EMPLOYMENT TRIBUNALS

Claimant: Miss S Collins

Respondent: The Maggie Keswick Jencks Cancer Caring Centres Trust

Heard at: Manchester Employment Tribunal (by CVP)

On: 13 and 14 January 2021

Before: Employment Judge Dunlop

Representation

Claimant: Ms C Step-Marsden (Counsel)
Respondent: Mr D Ogilvy (Solicitor)

JUDGMENT having been sent to the parties on 26 January 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

(1) This was a claim of unfair dismissal, heard over two days on 13 and 14 January 2021 by CVP. Miss Collins gave evidence on her own behalf and the respondent had one witness, Sharon O'Loan, who is the respondent's fundraising manager and who was the dismissing officer. I had regard to an agreed bundle of documents which ran to some 311 pages.

The Issues

(2) A Joint List of Issues appeared in the bundle, as follows.

1. Was the dismissal of Miss Collins for one of the five potential fair reasons in s98(2) ERA?

2. Whether the dismissal is fair or unfair having regard to that reason and whether in the circumstances (including the size and administrative resources of the employers' undertaking) the employer acted reasonably or unreasonably in treating that reason as sufficient reason for dismissing Miss Collins, having regard to equity and the substantial merits of the case.

Matters for consideration include:
i. Did the Respondent have a reasonable belief in the misconduct?
ii. Was the dismissing officer's belief genuinely formed?
iii. Was there a fair investigation and disciplinary procedure?

3. Was dismissal within a range of reasonable responses?

4. Should any award be reduced to reflect the prospect Miss Collins would have been dismissed in any event had a fair procedure been followed?

5. If there was an unfair dismissal was there contributory fault by Miss Collins and if so to what extent –
i. the relevant action was 'culpable or blameworthy';
ii. it caused or contributed to the dismissal; and
iii. it is just and equitable to reduce the award by the proportion specified.

6. What should Miss Collins be awarded? To what extent has she fulfilled her duty to mitigate her loss?

7. Should any adjustment to the award be made for failure to comply with ACAS Code of Practice: Disciplinary and Grievance Procedures under Section 207A TULR(C)A?

(3) At paragraph 2 the agreed list slightly misstates the well-known test from **British Home Stores v Burchell [1980] ICR 303**. Aside from that, it accurately summarises the matters in dispute between the parties and the issues which I had to determine in reaching my decision.

Findings of Fact

Background

(4) The respondent is a well-known charity which establishes and operates centres to support those diagnosed with cancer. The centres are generally located at NHS hospitals, but they are physically and organisationally separate from the hospitals themselves.

(5) Miss Collins was the Centre Head of the Maggie's Centre in Manchester from 16 November 2015. The centre formally opened in spring 2016 and she was its first head. There was a core team of eleven people working at the centre, of which Miss Collins was line line-manager to seven. (The others were line managed by managers elsewhere, in different streams of the business, for example fundraising.) Miss Collins also managed numerous volunteers.

(6) Prior to summer 2019, Miss Collins' line manager was Karen Verrill. In Miss Collins' annual performance review in 2019 Ms Verill had given her an overall performance rating of 45/50. Any rating between 40 and 49 was classified as a "Strong" performance.

(7) During summer 2019 the respondent's chief operating officer, Ann-Louise Ward, who was based in London, took over as Miss Collins' line manager. Also in the second half of 2019, Miss Collins developed some health problems and was diagnosed with anaemia after experiencing a suspected heart attack.

(8) One of the employee's managed by Miss Collins at Manchester, whom I will refer to as Mr X, had experienced significant sickness absence due to

mental illness during 2019. I accept Miss Collins' evidence that this was well known to the Manchester team (at least in broad terms) because they were a small team, the absence was significant, and it had been heralded by noticeable unwellness at work, including a 'breakdown' in a team meeting.

(9) Miss Collins alleges that Ms Ward told her that Mr X was "not a fit" for the respondent and instructed her to "manage him out". Her case is that her refusal to do so precipitated a break down in her own relationship with Ms Ward, which resulted in Ms Ward bullying her and, eventually, opportunistically orchestrating her dismissal. It was clear from the claim form that this was Miss Collins's case, and in those circumstances it was surprising that the respondent did not call Ms Ward as a witness.

(10) It is not disputed that Ms Ward placed Miss Collins "on performance management" in or around autumn 2019. However, there was no formal performance management plan, no targets and no written record of the supposed 'problems' with Miss Collins' performance.

(11) In all the circumstances (including the lack of evidence from Ms Ward) I find as a fact that by January 2020 Ms Ward had 'taken against' Miss Collins and developed a desire to remove her from the organization. I find that that desire was not justified by genuine performance concerns. I find it unnecessary to make any specific finding as to what exactly was said between Ms Ward and Miss Collins regarding Mr X, and whether it was that issue which gave rise to Ms Ward's attitude towards Miss Collins.

N Brown Incident

(12) The events giving rise to Miss Collins' dismissal began on 8 January 2020. In order to understand them, it is necessary to introduce N Brown, which is a commercial business with significant links to Maggie's Manchester, initiated by the former chairman of N Brown, Mr Jim Martin. Mr Martin sits on both the Manchester Centre board and the respondent's main board. Both he and the business directly donated to the centre as well as encouraging other wealthy individuals and businesses within the area to support it. The relationship continues to be an important one for the Manchester Centre.

(13) As well as a fundraising relationship, Maggie's vocational rehabilitation workers work with commercial partners to provide support in circumstances where employees are diagnosed with cancer. On 8 January 2020, Ms Sian Williams of N Brown approached Miss Collins with a complaint about the way in which Mr X had been providing such support to a particular N Brown employee. The relationship between the two organisations made this complaint (at least in the reasonable view of Miss Collins) potentially a very serious matter. She sought to reassure Ms Williams and, in her own words, to "defend" the reputation of the respondent.

(14) During the initial conversation with Ms Williams, Miss Collins offered the view that the actions alleged by Ms Williams would be "out of character" for Mr X and disclosed that he had been "poorly" and had recently returned from a long absence. She said that Mr X remained unwell and that she had

driven him home and to the GP herself (from work) on a day he had cycled in.

(15) Miss Collins did not disclose the diagnosis or nature of Mr X's health problems, although I find that it is likely that Ms Williams would have inferred from the conversation that those were likely to be problems related to his mental health, rather than his physical health. Miss Collins invited Ms Williams to record the complaint in writing, which she did. Miss Collins responded in writing and proposed to visit the HR department at N Brown. She informed Ms Ward who was happy with these steps

(16) Subsequent to this, Miss Collins discussed the potential for damage to the relationship with N Brown with Jemma Halman. Ms Halman was the Manchester Centre Fundraising Manager. She was outside Miss Collins's reporting line and reported to Marie Turnbull, a fundraising manager with a national role. Miss Collins and Ms Halman discussed the matter and agreed that it would be appropriate to inform Mr Brown of the complaint and the respondent's response to it. They were concerned that if he heard about it indirectly that would be more damaging. They believed that there was a good chance that he may hear of it, particularly given his role on the main board. The respondent has argued that Mr Martin would have been unlikely to hear of the complaint in the course of his work with the main board, and I accept that that is probably the case, but I also accept that Miss Collins genuinely believed that there was a real risk of this happening.

(17) Miss Halman drafted an email which she sent to Ms Turnbull to approve. Miss Collins had not been involved in the drafting and had not seen the email. The draft wrongly recounted the conversation between Miss Collins and Ms Williams in that it stated Miss Collins had disclosed that Mr X had been absent from work due to "mental health illness". It identified Mr X by name and gave further details of the steps taken and proposed by the respondent to address the concerns raised.

(18) Ms Turnball was concerned about the content of the draft email and raised it with Ms Ward, who, on around 10 January, telephoned Miss Collins to ask if she had revealed to N Brown that Mr X "had mental health problems". I accept Miss Collins's evidence that Ms Ward said she was in possession of an email which indicated that Miss Collins had done so, and implied that the email came from N Brown. Miss Collins was upset and discussed the matter with Ms Halman and Ms Turnbull. Again, I accept her evidence that they sought to reassure her and clarified that the email had come from Ms Halman, and had contained an error in her account of the conversation. In her later statement to the disciplinary investigation, Ms Halman described the account of the conversation in the draft email as "completely mistaken".

(19) The draft email was never sent. On 11 February Miss Collins, Ms Halman and other staff had a successful visit to N Brown, resulting in plans for further collaboration between the two organisations.

The Investigation

(20) Around this time Gillian Hailstones, the respondent's Head of Centre Operations Scotland, was asked to investigate "concerns of breach of confidentiality and GDPR requirements in the Manchester centre". Neither Ms Hailstones, or Ms Winship (the respondent's Head of Staff & Resources) gave evidence, so there is a lack of clarity around who instigated the investigation and how its terms of reference were formulated. However, it appears that Ms Ward was involved as the Investigation Report states "*Marie escalated the email to Ann-Louise Ward which instigated the investigation.*"

(21) Miss Collins was not suspended nor was any data breach reporting procedure instigated.

(22) Ms Hailstones obtained statements from Miss Collins and from Ms Halman. Ms Halman's statement confirmed that the second-hand account of the conversation between Miss Collins and Ms Williams she had included in the draft email was erroneous.

(23) Ms Hailstones produced an investigation report dated 24 February 2021. The findings of the investigation were as follows:

1. **Possible breach of confidentiality and GDPR when HR information concerning a staff member was discussed with external partner.**

   It has been found that there was a was a breach of confidentiality and GDPR in the conversation between Sinead Collins and an external partner. While the nature of the illness was not named directly there was an over sharing of details on pattern of illness and absence (including the need for the individual to be taken to the GP) that constitutes a breach of Confidentiality and GDPR policy by inference. This was intended to be a supportive and protective step in reassuring the external partner that the behaviour outlined in the complaint was unusual. There was poor judgement displayed in choosing to respond in this manner and a lack of insight into the scope of confidentiality and GDPR requirements in sharing the details of sickness/absence.

2. **Potential breach of confidentiality and GDPR through sharing of confidential HR information across Maggie's functions and teams.**

   It has been found that there was a breach of Confidentiality and GDPR policy in the decision to share the nature of the staff members illness with the Fundraising Board Chair. The intention behind the action was to protect the staff member concerned and show mitigating circumstances. The decision making process was heavily influenced by the perceived importance of the Fundraising Board Chair as an individual and their close association with the charity across a number of levels. Neither Jemma nor Sinead were clear on what information would be shared with the Maggie's Main Board in relation to Complaints and Staff Absence. There was a desire to gain approval for the email and its contents prior to sending however this was from a wider perspective than just the reference to the nature of the illness. There was no understanding from Sinead's position as the staff member's line manager or from a leadership perspective within the centre that such information should never be shared outwith HR and her immediate line manager. The decision to share the information was a conscious one taken after discussion and time to consider, not in the heat of the moment. In making this decision Sinead failed to follow policy which constitutes a breach of Confidentiality and GDPR.

(24) Although it is not clear from the wording of the terms of reference themselves, it is clear from the conclusions that allegation 1 related to the conversation with Sian Williams and allegation 2 related to the draft email. The investigation did not identify any specific provisions in the General Data Protection Regulation or other external legislation or code that had been

breached. Nor did it identify any specific provisions in any internal policy which had been breached. Ms Hailstones recommended that a disciplinary process be initiated with Miss Collins "for breach of confidentiality and GDPR" and that Ms Halman be given training "with particular reference to information boundaries with senior volunteer roles".

(25) On 24 February 2020 Ms Hailstones called Miss Collins to inform her she was recommending disciplinary action.

The Dismissal

(26) On 27 February there was a lengthy and ultimately abortive performance development review meeting between Miss Collins and Ms Ward. Ms Ward commented that she did not feel the Manchester Centre was "in good hands". The clamant believed that Ms Ward was pushing her to resign.

(27) On 18 March Miss Collins commenced a period of sickness absence for work-related stress. On 27 March she was invited to a disciplinary meeting scheduled for 1 April 2020. The respondent has offered no explanation for the lengthy delay between Ms Hailstones completing her report and arrangements being made for the disciplinary hearing. The latter part of this period coincided with the febrile days around the commencement of the UK's first national coronavirus lockdown, which may well have contributed, but that does not explain the earlier delay.

(28) The disciplinary invitation letter set out the allegations as follows:

> *The purpose of the hearing is to discuss the allegations of misconduct against you regarding concerns of a breach of confidentiality and GDPR requirements. The basis for this allegation is that you shared personal medical information about a member of your team with other Maggie's staff and an external party.*

The allegation therefore related to information "shared" by Miss Collins. It did not relate to her instructing or condoning Ms Halman sending an email to Mr Martin. The letter did not specify who was meant by "other Maggie's staff" or who the "external party" was. It also did not specify what personal medical information was alleged to have been disclosed. It is important that where such allegations are made, they are clear and specific, this was particularly the case here given the confusion which had arisen from the draft email, regarding what Miss Collins was alleged to have disclosed in her conversation with Ms Williams.

(29) The letter enclosed the Investigation Report, copies of Miss Collins's GDPR training certificates and the respondent's disciplinary Policy and Procedure. It did not enclose the statements taken by Ms Hailstones, nor a copy of the draft email, which were the key documents in the case.

(30) Miss Collins could not open the investigation report. She emailed Ms Winship who resent it in a different format.

(31) On 30 March 2020 Miss Collins emailed Ms Ward (who was to conduct the hearing) stating that she would be represented by Mr Matthew Harris of the RCN, who was unable to attend on the date proposed. She

also said that she was unable to participate due to anxiety. Finally, she indicated an intention to raise grievances against Ms Ward. She later forwarded this email to Ms Winship.

(32) There was no response to Miss Collins' email but on 3 April 2020 Ms Winship sent a further invitation, this time for a hearing on 15 April 2020, the day after Miss Collins's sick note was due to expire. This time the hearing was to be conducted by Ms O'Loan. This letter stated that "*You did not attend this first meeting and did not inform me ahead of the date that you would not be attending."* This is an odd comment in view of the fact that Miss Collins had informed Ms Ward she would not be attending, and forwarded that email to Ms Winship.

(33) On 6 April Miss Collins emailed Ms Winship pointing out her surprise at the comment about the first meeting, stating that she still considered herself too well to attend and asking that the meeting be postponed to allow her time to recover from her anxiety. There was no acknowledgement or response. On 10 April Miss Collins re-sent the email, nudging Ms Winship to respond. This prompted a bare acknowledgment on 14 April.

(34) On the basis that Miss Collins was not going to attend anyway, Ms Winship and Ms O'Loan brought the hearing forward to the 14 April which was more convenient for them. Miss Collins was not informed that the hearing would go ahead in her absence nor given any other options to participate (for example by sending her representative or making written representations).

(35) Ms O'Loan decided that Miss Collins had committed gross misconduct. The basis for this, as outlined in the dismissal letter was:

> *"that you shared personal medical information about a member of your team with other Maggie's staff and an external party….your actions constituted a serious breach of rules, policies and procedures."*

This is wording drawn directly from the invitation letter.

(36) In evidence, Ms O'Loan explained her conclusion in more detail. She said it was based on three disclosures. The first was the disclosure to Sian Williams, in respect of which she said that she accepted the account in the claimant's statement, and was not proceeding on the basis of the retracted account given by Ms Halman in her draft email. The second, was the (averted) disclosure to Mr Martin. Ms O'Loan accepted in her evidence that Miss Collins had not written this email, or seen it, and that it had not in fact been sent. However, she asserted that the claimant had "let it occur…without taking control of it". The 'third disclosure', Ms O'Loan explained, was the fact that details of Mr X's health appeared to be well-known amongst the Manchester team (including Ms Halman) and, therefore, must have been discussed amongst that team either by Miss Collins or with her knowledge. She appears to have formed the view that there was a culture of gossip within the Manchester Centre and Miss Collins, as the Centre Head, was responsible for that.

(37) I pause to note that despite the vagueness of the way the allegation was framed, it is fairly clear from the investigation report that the two concerns being investigated by Ms Hailstones corresponded to disclosures 1 and 2 in Ms O'Loan's thought process. The third element had never been distilled into a specific allegation, or investigated, nor had Miss Collins been given the opportunity to respond to it.

(38) Ms O'Loan considered that the gross misconduct allegations had been made out. In determining the appropriate sanction, Ms O'Loan telephoned Ms Ward to determine whether there were any mitigating circumstances or if this was an isolated event. Ms Ward then informed Ms O'Loan that Miss Collins was in a process of performance improvement. Ms O'Loan was keen to emphasise whilst giving evidence that her purpose in calling Ms Ward had been to see if she could identify any mitigating factors, and that, beyond the fact it clearly wasn't a mitigating factor, the information about performance management was not relevant to her decision. However, she did see fit to mention it in both the the note prepared of the disciplinary hearing and the outcome letter. I conclude that it is likely that the call with Ms Ward influenced Ms O'Loan to impose a more severe sanction that she may otherwise have done.

(39) Following her dismissal, the claimant submitted a lengthy grievance, although no grievance process was instigated. She declined to appeal the dismissal on the basis that she did not believe the decision would be overturned. In evidence, she pointed to the fact that the Centre website had been changed very shortly after the dismissal to show a colleague as acting Centre Head as evidence of this.

Relevant Legal Principles

(40) The respondent bears the burden of proving, on the balance of probabilities, that the claimant was dismissed for a potentially fair reason: s. 98 (1) ERA. In this case, the respondent says that the reason for dismissal was a reason related to conduct – namely the disclosure(s) of personal health information relating to Mr X.

(41) Consideration must then be given to the general reasonableness of that dismissal under s.98(4) ERA. Section 98(4) ERA provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing her. This should be determined in accordance with equity and the substantial merits of the case.

(42) In considering the question of reasonableness, the I have had regard to the decisions in **British Home Stores v. Burchell [1980] ICR 303**; **Iceland Frozen Foods Limited v. Jones [1993] ICR 17**; **Foley v. Post Office and Midland Bank plc v. Madden [2000] IRLR 82.**

(43) In summary, these decisions require that I focus on whether the respondent held an honest belief that Miss Collins had carried out the acts of misconduct alleged, and whether it had a reasonable basis for that belief.

I must not however put myself in the position of the respondent and decide the fairness of the dismissal based on the what I would have done in that situation. It is not for me to weigh up the evidence as if I was conducting the process afresh. Instead, my function is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses open to an employer.

(44) In conduct cases, when considering the question of reasonableness, I am required to have regard to the test outlined in the **Burchell** case. The three elements of the test are:

a. Did the employer have a genuine belief that the employee was guilty of misconduct?

b. Did the employer have reasonable grounds for that belief?

c. Did the employer carry out a reasonable investigation in all the circumstances?

(45) It was confirmed in **Sainsbury's Supermarket v Hitt 2003 ICR 111** that the 'band of reasonable responses' test applies equally to the employer's conduct of an investigation as it does to the employer's decision on sanction. Whilst an employer's investigation need not be as full or complete as, for example, a police investigation would be, it must nonetheless be even-handed, and should focus just as much on evidence which exculpates the employee as on that which tends to suggest he is guilty of the misconduct in question.

(46) Section 123(6) ERA provides that: Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. S.122(2) makes a similar provision in respect of the basic award.

(47) Under the principle in **Polkey v A E Dayton Services Ltd 1988 AC 344** the Tribunal may reduce the amount of compensation payable to the claimant if it is established that a fair dismissal could have taken place in any event – either in the absence of any procedural faults identified or, looking at the broader circumstances, on some other related or unrelated basis.

Submissions

(48) Both representatives prepared comprehensive written submissions, which were supplemented by oral argument. As this is a straight-forward case, concerning well-established legal principles, I need not lengthen this judgment by rehearsing those submissions.

Discussion and conclusions

(49) The first question is whether the dismissal was for one of the five potentially fair reasons in s98(2) ERA? I find that the reason for the

dismissal was the claimant's conduct, which is one of the potentially fair reasons.

(50) Although Ms Step-Marsden sought to make much of the background to the 'disclosure' issue and, in particular, sought to emphasise the deteriorating relationship between Miss Collins and Ms Ward, I am satisfied that the disclosure issue was the reason for the dismissal as far as Ms O'Loan was concerned. I am further satisfied that Ms O'Loan was the decision maker – she was not a 'puppet' for Ms Ward, and the decision to dismiss due to the disclosure issue was not a sham or fabrication. It may well be the case that when Ms Halman's draft email came to light it was seen by Ms Ward as presenting a useful opportunity to discipline an employee that she considered problematic, but that doesn't itself change the reason for dismissal. I am satisfied (and it was not seriously argued otherwise) that this was conduct dismissal.

(51) In considering the fairness of a conduct dismissal I have to apply the **Burchell** test.

(52) Firstly, did the Respondent have a genuine belief that the claimant had committed the misconduct in question? That is often a simple question to answer. In this case, it is slightly more difficult. I consider there are two elements to this (i) what was the respondent's belief about the conduct that had actually occurred and (2) given that, was there a genuine belief that that conduct amounted to misconduct?

(53) As noted, the respondent characterised the misconduct in the disciplinary invitation and outcome letters as a "*breach of confidentiality and GDPR requirements*" in that the claimant "*shared personal medical information about a member of your team with other Maggie's staff and an external party*".

(54) I find there was a lack of clarity of thought on Ms O'Loan's part about what had been disclosed, when and to whom, and how those facts fitted into the allegations that had been made in the disciplinary process.

(55) In relation to the conversation with Sian Williams, there is nothing in the documentary records to show whether Ms O'Loan had rejected the account of that conversation given in the draft email or not. If she did not, then that would be an unsustainable conclusion given Miss Halman's retraction. If she did, and based her conclusion purely on the account of the conversation in the claimant's statement (as she now says) then it is surprising that the disclosure was considered to be serious enough to be considered misconduct rather than, for example, a matter for training or advice. However, I am prepared to accept that this is version which Ms O'Loan based her findings on and that there is in that statement – just about – sufficient evidence to support a genuine belief that the claimant had disclosed some confidential information about Mr X's health and that this amounted to misconduct.

(56) In terms of the other two disclosures relied upon, I am not persuaded that even this first part of the **Burchell** test is met. The email was not drafted by Miss Collins, was not seen by her until these proceedings, and was never

actually sent at all. It did not give rise to any breach of confidentiality and certainly not any breach by Miss Collins. If Ms O'Loan had turned her mind to this, and analysed the allegation with any degree of rigour, she could not have formed a genuine belief that there was misconduct on the part of Miss Collins in respect of the email (particularly given the terms of reference which related to allegations that information "*had been shared"*).

(57) The third purported 'disclosure,' relating to unspecified internal discussions amongst the team at Manchester had not been part of Ms Hailstones' terms of reference and there had been no investigation into it. In evidence, Ms O'Loan did not put forward a specific assertion as to what Miss Collins was said to have discussed, with whom, and when, that was improper. She seems to have concluded that the fact that the matter was known about by other staff spoke for itself, but in my view that conclusion was not one any reasonable employer could have come to on the material available to Ms Loan. This was a small team and Mr X had had lengthy absences and suffered the effects of mental ill health at work. It is a huge jump to say that simply because colleagues were aware of this in general terms, it must mean that Miss Collins had breached Mr X's confidentiality in the way she had discussed him with colleagues. I find that Ms O'Loan did not have a genuine belief in that misconduct.

(58) I therefore find there was no genuine belief in misconduct on two of the three grounds. By this, I don't mean by that that Ms O'Loan was acting dishonestly, or that the dismissal was a sham. Rather, I mean there was a complete failure to analyse the matter that had been put before her and consider what had actually happened and whether it was capable of amounting to misconduct as alleged.

(59) The second question is: was the dismissing officer's belief reasonable? I have already said that there could be no genuine belief in misconduct on two of the three grounds. In respect of the first ground, was it reasonable to consider that that amounted to misconduct? The circumstances in which it would be appropriate for someone in a leadership role to say anything to an external party about a colleagues' health will be few and far between. I therefore consider that, although the position is somewhat borderline, Ms O'Loan could reasonably form the view that the conversation with Ms Williams, as described in Miss Collins' statement for the investigation, did amounted to misconduct.

(60) The third question is: was the belief the result of a reasonable investigation? I acknowledge that the obligation to investigate extends only to conducting a reasonable investigation. There is no duty to "leave no stone unturned" as Mr Ogilvy described it. If the two disclosures which I have disregarded were to be taken into account, then I would have found significant defects in the investigation. If, for example, the allegation concerning the second disclosure had been that Miss Collins had instructed or encouraged Miss Hanlan to write an email in those terms, then a fair investigation would have examined much more closely how the email came to be written and what fault (if any) attached to Miss Collins. If the allegation concerning disclosures within the Manchester Centre was to be investigated, then the investigation would have needed to establish what

exactly was being discussed by the staff, when and by whom. If a more robust analysis had been applied to working out the 'charges' against Miss Collins, then the holes in the investigation would have been apparent.

(61) In respect of the conversation with Sian Williams, however, the position is different. I have accepted that Ms O'Loan took the claimant's account at face value and any 'misconduct' arising out of that conversation is therefore limited to what is apparent on the face of her statement to the investigation. On that basis, no other investigation was necessary.

(62) I am unable to accept that, if Miss O'Loan had excluded the unmerited concerns about the second and third so-called 'disclosures', she would nevertheless have found that the very limited disclosures made to Ms Williams (on a spur of the moment basis, and genuinely motivated by a desire to protect this important relationship) amounted to gross misconduct justifying dismissal. The decision to dismiss is fatally tainted by Ms O'Loan's flawed findings that there were other breaches of confidentiality. Therefore, the **Burchell** test, in the round, is not met.

(63) Further, I do not consider that a dismissal for the limited misconduct I have identified was within the band of reasonable responses. In reaching this conclusion I acknowledge that test gives a wide margin of error to an employer, and that I must consider whether any reasonable employer could have reached that decision and not substitute my own view for the view of the employer in this case. The respondent's difficulty is that neither Miss Hailstones nor Ms O'Loan identified the misconduct with specific precision to allow them to turn their minds to how limited it really was. Notwithstanding the seniority of Miss Collins' position, I conclude that if Ms O'Loan had done so, she would not have seen this as a dismissal matter. Only if she had been acting entirely unreasonably could she have done so. I am fortified in this belief by the fact that the respondent did not instigate disciplinary proceedings against Miss Halman, but considered that training was sufficient in her case.

(64) Finally, I consider that there were significant procedural defects in this dismissal. Some of these will be apparent from the findings of fact set out above. Given my conclusion that the dismissal was substantively unfair I do not need to discuss these in detail. I will, however, address one point which exercised the parties' attention: I do not consider that it was incumbent on the respondent to put the dismissal process 'on hold' either until Miss Collins recovered from her anxiety or until she lodged a grievance and that grievance was determined. It was, however, unreasonable for the respondent, having decided that it may be necessary to proceed in Miss Collins' absence, not to notify Miss Collins clearly, and in writing, of that intention and to inform her of the ways which she might seek to put her position forward nonetheless, for example by written submissions or by her representative attending without her.

(65) That defect was compounded by the failure to supply Miss Colins' with the witness statements and the draft email itself in advance of the disciplinary hearing. Those were the key documents in the case and, without them, she was hampered in her ability to put forward a defence, either through attending a hearing or providing a written response to the

allegations. In those circumstances, I find that the procedure was fundamentally flawed.

(66) This means that the claimant's claim that she was unfairly dismissed is well-founded.

(67) I then turn to the adjustments to the award: I consider that both the basic and compensatory award should be reduced by 20% for contributory conduct. That reflects Miss Collins' admitted comments to Sian Williams of N Brown and the fact that she at no point acknowledged that she ought to have been more circumspect and handled that conversation differently. Miss Williams has argued that she was deprived of the opportunity to demonstrate that reflection due to the failure to delay the disciplinary hearing, but I find that it would have made no difference on this point. Miss Collins didn't demonstrate any 'second thoughts' about those comments at the time or in the investigation, nor in her evidence to this tribunal. On the contrary, she considers they were entirely justified as her motivation was to protect the relationship between the respondent and N Brown.

(68) In terms of a '***Polkey***' deduction, the flaws in this dismissal were substantive and fundamental, there is therefore no basis for reducing the award to reflect the possibility of dismissal absent the procedural defects.

(69) The respondent put forward a broader argument that the claimant's losses flowing from dismissal were limited as she would have been dismissed on a capability basis in due course. I have to consider not simply whether the employment would have terminated, but whether it could have been ***fairly*** terminated. On the evidence I have heard, I have no basis to say either that the performance management process imposed by Ms Ward would have resulted in a dismissal or that any such dismissal would have been fair. I therefore make no adjustment on this basis.

(70) Each party asks for an adjustment in its favour with regard to the other party's failure to comply with the ACAS code. I consider that both parties have failed to comply with the code. In the respondent's case, that arises from the arrangements for the disciplinary hearing, in the claimant's case, it arises from her failure to avail herself of the internal appeal process. Both are at fault to a level which would have resulted in an adjustment had only one side been at fault. That conclusion is particularly disappointing in circumstances where the respondent is a relatively large organisation with a dedicated HR function, and the claimant is a senior professional who had the benefit of union representation. I hope that both the respondent and the RCN officials involved will consider these points when involved in future disciplinary processes. However, I am entirely satisfied in this case that the appropriate response is to make no adjustment in either direction.

Remedy

(71) The sums awarded in the judgment were agreed between the parties following delivery of the oral judgment.

Employment Judge Dunlop
Date: 25 January 2021

REASONS SENT TO THE PARTIES ON
26 January 2021

FOR EMPLOYMENT TRIBUNALS