evidence whether she upheld this allegation. I say that because the notes of disciplinary outcome meeting, and the dismissal letter, refer to a differently worded allegation which was that the claimant *"used confidential information which was shared with you in your capacity as Quality and Risk Manager at BMI Carrick Glen hospital, and used this information in your capacity as owner and director of Quest Clinic to write to consultants offering an alternative for their private practice."*

150. Ms Sloey told the tribunal she did not notice the wording had changed. She rejected the suggestion the allegation had changed and the reference to "harm the business" deleted because the respondent knew there had been no harm to the business. Ms Sloey stated the change had "not been conscious". I considered there were a number of difficulties with Ms Sloey's position: firstly, Ms Sloey told the tribunal she did not notice the change, but she had reviewed all of the paperwork in preparation for the disciplinary hearing, read out the disciplinary charges at the disciplinary hearing and outcome meeting, and wrote the letter of dismissal which included reference to the disciplinary charges. I considered these facts cast significant doubt on Ms Sloey's position. Secondly, Ms Sloey did not ever clarify which allegation she thought was being dealt with, or which allegation she upheld. Thirdly, there was no suggestion the claimant had been informed she faced a different disciplinary charge. Fourthly, I referred above to the **Strouthos** case and the need to have charges that are precisely framed; and fifthly, the allegation, as set out in the letter of dismissal, is a less serious charge because the reference to harming the business of BMI Healthcare had been deleted. I

considered the change to the wording of the allegation, in the absence of any explanation for it, to be a flaw in the procedure followed by the respondent.

151. Ms Sloey attached significant weight to the fact the Quest letter had not made mention of onward referral to a BMI hospital, or to the existing informal referral network, or to BMI footprint; and the claimant had not sought permission to send the letter, and had not recognised why Ms Smith could have nothing to do with the letter. Ms Sloey used these points to find the claimant's explanation for sending the letter to be not credible, and to conclude this had been a "bold attempt by the claimant to solicit Consultants from Carrick Glen to Quest."

152. The claimant, throughout the investigation and the disciplinary and appeal process, explained she had sent the letter because she had been asked by various Consultants for information regarding her clinic, in light of Carrick Glen hospital closing. The claimant repeatedly stated that she would not have sent the letter if Carrick Glen had not been closing (during the investigation she said *"I think if I had waited a few weeks then I would have known that the clinic space would remain and I would not have sent the letter.")*

153. The claimant accepted she had not asked for permission to send the letter: she had not thought to do so in circumstances where the hospital was closing. The claimant also accepted the letter could have been better worded and could have included reference to a BMI footprint and onward referral to BMI.

154. Mr Millar, in his submission, argued Ms Sloey was entitled to test the claimant's credibility and form a view regarding her honesty and intentions. I accepted that submission, and accepted Ms Sloey was entitled to test the claimant's credibility. However, in doing so, Ms Sloey was required to take into account and balance all of the material facts and considerations and not cherry-pick only those that supported the decision she wished to make. I say that for a number of reasons: firstly, Ms Sloey attached weight to the fact the claimant had not given a straight answer to Mr Clark's question about how many Consultants she had written to. Ms Sloey asked the claimant questions

about this matter. Ms Sloey failed to have regard to the fact the claimant had provided Mr Clark with a list of the names of the six Consultants to whom she had written in circumstances where the claimant had told her this list had been provided.

155. Secondly, Ms Sloey attached no weight to the fact that at the time the claimant's letter was sent to the Consultants, the claimant and the Consultants believed Carrick Glen was closing, and the Consultants had been asking about an alternative clinic. Ms Sloey accepted there was no dispute regarding the fact the staff (including the claimant) and Consultants thought the hospital was closing. Ms Sloey proceeded on that basis. I however considered there could be no dispute regarding the fact knowledge of the closure went wider than the members of staff. The Consultants believed the hospital was closing, and Ms Smith, Executive Director, informed Ms Winifred McClure, HIS, on the 7 December that *"following a site visit yesterday from the new CEO we have been informed that CG will close whenever certain discussions have occurred and all appropriate actions and notifications have taken place."*

156. Ms Sloey told the tribunal a number of times that she did not think the closure of the hospital was "relevant", because the principles and policies are the same. She added a comment about taking the letter sent by the claimant "at face value". I believe these comments demonstrated a fundamental flaw in the way in which Ms Sloey approached her task when she focussed on the breach of contract/policy and excluded consideration of the facts and circumstances in which the incident occurred, and failed to have regard to those matters when considering mitigation.

157. The case of **Taylor v Parsons Peebles NEI Bruce Peebles Ltd 1981 IRLR 119** illustrates this point. This was a case where the employer had dismissed an employee with long service and an unblemished record for striking a fellow worker, simply because the company's disciplinary rules laid down that such an offence would lead to dismissal. The EAT held that the employment tribunal had erred in finding the dismissal fair. It was stated that *"the proper test is not what the policy of the employer was, but what the reaction of a*

reasonable employer would have been in the circumstances. That reaction would have taken into account the long period of service and good conduct which the claimant was in a position to claim." The key point of the case was that even where there is an express disciplinary rule, employers cannot rely on it to make dismissal for breach of the rule automatically fair: the employer is still required to investigate and have regard to the information gathered.

158. I considered that Ms Sloey's opinion that the closure of the hospital was not relevant, and that she could take the letter at face value, demonstrated that her focus was solely on whether there had been a breach of the company's rules, rather than taking into account all material factors. Ms Sloey in fact confirmed this was her approach when she told the tribunal *"for me the closure was not the key thing because, regardless, the principles and policies are the same"*. The closure of the hospital was relevant and material: it was the context in which the letter was sent. I considered no other reasonable employer would have regarded the closure of the hospital as not relevant. Closure was relevant to the facts and circumstances in which the act took place and it was relevant to mitigation. I concluded Ms Sloey's dismissal of this material fact demonstrated her flawed approach.

159. Thirdly, Ms Sloey attached significant weight to the fact Ms Smith, Executive Director, told the claimant she could not be involved in the letter. Ms Sloey however attached no weight to the fact Ms Smith did not tell the claimant not to send the letter, and the reason for that was because she was "in closure mode". Ms Sloey was asked in cross examination whether she agreed Ms Smith had been in closure mode, and had not seen any conflict of interest or breach of confidentiality. Ms Sloey accepted that suggestion.

160. Ms Sloey also disregarded Ms Smith's comments when she stated that as long as Carrick Glen was there, the Consultants would remain with them, and that she had thought the claimant's letter was an opportunity to bring business to BMI.

161. Fourthly, none of the Consultants did transfer to the claimant's clinic because there was an announcement that Carrick Glen was to stay open as an out-patient department.

162. Fifthly, no consideration was given to whether, if Carrick Glen had closed, it would have been to the benefit of BMI Healthcare, to have had Consultants at Quest Clinic making referrals to Ross Hall hospital.

163. Sixthly, the claimant had owned and operated Quest Clinic for 10 years and there had never been any issue/conflict with BMI or Carrick Glen.

164. I concluded, for these reasons, that whilst Ms Sloey was entitled to test the claimant's credibility, she failed to take into account and balance all of the material facts and mitigating factors.

165. I returned to the question of whether there were reasonable grounds upon which to sustain the belief the claimant was guilty of allegation 2. I have referred above to the wording of the allegation changing and I concluded, given the amended allegation was referred to at the disciplinary outcome meeting and in the letter of dismissal, that I must consider whether the respondent had reasonable grounds upon which to sustain the belief the claimant was guilty of the allegation (that is, whether the claimant made use of confidential information which was shared with her in her capacity as Quality and Risk Manager, and used that information in her capacity as owner and director of Quest Clinic to write to consultants offering an alternative for their private practice).

166. In considering this matter I noted two particular points: firstly, the claimant was alleged to have used confidential information which had been shared with her, but as set out above, Ms Sloey accepted the information was not confidential. Secondly, there was no dispute regarding the fact the claimant did send the letter to six Consultants, and did offer them an alternative place for their private practice. I accordingly concluded the respondent had reasonable grounds to sustain their belief the claimant used information that Carrick Glen

hospital was closing to write to six Consultants offering them an alternative place for their private practice.

167. I next considered whether, by doing this, the claimant breached clauses 10, 11 and 12 of her contract of employment. (The clauses are set out in full above and not repeated here).

168. The claimant accepted she had not obtained written permission to write to the Consultants and, on this basis, I concluded Ms Sloey had reasonable grounds upon which to sustain her belief the terms of clause 10 of the contract had been breached.

169. Ms Sloey further concluded that the fact the claimant had written to the Consultants offering them an alternative for their private practice created a conflict of interest: in essence, a breach of the Business Conduct policy and a breach of clause 11 of the contract of employment. I concluded Ms Sloey had reasonable grounds upon which to sustain that belief because at the point where the decision was taken to retain Carrick Glen hospital as an Outpatient Department, a conflict existed.

170. I, in conclusion, decided (i) there were not reasonable grounds upon which to sustain the belief the claimant was guilty of allegation 1; (ii) the change to the wording of allegation 2 was a flaw in the procedure followed by the respondent and (iii) there were reasonable grounds upon which to sustain the belief the claimant was guilty of allegation 2 (as amended) and that allegation 2 amounted to a breach of clauses 10 and 11 of the claimant's contract of employment (and a breach of the Code of Business Conduct).

Band of reasonable responses

171. I next had regard to whether it was reasonable or unreasonable for the respondent to dismiss the claimant for that reason. I had regard to the case of **Iceland Frozen Foods Ltd v Jones 1983 ICR 17** where the EAT summarised the law and set out the correct approach for the tribunal to adopt when answering this question. It was stated:

".. the correct approach for the tribunal to adopt in answering the question posed by section 98(4) is 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."

172. I, in considering this question, had regard to a number of matters including the decision of Ms Sloey to summarily dismiss the claimant. I referred above to the fact I concluded Ms Sloey's decision-making was flawed because there was a blinkered focus on the fact of a policy having been breached without having regard to the facts and circumstances in which the breach occurred. I considered this was demonstrated principally by the fact Ms Sloey regarded the closure of the hospital as not relevant; and the fact that having acknowledged the information disclosed was not confidential, and that the Consultants were already aware of the closure, she proceeded to uphold allegation 1 in any event for other reasons not included in the allegation.

173. I have set out above my conclusion that no other reasonable employer would have regarded the closure of the hospital as not relevant. The closure of the hospital defined the context in which the letter was sent: it explained the reason why the letter had been sent. These factors go to mitigation and no other reasonable employer would have failed to consider them as such. The claimant repeatedly told Mr Clark, Ms Sloey and Mr Rosenblatt that if she had known Carrick Glen was staying open she would not have sent the letter. I concluded no other reasonable employer, having regard to the material facts and circumstances in which the letter was sent, would have rejected that explanation and found instead that the letter was a "bold attempt by the claimant to solicit Consultants from Carrick Glen to Quest."

174. Ms Sloey failed to take into account and consider the fact that at the time the letter was sent by the claimant, Carrick Glen hospital was closing and, if that had come to pass, and the hospital had closed, there would have been no conflict of interest. The conflict was created by the fact of the change of plan for the hospital. This change post-dated the letter having been sent.

175. Ms Sloey's blinkered approach was also evident from the fact she acknowledged the information disclosed was not confidential, but this did not deter her from upholding allegation 1. She also conceded the allegation was framed in terms of being a disclosure to the Consultants, but this did not deter her from upholding the allegation on the basis of a disclosure to someone else.

176. Ms Sloey spoke of the claimant putting the "benefits" for Quest Clinic ahead of the benefits for the respondent. The benefits identified by Ms Sloey were all hypothetical: there was, for example, talk of the claimant expanding the clinic, in circumstances where the claimant had not been asked about this and Ms Sloey had no basis for making her statement.

177. I concluded Ms Sloey had failed to have regard to the significant points of mitigation in this case.

178. Ms Sloey told the tribunal that she decided a final written warning would not have been appropriate in this case because the claimant had, by wilfully breaching her contract, destroyed trust and confidence. Ms Sloey stated the claimant could not have continued to work with the respondent. Ms Sloey had, however, earlier in her evidence, accepted the claimant would not have been continuing to work with the respondent because her post was redundant and there was no suitable alternative employment for her. The claimant would, but for the dismissal, have been made redundant. There was no question of the claimant continuing to work for the respondent.

179. The claimant had an opportunity to appeal against the decision to dismiss. The appeal was heard by Mr Rosenblatt. Ms Forrest challenged whether Mr Rosenblatt was an appropriate person to hear the appeal in circumstances where he had a knowledge of the case. I acknowledged the desirability of having each stage of the disciplinary process dealt with by someone who is independent and has had no prior knowledge/involvement with the case. Mr Rosenblatt is Head of HR Operations. It is within his role to have an overview of disciplinary cases. I did not consider that alone rendered him unable to hear an appeal. I say that because beyond knowing of the fact of the disciplinary case and the outcome, there was nothing to suggest Mr Rosenblatt had had any direct involvement in the case.

180. Mr Rosenblatt told the tribunal that his task as appeal manager was to ensure there had been a fair process, a fair decision and to deal with any issues. He, in preparation for the appeal, requested all relevant information and paperwork, and spoke with Ms Sloey to understand the rationale for her decision. There were three facts, however, which undermined the credibility of Mr Rosenblatt's evidence that he had read the paperwork and understood the rationale of Ms Sloey's decision. Those facts were (i) Mr Rosenblatt was unaware of the fact Ms Sloey accepted the staff and Consultants believed the hospital was closing; (ii) he was unaware of the fact Ms Sloey accepted the information was not confidential and (iii) he was unaware of the fact the claimant had given a list of the Consultants to whom she had written, to Mr Clark at the investigation stage of this procedure.

181. Mr Rosenblatt doubted the claimant's position that she believed the hospital was closing. He pointed to the fact the claimant had, in the letter to the Consultants, used the word "potential" closure. This was, in his opinion, significant. He also focussed on the fact no decision had in fact been taken about closure.

182. I acknowledged Mr Rosenblatt was technically correct in his position that no final decision had been taken about closure: there was, for example, no closing date set. There was, however, a plethora of evidence about the state of knowledge of staff and Consultants, all of which indicated that staff and the Consultants, and the Executive Director of Carrick Glen believed the hospital was closing. This belief was based on the fact that this is what they had been told by Ms Prins and Mr Buckingham. Mr Rosenblatt did not look into this information. He did not question Ms Sloey about it. He did not know Ms Sloey accepted this point. He cannot have read the statement or interview notes from Ms Smith's interview where she made clear the belief of staff and Consultants and referred to herself being in "closure mode".

183. Mr Rosenblatt was also unaware that Ms Sloey had accepted the information was not confidential: it could not be confidential in circumstances where the Consultants and others were aware of it. Mr Rosenblatt told the tribunal he considered the information was confidential. He proceeded to hear the appeal on this basis.

184. I also considered further doubt was cast on whether Mr Rosenblatt had read and considered all of the documents in this case because he was also unaware of the fact the claimant had provided a list of the Consultants to whom she had written, to Mr Clark at the investigatory stage. There was no uncertainty regarding this matter. The claimant had not prevaricated in her response to questions.

185. Mr Rosenblatt upheld the first allegation against the claimant on the basis the information was confidential outside BMI. The difficulty with that conclusion is

that the first allegation was not framed in those terms. The allegation specifically referred to confidential information being disclosed to the Consultants. Mr Rosenblatt did not explain the basis for finding the information confidential in circumstances where (a) it was widely known and (b) when Ms Sloey had found it was not confidential.

186. Mr Rosenblatt also failed to notice the wording of allegation 2 had changed. He, when asked about it in the tribunal hearing, dismissed it by referring to the context being the same. I could not, having compared the wording of the allegation, accept Mr Rosenblatt's position.

187. Mr Rosenblatt maintained the respondent's position that the closure of Carrick Glen was not a relevant fact to consider. He adopted this position because the hospital had not in fact closed. I considered Mr Rosenblatt, in giving this response, was seeking to avoid accepting the closure was a material fact to consider in mitigation of what had occurred.

188. I concluded the appeal process compounded the earlier flaws in Ms Sloey's approach, and in fact went beyond them by attacking the claimant's credibility regarding, for example, her belief the hospital was closing, when this fact had been recognised earlier in the process. Mr Rosenblatt failed to consider mitigation just as Ms Sloey had done, but he exacerbated this by failing to consider the claimant's very lengthy period of unblemished service; the fact no Consultants transferred, the fact there was no benefit to the claimant as at the time of her dismissal and the fact there was no damage to BMI. The question was put to Mr Rosenblatt that the conflict with BMI only arose if (and when) Carrick Glen hospital did not close. Mr Rosenblatt took a very long time to answer this question. I again concluded this was because Mr Rosenblatt did not want to acknowledge this point, or the fact that this was a matter which should have been considered in mitigation.

189. Ms Sloey and Mr Rosenblatt both gave evidence regarding their belief the claimant had not shown remorse for her actions. Mr Rosenblatt in particular appeared to attach great weight to this. He was asked in cross examination

what the claimant could have said to change his mind. He replied that she could have said she was "really sorry", that there had been a "misjudgement", that she was "remorseful". He wanted her to have reflected on her actions and for this to come across clearly in what she said and in her body language. He told the tribunal "none of that came out".

190. Mr Rosenblatt was taken to several statements made by the claimant where she indicated she was sorry; where she "expressed regret" and where she said she had been stupid and naïve. Mr Rosenblatt rejected each of those statements as being remorse. He acknowledged the claimant regretted sending the letter, but did not consider this was remorse. He also, in contrast to what he stated above, told the tribunal that reflecting on something does not equal remorse.

191. Mr Rosenblatt, having set all of the above out in detail, was then asked whether, if the claimant had shown remorse, it would have influenced his decision. He replied no to this question. I considered Mr Rosenblatt gave this answer in a deliberate attempt to forestall any decision by the tribunal that a reasonable employer would have concluded from what had been said by the claimant that she had shown remorse, and that this should, and would, have made a difference to his decision. I considered it abundantly clear from Mr Rosenblatt's evidence that remorse was a big issue for him, but he held to a position that the claimant had not shown remorse, because to acknowledge otherwise would have undermined his decision.

192. Mr Rosenblatt denied the suggestion that he had rejected the appeal because to do otherwise would have meant the claimant received a redundancy payment. The notes of the appeal hearing confirmed that when the claimant's representative told Mr Rosenblatt she wanted the decision to dismiss overturned and the redundancy payment made, he responded "This is a bit much to ask as she is no longer employed by BMI".

193. Mr Rosenblatt confirmed he thought overturning the decision to dismiss, which would usually mean a return to work, but in the claimant's case,

because she was redundant, would mean payment of a redundancy payment, was too much to ask.

194. I concluded from this evidence that Mr Rosenblatt was very well aware of the fact that if he overturned Ms Sloey's decision to dismiss, it would mean the claimant would receive a redundancy payment of approximately £53,000. I further concluded this was an influencing factor in Mr Rosenblatt's decision not to uphold the appeal.

195. I, having had regard to the appeal process, concluded that rather than rectifying any flaws in the earlier process, the appeal compounded and exacerbated those flaws. I further concluded the fact that upholding the appeal would lead to payment of a redundancy payment for the claimant, was a factor which influenced Mr Rosenblatt in his decision to reject the appeal.

196. I have set out above my conclusions that (i) there was a flaw in the investigation arising from the fact the Consultants were not interviewed at any stage; (ii) there were no reasonable grounds upon which to sustain a belief the claimant was guilty of allegation 1; (iii) there was a flaw in the respondent's procedure when the terms of allegation 2 were changed; (iv) there were reasonable grounds upon which to uphold the amended allegation 2; (v) Ms Sloey failed to have regard to mitigation and (vi) the appeal process was flawed because Mr Rosenblatt did not consider mitigation and was influenced in his decision by the fact upholding the appeal would mean the claimant was entitled to receive a redundancy payment.

197. I asked whether the respondent's decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted. I decided the decision did not fall within the band of reasonable responses. I say that because of the conclusions I have reached and which are set out above. Ms Sloey approached the disciplinary hearing with a closed mind: she took all of the points against the claimant and failed to have regard to the circumstances and the very many points raised in mitigation. Mr Rosenblatt compounded and exacerbated those errors and did not come to

the appeal with an open mind in circumstances where upholding the appeal and overturning the decision to dismiss, which would result in the claimant receiving a redundancy payment, was considered by him to be a bit much.

198. I considered no other reasonable employer would have failed to take into account the fact the letter was sent to Consultants in the context of Carrick Glen hospital closing and that the letter would not have been sent at all if the claimant had known Carrick Glen was going to remain open. Ms Smith, Executive Director, during the investigation stated *"As long as we are here consultants would stay with us."* She also stated to Ms Sloey that *"I felt it [the letter to the consultants] would be an opportunity to bring business to BMI".* These are further examples of points of mitigation supporting the claimant's position which were disregarded by Ms Sloey and Mr Rosenblatt for no apparent reason.

199. I decided the claimant has been unfairly dismissed by the respondent. I must now continue to consider what award of compensation should be made in respect of that unfair dismissal.

200. Mr Millar, in his submissions, invited the tribunal to make a reduction to compensation on the basis of three points: (i) Polkey; (ii) contributory conduct and (iii) mitigation of loss.

201. The **Polkey v A E Dayton Services Ltd 1987 IRLR 142** case made clear that procedural fairness is part of the overall test of fairness. A dismissal may be rendered unfair because of procedural flaws. A respondent may, however, argue that compensation should be reduced to reflect the fact that even if a fair procedure had been followed, dismissal would still have occurred.

202. I concluded, above, that the respondent made a number of errors during the disciplinary process: there was a failure to interview the Consultants, a change to the wording of the second allegation, a failure to have regard to the material facts and circumstances in which the incident took place, a failure to have regard to mitigating factors, an appeal process which was flawed

because it compounded the earlier errors and a failure by Mr Rosenblatt to come to the appeal hearing with an open mind. Mr Millar invited me to find the claimant would have been dismissed in any event even if the employer had followed a fair procedure. I could not accept that submission because I was entirely satisfied that if the respondent had carried out a fair procedure and had regard to the material and mitigating factors in this case, and if there had been a fair appeal process, there was a 100% chance the claimant would not have been dismissed. I say that primarily because whilst the claimant did send the letter to the Consultants, she did so in circumstances where Carrick Glen hospital was closing and there would have been no conflict of interest. That position only changed when the respondent subsequently decided to retain Carrick Glen as an outpatient facility.

203. The effect of my decision is that there will be no reduction to compensation on the basis of ***Polkey***.

204. I next considered the issue of contributory conduct. Section 123(6) Employment Rights Act provides that where a tribunal finds that a dismissal was to any extent caused or contributed to by any action of the employee, it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding. I was referred to the case of **Nelson v BBC (No 2) 1980 ICR 110** where the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:-

- the relevant action must be culpable or blameworthy;
- it must have actually caused or contributed to the dismissal and
- it must be just and equitable to reduce the award by the proportion specified.

205. The Court of Appeal went on to say that “culpable or blameworthy” could include conduct that was “perverse or foolish”, “bloody minded” or merely unreasonable in all the circumstances.

206. The was no dispute regarding the fact the claimant sent the letter to the Consultants, offering them an alternative place, at Quest clinic, for their private practice, and that she was dismissed for this reason. Mr Millar, in his submission, addressed the issue of culpability and blameworthiness on a very broad basis: he simply submitted the claimant was the author of her own downfall and that she should not have written the letter. I however considered the issue could not be dealt with on this broad basis because it had to be looked at in the context in which it happened. The question to be addressed is, was it culpable and blameworthy to write the letter to the Consultants and fail to get permission to do so, in the context of Carrick Glen hospital closing?

207. There were two factors which persuaded me it was not blame worthy conduct, and those factors were firstly, Ms Smith, Executive Director, who had knowledge of the letter, did not tell the claimant not to send the letter. The reason why she did not stop the claimant was because she was in "closure mode". I inferred from this that if Carrick Glen had not been closing, Ms Smith would have acted differently. The reason why Ms Smith did not stop the claimant was because Carrick Glen was closing and, although Ms Smith could not be involved, she saw no difficulty in the claimant sending the letter. Secondly, Mr Rosenblatt was asked the question whether a conflict arose only if Carrick Glen did not close. Mr Rosenblatt, as set out above, thought about this question for a very long time. I formed the impression Mr Rosenblatt did not want to answer in the affirmative, and therefore had to take time to formulate another answer. Mr Rosenblatt, when he did respond, said "it diminishes it". He could not explain the basis of this answer except to refer generally to something to do with the Group.

208. I concluded the sending of the letter and the failure to seek permission to send the letter was not blameworthy conduct because at the time the letter was sent there was no conflict of interest.

209. I finally considered the respondent's submission that the claimant had failed to mitigate her losses. This submission was based on the respondent's

position that it had suited the claimant to work at Quest clinic rather than finding a job.

210. I had regard to the fact that when calculating compensation, the calculation should be based on the assumption the employee has taken all reasonable steps to reduce his/her loss. If the employee has failed to take such steps, the compensatory award should be reduced so as to cover only those losses that would have been incurred even if the employee had taken the appropriate steps.

211. The respondent was critical of the fact the claimant "did not do much", and had not applied for jobs during the period of her notice. I could not accept that criticism. The claimant received a payment in lieu of 12 weeks' notice. She accordingly had no loss in the period 27 April to 1 August.

212. I accepted the claimant's evidence that she took on a post working 20 hours per week at Quest clinic, starting on the 1 August 2018, following advice from her Accountant that this is what the business could support. She earns a salary of £20,000.

213. The claimant did not work full time for the respondent and has not worked full time hours for a number of years. The claimant cares for her grandchildren on a regular basis.

214. Mr Millar put to the claimant a number of job advertisements which he had sourced, and examined the claimant why she had not applied for that job, or a similar job. The claimant responded to explain why each job would not have been suitable for her, and this mostly related to the fact they were full time positions.

215. I was wholly satisfied the claimant had taken reasonable action to mitigate her losses. She had searched for employment opportunities and identified no suitable options in the area. She had accordingly taken other steps to mitigate her losses by working in the clinic and drawing a salary at a level as

recommended by her Accountant. I accordingly decided there had been no failure to mitigate loss.

216. The claimant is entitled to a basic award which I calculate to be £15,240 (being 30 x £508 per week).

217. The claimant is also entitled to a compensatory award. Ms Forrest invited the tribunal to make an award to the claimant of the redundancy payment she would have received but for the dismissal. This submission was based on the fact the redundancy payment was a loss arising as a consequence of the dismissal, it was attributable to the respondent because they unfairly dismissed her, and it would be just and equitable to make the award.

218. I, in considering this submission, had regard to the terms of section 123(1) Employment Rights Act which provides that *"subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."*

219. I accepted Ms Forrest's submission that the key factors, in terms of section 123(1), are (i) that the amount of compensation must be just and equitable, (ii) the loss must be a consequence of the dismissal and (iii) the loss must be attributable to action taken by the employer.

220. I next had regard to the fact there was no dispute regarding the fact the claimant was placed at risk of redundancy, there was no suitable alternative employment for her and she would have been made redundant had she not been dismissed by Ms Sloey. The claimant's job has ceased to exist. There was also no dispute regarding the fact the respondent offers an enhanced redundancy payment scheme, and the claimant would have been paid an enhanced redundancy payment of £46,328.44 (per page 173) if she had been made redundant.

221. I asked whether the loss of the redundancy payment was a consequence of the dismissal. I concluded that in the circumstances of this case, and the admissions made by the respondent, there could be no doubt that the redundancy payment was lost as a consequence of the dismissal. The claimant's job was at risk of redundancy and subsequently ceased to exist within the structure for Carrick Glen. The issue of alternative employment had already been considered and Mr Rosenblatt accepted there was no suitable alternative employment for the claimant. If the dismissal had not occurred, the claimant would have been redundant, and would have left the employment of the respondent with a payment in lieu of notice and an enhanced redundancy payment. The only reason she did not receive the redundancy payment was because she was dismissed. The loss of the redundancy payment was a direct consequence of the dismissal.

222. I next asked whether the loss of the enhanced redundancy payment was attributable to the employer. I again answered that question in the affirmative. If the respondent had not unfairly dismissed the claimant, she would have received the enhanced redundancy payment.

223. I finally asked whether, if an amount of compensation equivalent to the enhanced redundancy payment is ordered, compensation in this sum would be just and equitable. I noted the award of compensation is not a punishment for the employer: it is to compensate for losses. I considered the payment of compensation equivalent to the enhanced redundancy payment would be just and equitable in the circumstances of this case. The claimant had 26 years' service and an unblemished record of service. She was unfairly dismissed by the respondent in circumstances where the respondent could have had regard to the material factors in the case, and could have considered those factors in mitigation. They failed to do so at both the disciplinary hearing and at the appeal hearing.

224. The enhanced redundancy payment amounted to £46,328.44. I have already made a basic award to the claimant, which is calculated in the same way as

a statutory redundancy payment. This payment of £15,240 must be deducted from the enhanced payment (leaving a balance of £31,088).

225. There is a statutory cap on the amount of the compensatory award equating to 52 weeks' salary. The claimant's salary was £32,555.

226. I, in conclusion, order the respondent to pay compensation comprising a basic award of £15,240 and a compensatory award of £31,088 (this award being below the cap on the compensatory award).

227. Mr Millar, in his submissions, invited the tribunal to have regard to the accounting information produced by the claimant and which tended to show the claimant had received a dividend of £6000 from the business. The claimant's evidence regarding the figures in the accounts was not entirely clear. I decided, on the basis of the evidence before me, that there was not sufficient clarity regarding the figures to make a deduction of £6000 in respect of a dividend payment.

Employment Judge:	Lucy Wiseman
Date of Judgement:	21 March 2019
Entered in Register,	
Copied to Parties:	22 March 2019