EMPLOYMENT TRIBUNALS

Claimant: Mrs L Lovelace

Respondent: Optic-Kleer Ltd

Heard at: Nottingham **On:** 21, 22, 28 October and 5 November 2020

Before: Employment Judge Rachel Broughton (Sitting alone)

Representatives

Claimant: In Person
Respondent: Mr Gilbert -solicitor

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claim of unfair dismissal is well founded and succeeds.
2. The compensatory award is subject to a reduction of 40% to take account of the chance that the claimant would have been dismissed had a fair process been followed
3. The claimant is awarded a total sum of £3,850

REASONS

The Claim

1. This is a claim of unfair dismissal pursuant to section 94 and 98 of the Employment Rights Act 1996 (ERA). The claim was presented on the 18 December 2018 following a period of early Acas conciliation from 29 October 2018 to 29 November 2018. The claimant has not brought a separate claim of wrongful dismissal.

The Background

2. The claimant was employed by the respondent as a Data Processor from 1 October 2004 until her summary dismissal on 30 September 2018.

3. The essence of the claim is that the respondent introduced a new computer system in January 2018 replacing paper invoicing with an electronic function.

The respondent's case is that the claimant was summarily dismissed for actions which constituted a fundamental breach of the implied duty of mutual trust and confidence, namely her conduct in writing off an excessive number of invoices in breach of the correct procedure. The claimant does not deny writing off the invoices but denies doing it deliberately, she blames a lack of training on the new system. The claimant further claims that the real reason the respondent terminated her employment, was because they no longer required someone to carry out her role but wanted to avoid liability for a redundancy payment.

Issues

4. At the outset of the hearing, the parties identified the issues for the tribunal and they are as follows;

Unfair dismissal

a. *What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?*

The Respondent asserts that it was conduct.

The claimant alleges that the real reason for dismissal was redundancy

b. *If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'?*

The claimant complains that the dismissal was both substantively and procedurally unfair in that;

- *The respondent failed to comply with the Acas Code of practice*
- *The respondent failed to provide the claimant with notes of the suspension meeting until after the disciplinary hearing*
- *Witness statements relied upon by the respondent in its decision to dismiss, were not taken until a day after the disciplinary hearing and only provided following a request from the claimant.*
- *Documentary evidence relied upon was unreliable*
- *The respondent failed to consider the possibility of the issue being a lack of training*
- *There was no written procedure in place and the claimant asserts that she had carried out of the same process throughout her employment*
- *There was a lack of clarity over the allegations*
- *The claimant was only asked about duplicated invoices at the disciplinary appeal and not sent the evidence to provide a response*
- *The HR consultant who carried out the disciplinary appeal process relied upon the respondent's assertions which contradicted what was set out in the franchisee's manual.*
- *Letters disclosed in evidence were different to those received by the claimant*

- *That the claimant was not provided with the relevant evidence during the disciplinary process to enable her to respond to the allegations*
- *The claimant was not given the appropriate training to carry out the role following the contribution of a new computer system.*

The Evidence

5. The parties produced a bundle initially numbering 452 documents, however the respondent had prepared the index and failed to include some of the claimant's documents and with further disclosure during the hearing, the final bundle numbered 464 pages.

6. The Tribunal heard evidence from the respondent's witnesses; David Overton, Director of the respondent, Sarah Overton, Director of the respondent, and Susan Smith, Office Manager of the respondent. All three witnesses were cross examined by the claimant.

7. The Tribunal heard evidence from the claimant who was cross examined by the respondent. The claimant did not call any witnesses.

The Hearing,

8. The hearing had been listed for 2 days. It was conducted remotely with all parties and witnesses participating by Cloud Video Platform. The case required a further listing of an additional one and a half days to complete the evidence and allow oral submissions.

The Findings of Facts - Background

9. The respondent is a vehicle windscreen repair franchisor. It has operators (franchisees) who carry out windscreen repairs for customers on an insurance and non-insurance funded basis. The respondent charges its operators a management service fee to process its invoices, deal with customers and insurance companies.

10. The respondent has a manual for the operators which sets out the invoicing procedures. This document sets out the 4 methods by which a windscreen repair may be paid for and the different ways the payment is processed;

    i. Direct Bill –the customer has insurance and the respondent forwards an invoice for payment to the customer's insurer. The manual provides that; "*every assistance will be given by [the respondent] to collect the money on behalf of the franchisee"*.

    j. Pro-Pay - the customer pays the operator the full invoice price. The customer sends a copy of the paid invoice to the insurer and is reimbursed directly by the insurer.

    k. Account – this is referred to as a high-risk method of payment. This is where the repair is carried out, and only when the customer receives payment from their insurer, does the customer pay the invoice. The manual recommends that the operator qualifies with ID from the customer, their name and address. It states that; "*any outstanding debt from an account customer is the responsibility of the individual franchisee and whilst every assistance will be*

given by [the respondent] to collect the money on behalf of the franchisee any bad debt arising from account work is their sole responsibility" and;

*"For the avoidance of doubt every assistance means that [the respondent] will send Polite Reminder, Strong Reminder and Final Demand and backed up with **a telephone call** following the submission of Final Demand". [my stress]"*

l. Self – Pay; where the customer does not have or does not wish to claim for the repair via an insurer. The customer pays in full at the time of the repair.

11. The operators receive statements from the respondent, showing the repairs undertaken, outstanding invoices and payments made.

12. The claimant's role for the respondent involved managing the invoices, including submitting them for payment to the insurer and chasing unpaid invoices.

13. Prior to the introduction of a bespoke computer system in 2017, the respondent used template letters for chasing payments but these had to be manually created. Notes were recorded on the system confirming what action had been taken in respect of each invoice/repair.

Contract of Employment

14. The claimant's contract of employment is dated 15 May 2013. The claimant had been employed by the respondent prior to its acquisition in 2014 by David and Sarah Overton. The paragraph dealing with her job title does not describe the responsibilities of the role. Her working week is recorded as 9am to 3pm two days per week i.e. Wednesdays and Fridays.

15. Paragraph 16 of the contract which deals with the disciplinary procedure and refers to the staff handbook however it is not in dispute that there was no separate disciplinary policy. The claimant was informed during the disciplinary process that the respondent follows the Acas code of practice.

16. From around 2014 it is not in dispute that the claimant worked three days per week however she denied in cross examination that she had been paid an additional day only to chase payments. The evidence of Mr Overton, Mrs Overton and Ms Smith was that from 2014 she worked and was paid for one extra day per week to concentrate on outstanding invoices. Mr Overton in his evidence, complains that the claimant often had to be reminded what she should be doing on that extra day as she would spend time performing other duties such as opening post or inputting invoices. There were no documents relating to this variation to her working hours, however the Tribunal find on the evidence and on a balance of probabilities, that the claimant was asked to work an additional day to chase invoices. The claimant did not allege that Ms Smith, had any reason to falsify her evidence and she did not allege that she had done so.

17. The claimant accepted that from July to October 2017 she increased her working week to five days per week to assist in submitting paper invoices to the respondent's new computer system which was trialled in December 2017 but rolled out in January 2018.

18. The respondent is a small employer. It recruited in the administration team; the claimant, an apprentice, and Ms Smith, the Office Manager. The undisputed

evidence of Mrs Overton is that the apprentice did not carry out any invoicing work.

Computer System in place before January 2018

19. Prior to the formal introduction of the new computer system in January 2018, the administration team used paper invoices. Some operators would prefer old debt to be removed from their statements however the invoice was not 'written off', it would still be chased and capable of being paid however it would no longer appear on the operator's statement.

20. The claimant accepted that the process she was required to follow was to identify the invoice, click on the computer system to check the records and the last action that had been carried out (whether that was a telephone call or a letter to chase payment) before she 'hid' the invoice from the operator's statement. It is not in dispute that the claimant had access to this function on the system and would use it and that this was marked as 'hide from operator'.

21. The 'old' system had a 'Reconcile' tab which would allow invoices to be written off. The undisputed evidence of Mrs Smith and the claimant was that under the old system the Reconcile function would be used where mistakes had been made and Mrs Smith accepted in cross examination, that the claimant would write out on a piece of paper what the mistake was or where there had been a duplicate invoice entered and it was Mrs Smith not the claimant, who would deal with that through the Reconcile function. The respondent does not allege that the claimant had written off invoices under the previous system.

22. The letters which were sent out to customers or insurers when processing the payments, were standard letters but the details of the invoice, customer etc had to be inputted manually.

23. The claimant's evidence which was supported by the evidence of Mrs Smith, is that (set out in the claimant's notes for the disciplinary appeal p.118), the way she had worked for the past 13 years when processing invoices was as follows;

    No details: Awaiting details letter and No details bill
    Incorrect Details: Standard returns and Incorrect details bill
    Account: Polite Remainder, Overdue Reminder and Bad Debt letter
    Third Party: Third party bill
    No Windscreen cover: No windscreen cover bill
    High Excess: High excess bill

24. Mrs Overton's evidence was that more letters than those described by the claimant had been sent out under the old system, she had by her own admission however limited knowledge or involvement in this part of the business prior to the disciplinary proceedings.

25. On balance the Tribunal find, that the process which was in place as a matter of fact, was as described by not only the claimant but the office manager, Mrs Smith.

26. Mrs Overton's evidence was that the new system included letters to cover 23 scenarios. The claimant's evidence during this hearing was that it had not been clear to her which letters should be sent out however, Mrs Overton's evidence

was that it was obvious, that there was a drop-down list on the new system and each letter has a title which is self-explanatory e.g. "first *letter to chase up invoice*". There was a dispute over whether it was possible to see all the letters on the drop-down list, the claimant referred to her having been able to see only 4 or 5. The claimant was vague however when asked by the tribunal whether or not she was aware that 23 letters had been created and maintained that some of the letters had not been on the system as at the date of her dismissal and if she did not know they were there she would not have known to look for them but regardless there was no clear policy on which or how many should be sent out . Mrs Overton in cross examination stated that she was "*pretty sure*" that when rolling out the new system, she spoke to the claimant, Ms Smith and the apprentice and printed off all the letters and a pack of each letters was given to all the operators. The claimant denied being aware of this. This information about the scrolling down list and the provision of packs of letters was not however discussed during the disciplinary hearing.

27. Mrs Overton's evidence about what instructions had been given about the new letters was vague and not compelling. There was no policy, no memorandum, no evidence about any meetings to discuss the new letters. It appears that Mrs Overton was relying upon the mere existence of more letters as giving rise to an obligation to send them. The Tribunal do not find the claimant's evidence convincing either however in terms of her knowledge of the existence of more letters. The claimant is experienced in using computers, the system may have changed but scrolling down is a basic function and the Tribunal do not accept that there would not have been at least some general discussion within the very small office about the letters which were now available. The claimant's own evidence is that she and Mrs Smith had discussed the creation of a further letter which Mrs Overton had actioned (for high excess cases). There is also however no evidence that prior to these disciplinary proceedings, there had been any action taken by the respondent in respect of any failure by the claimant to send out the required number of letters or later, to send out any of the 'new' letters which had been introduced. What the claimant was doing was the Tribunal fine, clearly visible and capable of being checked/ monitored by the respondent.

New System –2017/2018

28. A new computer programme was commissioned in August 2016. The system had been used alongside the old system for 3 months prior to the switch and while testing it in this way, the respondent added new functions, it was fully operational from the end of 2017/ January 2018.

29. During July 2017 to October 2017 the Tribunal accept the undisputed evidence of Ms Smith that all paper invoices were inputted onto the new system and that during this period a few mistakes were made by the claimant and some invoices were inputted twice. It is not alleged that the claimant however removed the duplicated invoice from the system.

Reconcile Tab

30. Mr Overton's evidence was that the reconcile function on the new system was "*completely different*" from the old system.

31. The Tribunal was shown both in paper format and on screen, a copy of the computer screen; there are a number of tabs that run along top of the window/screen; *claim, payment in, correspond, notes, credit, charge, reissues, reconcile, edit*. When the Reconcile tab is selected, the screen opens and there are then a number of boxes shown. On the left of the screen are three boxes; a box headed (i) *'reference',* another box to the right of it is headed; (ii) *'charge to*

operator' (and a sum can be inserted or a zero) and the third, to the far right on the left of the screen is headed; (iii) *'remaining write-off*.' Below two of the larger boxes on the left of the screen are two small checklist boxes. Underneath the box headed *'reference'* is a tick-box headed; '*Transfer to debt collection*". Under the box headed 'charge to operator' is a tick-box headed; '*remove from operators list'.* I shall explain each in turn because this is central to the case;

(1) Remove from operators list

32. It is not in dispute that if this small checkbox is ticked, the invoice does not appear on the operators next statement. The invoice is not written off, it simply does not appear on the operators' statements going forward.

(2) Transfer to debt collection tick-box /checkbox- Reconcile Function – OK Debt – August 2018

33. It is not in dispute that if the checkbox '*Transfer to Debt collection'* is ticked, the invoice is transferred to a new facility called; 'OK Debt Collection'. The invoice is not written off.

34. If this checkbox is box is **not ticked**, the invoice will be written off. To prevent the tick-box not being ticked in error/ overlooked, Mr Overton arranged with the software developer that this checkbox is **always ticked by default**. It would therefore take a deliberate action to untick it and write off the invoice.

35. This was a new function introduced to extend the functionality of the 'Reconcile' option. The Reconcile function/tab was no longer in the new system, used to just write off invoices, it had an added feature i.e. the transfer into '*OK debt'* and remove the invoice from the operator's statement (the latter a facility which was in place but not within the Reconcile function).

36. The undisputed evidence of Mr Overton was that the respondent had prior to 8 August 2018, been able to transfer invoices into a similar function, albeit under the previous system it was called 'OK operator'. It is not in dispute that when an invoice is transferred to Ok Debt it creates a duplicate, there are 2 invoices with the same invoice number; the operator and Ok Debt invoice. The OK Debt function was introduced in August 2018 and it is the respondent's case that this new function was shown to the claimant on 8 August 2018.

37. The claimant's case is that she was not aware of the '*OK Debt'* function under the Reconcile function or that to untick the 'Transfer to debt collection' would write off an invoice. Her case is that she had only been told and understood that by using the Reconcile function/tab, she was hiding invoices from the operator's statement.

The steps in the process

38. The evidence of the respondent's witnesses, which was not disputed by the claimant (although her evidence in cross examination was that she could not recall what words appeared), is that when the '*Transfer to debt collection'* box is ticked by default (i.e. the amount is not written off but moved to OK Debt), the '*Remove from operators list'* box can then be ticked (which means that the invoice will not show on the operator's statement.) When Submit box is then pressed a message is shown on the screen to confirm what transaction has been carried out.

39. If the invoice has been transferred to OK Debt (i.e. not written off) the message which appears is;

    Debt reconciled

    The outstanding amount has been reduced to zero and the repair is now closed. All remaining debt has been transferred to a new job for collection. [my stress]

40. If the 'Transfer to debt collection 'box is unticked, the message which appears on the middle of the screen is a different message which reads;

    Debt reconciled

    The outstanding amount has been reduced to zero and the repair is now closed

41. The Tribunal find that the words '*written off'* do not appear on the screen.

    Needs Action list

42. The evidence of Mrs Overton, which was not disputed by the claimant, is that on the new system there is a log where the respondent can see what work is outstanding. When an invoice is transferred to OK Debt, this has no effect on the 'Needs Action' list. If an invoice is written off there is a corresponding reduction in the 'Needs Action' list. The evidence of Mrs Overton is that she believed that the claimant wrote off invoices to reduce the amount of work that she was required to do. This was denied by the claimant.

    Claimant's attitude/performance

43. It is not in dispute that on both computer systems, there is a note kept of the history to the invoice which shows the progress of the invoice including what action has been taken to recover the payment. Mrs Smith gave evidence that the claimant did not always read the notes before taking action and gave an example of an email sent direct to a customer where the notes recorded that the email address was incorrect. The Tribunal accept the claimant's evidence which was not disputed, that she was not aware of this incident and that the respondent had not taken any steps to bring this to her attention at the time.

44. There was from Mr and Mrs Overton and indeed from Mrs Smith it appears a shared view that the claimant was not always as proactive in chasing for payment as perhaps they would have liked. The evidence of the respondent was also that the claimant was very opinionated about having to contact customers on Account work and that the operators should themselves chase the customers for their details where they had failed to obtain the details at the time of the repair. The claimant conceded in cross-examination that she did believe operators should get payment upfront or contact the customers themselves but denied that she would complain about it.

45. The Tribunal find however on balance of probabilities, that the claimant more likely than not voiced her irritation at having to contact customers for details on Account work. However, Ms Smith accepted under cross examination that she would herself have been *"annoyed*" on those occasions but that she considered that the respondent had a duty of care towards the operator.

46. The Tribunal find that despite the criticisms of her performance and attitude, reluctance to contact customers by telephone and chase for details on Account work, the respondent took no action to address it and the claimant continued

working as she always had. There is no suggestion her attitude or performance had materially changed in 2018.

Instructions June 2018

47. It is not in dispute that the claimant was asked by Mr Overton from June 2018 to concentrate on outstanding invoices and go through each operator's statement and chase all debts from November 2017 and that Mr Overton took on the task of looking at the paper invoices which predated this.

48. The evidence of Mr Overton and of Mrs Smith was that the claimant had been told to chase by letters and telephone. The claimant's evidence under cross-examination was that while she had accepted (p.119) in her statement for the disciplinary appeal hearing, that she had telephoned customers to chase invoices, this had not been a direction from Mr Overton and that she had been chasing payments 'back' from the insurers for the customers, not chasing debt. The claimant referred to the invoices within the bundle where there is no reference to telephone calls however, her evidence is that she did chase and ultimately, she does not contend that the invoices which were written off, should have been and that there was no further action which could have been taken to recover the payments.

Instructions 8 August 2018

49. It is not in dispute that Mr Overton spoke with the claimant on the 8 August. The claimant had informed him that she was up to date on chasing the outstanding invoices he had in June, asked her to chase. The claimant's evidence is that she was instructed to go over all the operator's statements and tidy them up; her evidence is not that she was told to write off invoices, but that; "*the meaning of tidying up was a reference to hide an invoice from the operator*". There is a dispute over what those instructions were and whether she was told she needed to telephone the customers to chase outstanding payments.

50. What was discussed in June and August 2018 would be considered by Mrs Overton as part of the disciplinary process.

August/September 2018

51. The undisputed evidence of the respondent is that operators began complaining in around the end of August to early September 2018, about the value of their outstanding repairs as shown on their statements, falling without a corresponding increase in payments. Mrs Sue Smith then informed Mr Overton that the respondent had received a cheque from an insurance company for (invoice 579005) however when she tried to allocate the payment to the invoice, the balance was showing as zero. The claimant had written off the invoice and this had been actioned only the day after the claimant had written out to the customer.

52. Mr Overton instructed the respondent's software developer ('TJS') to compile a report of invoices written off by the claimant, tracked by using her username, password and IP address. The report it is not in dispute, revealed that 400 invoices had been written off over 8 days. After taking off duplicates and training invoices, the number was circa 300 invoices.

53. There was some confusion over the report during the disciplinary process; the report TJS provided (p.404- 409); (**TJS report)** showed the writes off by

reference to the date they had been written off. However, Mrs Overton attempted to reorganise the spreadsheet by reference to invoice date order (p.397 – 403) (**Amended Report**).

54. The claimant's case is that she was only sent the **Amended Report** (p.397- 403) prior to the disciplinary hearing and the TJS Report was not sent to the claimant until after the appeal hearing (p.404 – 409). Mrs Overton did not address this issue with the two versions of the reports, in her witness statement and under cross examination she was not sure which version of the report had been relied upon at the disciplinary hearing and that she "*assumed"* that the TJS report had been provided to the claimant. However, the appeal report refers to the claimant having noticed that the dates of the actions on the report did not appear to match the records of the actions held on the system. The appeal report dated 6 November 2018, refers to Mrs Overton having asked Mr Buckley of TSJ about this and that he had replied on 30 October 2018 explaining that Mrs Overton had sought to put the list of invoices and their actions into invoice number order which had misaligned the dates.

55. There is then a letter from the claimant after she received the appeal report, on 12 November 2018 (p.149) asking for a copy of the original (TJS) excel spreadsheet before it was sorted by Mrs Overton. This was sent by Mrs Overton on 14 November 2019 to the claimant. The Tribunal find therefore that a copy of the TJS report was **not** provided to the claimant during the disciplinary hearing on 25 September or before the appeal process. The relevance of this is addressed further below however the claimant does not allege that that the confusion caused by trying to re-order the report was deliberate.

56. The claimant accepted in cross-examination that the disciplinary process had come about because the respondent had received payments for invoices which had been written off. She does not therefore question the genuineness of their reasons for initiating the disciplinary proceedings.

Suspension

57. The claimant attended a meeting with David and Sarah Overton on 14 September 2018 to discuss the findings of the TJS Report.

58. It is not in dispute that what the TJS Report showed in summary, was that the claimant had by using the Reconcile function, transferred 44 invoices on 8 August 2018 to '*Ok Debt collection*. She had then un-ticked the checkbox; *"transfer to debt collection'* and wrote off circa 300 invoices.

59. The Tribunal find that the claimant was shown the TJS Report on screen at this first meeting. Mrs Overton could not recall which report had been shown however the Tribunal note from the bundle (p.125) that she referred to showing this version and then after this changing the report into invoice order and providing the claimant with a copy. The respondent asked the claimant to explain why so many invoices had been written off and in particular, it appeared that over a 100 had been written off in 1 day to which the claimant according to the notes replied;

"*Didn't *think I'd been through that many. Some of them with the old numbers 2016 and 2017 go back on the old system where no response or contact with them. They're hanging on the bottom. We used to be able to hide them but I've put them onto the ok debt list but then I had twice as many on there".

60. Ms Overton pointed to the claimant that she had transferred 44 to OK Debt and then written those off but that the rest had been immediately written off and

'hidden' from operator. Mrs Overton refers to having gone through some of the invoice records and she cannot see that any procedure had been followed before they had been written off. The claimant responded, not by denying having written off the invoices but;

"these ones on here on the old system so I'd check on the old system to see what letters have gone out as we didn't transfer all the information across"

61. When asked again about writing off 100 in a day, the claimant is recorded as stating; "***A lot of the time not what I was doing. I was looking at the old ones and taking them off. If there's 100 in a day it'll be the old ones that's what I was doing as in clearing up statements and going through them***."

62. Because the claimant does not say at this meeting that she had not written off the invoices, but that she had understood she was only hiding them from the operator, much of the meeting is then concerned not whether what she did or did not know, and what training she had received but with a discussion about what had been done to chase the payment before she had written them off. The notes record the claimant being asked about the 15 August and how she could write 6 new invoices off in just 2 minutes because this would not have given her time to check the history of the invoice. The claimant is recorded as stating she cannot comment on the individual invoices but when asked generally how she can write off an invoice and check the history in that short amount of time, without following procedures, the claimant asks what procedures she is referring to. There is then a reference to Mrs Overton referring to the letters that need to be sent out and the claimant is recorded as stating in response;

"*they'll be ones that have had letters and no reply. I'm not going to write it off willy-nilly if it's a recent one and there's something we can do".*

63. In response to further questions about the 300 invoices written off the claimant referred to being told to "***clear off all the old ones***". Mr Overton states that when told to 'clear off all the old one', the respondent meant to look at them to which the claimant states; "***I won't write anything off ever again I didn't want to write them off."***

64. The claimant is informed by Mrs Overton that even with the old invoices, where there has not been letters chasing, she cannot just write off to which the claimant is recorded as stating;

"There is no way I would write an invoice off without reading what has been done. No way I've just gone through all of them and ticked written of. It's about choosing… were they old operators? There's some that you're never going to get the operator to go and ring the customer and they've had 3 letters and what else can you do?"

65. The claimant is asked how she had time to write off over 300 in 6 days to which she replies that; "***because I'm not doing anything else****."*

66. The claimant had produced her own notes of the meeting (p.43). The notes are not as comprehensive as the respondent's but record the claimant stating that she had '***hid invoices'*** from the operators as instructed by David Overton, where they stood little chance of payment. The notes the Tribunal find are however to a large extent consistent with the respondent's notes although the claimant would later complain about certain comments not having been made by her or taken out of context. However, crucially her own notes record the claimant being asked about writing off invoices and nowhere within her own notes does she deny that this is what she had done.

67. The claimant does allege that no mention had been made in that meeting to the 'OK Debt' function. The respondent's notes were taken at the time, the claimant did not take contemporaneous notes herself and given her apparent confusion at the meeting about what was being discussed and meant, including reference to 'writing off', the Tribunal find on a balance of probabilities that the notes are correct in that regard albeit the claimant may not have understand the reference or significant at the time of this meeting.

68. The claimant was then suspended on full pay that day. The suspension letter dated 14 September 2018 refers to the conversation that morning; "***regarding the failure to follow the process of chasing and recovering monies from outstanding invoices".***

69. Despite the claimant in these proceedings challenging the notes, the claimant did not dispute that Mrs and Mr Overton had discussed with her writing off invoices but her evidence under cross-examination was that the term had not been used before this date and what she thought Mrs Overton meant was that the invoices had been '***hidden from operator'***. When it was put to the claimant under cross-examination why if she had believed she was only hiding statements from the operator, she had asked whether the invoices could still be viewed from the system during the meeting on the 14 September, her response was that she could not recall asking the question. The notes record not only the claimant asking the question but Mr Overton responding to it, and explaining that they could not be viewed once written off. The Tribunal therefore find on a balance of probabilities that this question was asked by the claimant.

70. The claimant was asked under cross-examination about her comment that she would not write-off "***willy-nilly"***. The claimant under cross-examination did not accept that she had made that comment during this meeting, however it is a fairly distinctive comment, she had not raised this during the appeal and the Tribunal find on balance of probabilities that she did make this comment during the hearing – it is not inconsistent with other comments she made about checking the history to the invoices.

71. The claimant under cross-examination also denied making the comment; *"**I won't write anything off again***…". The claimant denied having made this comment however on a balance of probabilities, given that the notes appear largely accurate and the claimant does not dispute that the words 'writing off' were used albeit she understood they were being given a different meaning, the Tribunal find on balance of probabilities these words were said.

72. It was also put to the claimant that she had said*; "***no way I've just gone through all of them and ticked written off. It's about choosing."*** The claimant stated that this had been taken out of context and that she had not said she had chosen an invoice rather her words had been; "***I don't just choose an invoice***". The claimant may be correct that the words she used have not quite been captured correctly however although the claimant takes issue with some of the comments in the notes of the meeting, the essence of what was recorded is the Tribunal find in material respects, not in dispute. It is not in dispute that it was put to her that she had written off 300 invoices, and she did not deny she had carried out transactions on those invoices and did not at the time deny having '*written them off'.*

Invitation to Disciplinary Hearing

73. The claimant accepted in cross-examination that when she received the letter of 20 September 2018 on 21 September 2018, inviting her to the disciplinary hearing, it included with it copies of 59 of the invoices. She divided them into those which Mr Overton had said he would go over prior to November 2017 and those from November 2017 (p.184- 241). She was also sent a copy of the **Amended** Report (p.398 – 403).

74. The claimant confirmed in cross-examination that she had time to consider the evidence supplied before the disciplinary hearing.

75. The disciplinary took place on 25 September 2018 and was chaired by Mrs Overton. In attendance was Mr Buckley, director of the TJS. The claimant was told that the allegation was;

    "***The excessive number of invoices that have been written off, without following the correct procedure to chase outstanding invoices, resulting in unnecessary financial loss to our company and our franchisees"***

76. The claimant was informed of her right to be accompanied and warned that the outcome may be summary dismissal.

Disciplinary Hearing

77. The claimant had prepared a statement for the disciplinary hearing dated 25 September 2018 (p.45) in which she now denied having '*written off'* anything. She read this statement out at the start of the hearing. The claimant stated that it had only been on her way home after the first meeting, that she had realised she had not written anything off. That she had not realised that she was writing off the debt and Mr Overton had asked her to '*hide'* the repairs from the operator. She maintains in this statement that as far as she was aware, she was doing as Mr Overton had instructed her to do.

    <u>Instructions from Mr Overton</u>

78. The statement the claimant read out at the hearing alleged that;

    "On 8 August, I said that I was up to date on this chasing. I was then instructed by David to go over the operator statements and tidy them up. He said that one of the operators… he was fed up of seeing the old "55" invoices sitting on his statement. He said to go into reconcile, no charge to operator and uncheck the box on the left and this will be hidden from operator. Not written off"

79. There is no dispute that there was a conversation on the 8 August where Mr Overton gave the claimant instructions, this is the evidence of the claimant, Mr Overton and Mrs Smith. What is in dispute is what was said to the claimant on 8 August 2018.

80. Mrs Overton's evidence before this Tribunal was that her belief had been that the claimant would not have been told to uncheck the box on the left because that "*that would write off*", which is why she believed this instruction would not have been given. Mrs Overton accepted that if Mr Overton had given that instruction, the claimant would have been doing what she had been told to do by writing off the invoices and the outcome of the disciplinary process would have been very different. Mrs Overton however was of the belief that there was "*no way*" the claimant would have been told to do as she alleged.

81. The notes of that disciplinary hearing refer to the claimant describing the process of writing off a debt, however the claimant's evidence under cross-examination was that she was not describing the process of writing off a debt, that was the interpretation placed on what she had said by Mr Buckley when he prepared the notes, what she was doing was describing was the instruction that Mr Overton had given her. The claimant's explanation in this regard is more credible given that her position throughout the disciplinary hearing was that she had not written off an invoice. The claimant describes the process she followed on the system (p.47); "***going into reconcile, not charging operator, uncheck the box underneath and hide from operator then submit"***

82. The undisputed evidence of the respondent is that the transfer to '*debt collection box* '(which it is not disputed is ticked by default) sits underneath a separate box headed '*reference*'. Those boxes are both to the left of the screen; the '*transfer to debt collection'* box is to the far left, the '*remove from operator's list*' is to the right of that other box but still over to the left of the screen far left. To write off the invoice would require deliberately un-ticking/unchecking the '*transfer to debt collection'* box. To remove the invoice from the operators list would require the Tribunal find, a second step; a deliberate ticking/checking of the '*remove from operator's list'*.

83. During the disciplinary hearing, Mrs Overton does not specifically explain to the claimant what happens when the '*transfer to debt collection'* box is unticked i.e. that this is the box which will write off.

84. The box however which removes the invoice from the operators list is clearly identified at the side of it with the words; '*remove from operators list',* the box which writes off however, is not marked write off – it is entitled;' *transfer to debt' function.*

85. In the hearing Mrs Overton set out what the process is which should have been followed; '*Transfer to debt collector – checked by default. Hide from operator – unchecked by default'.* The claimant then asserts that she had not realised she was writing off debt. In cross-examination the claimant was asked what she had understood *'repair closed'* to mean (the words which appear in the middle of the computer screen when an instruction to write-off has been submitted i.e. when the Submit function is selected), the claimant's response was that she did not recall what the words in the box had said. It was put to her that this showed a 'blasé' attitude.

86. The disciplinary notes refer to Mrs Overton putting it to the claimant that some repairs had not had 3 letters and asking why they had been written off and the claimant not responding to that question. Under cross-examination the claimant alleged that she had answered that question by saying that there was always 3 letters sent out where details were missing but three letters were not sent out where there was no windscreen cover or third-party. In light of the Tribunal's findings about the number of letters normally sent out, it is surprising that the claimant would not have felt able to respond to this question, and on a balance of probabilities find that she did respond as she alleges and that the notes did not record her response. The Tribunal find (given its findings on what the normal practice had been) that on a balance of probabilities, there was a lack of understanding on the part of Mrs Overton around the process which had been followed routinely with respect to the various types of payment methods and which letters would normally be sent out. Mrs Overton had by her own admission before this Tribunal, had limited involvement in this part of the business prior to the disciplinary proceedings.

87. The claimant is questioned about the number of letters which had gone out, however Mrs Overton did not check with Mrs Smith or Mr Overton what they understood the process to be, that does not appear in the statements of the interviews she would conduct with them. The Tribunal heard however the evidence of Mrs Smith before this tribunal, that she agreed with the claimant's account of the normal letters sent out and the Tribunal find that it is more likely than not that she would therefore have given the same information to Mrs Overton if she had been asked as part of this disciplinary process. A view that the claimant had not chased for payment as she should have done, the Tribunal find may well have influenced Mrs Overton perception of the claimant, her performance and her possible motivation in writing off debt (i.e. to reduce the Needs Action list).

Invoices – examples

88. In respect of invoice U59CZF; the claimant is recorded in the notes as agreeing that the customer could still pay the debt. Under cross examination the claimant's evidence was; "*suppose they could - it was pay up front and we could not get payment from the insurer, the customer was not told at time, the operator should have got payment upfront*". The claimant again asserted that it was the operator who should have got the correct information at the time however, she conceded that she had not spoken to the operator (prior to the invoice being written off, albeit the claimant maintained that she thought she was only hiding it from the operator). The claimant put it to Mrs Overton that the responsibility is with the operator to recover payments where they should have taken the payment at the time of the repair however, she conceded that this did not obviate her responsibility to chase for payment.

89. In respect of invoice T15JJX; the claimant referred to this being on the aged debt list and was chased every week. The claimant does not assert that this was an invoice which should have been written off.

90. The claimant was also taken to another invoice 561016; the claimant's evidence during the disciplinary hearing was that the respondent could not get payment from Wicks or Glasscare (a claims service for motor insurers), however it was put to the claimant that she could have contacted Glasscare before it was written off and the claimant did not dispute this but again made the point that she was hiding it from the operator and not writing it off.

91. In respect of invoice M10TSW; the notes record Mrs Overton mentioning that only one letter had been sent out and the claimant agreeing. In cross-examination, the claimant denied that she had not done her job properly and alleged that a bad debt letter would not have gone out as a matter of course, although the operator can ask for it to be sent. She confirmed that she had not contacted the operator but stated that the operator could have contacted her and they can see from there at the letters which have been sent. Her evidence was that it was up to the operator to tell her if they wanted a bad debt letter sending but in any event, she had not written it off. However, the claimant does not allege that she said all this at the hearing, she had only accepted that a bad debt letter could have been sent.

92. In respect of invoice RJ62KZR; the claimant at the disciplinary hearing had confirmed that she had overlooked the excess on this claim. In cross-examination she stated that she has looked into this matter since and that it was a failed excess however she admitted that at the disciplinary hearing she had simply admitted to overlooking the excess and gave no other explanation

93. With respect to invoice HG08KUF; the notes of the disciplinary hearing record Mrs Overton asking the claimant about this invoice and the claimant had failed to answer. The claimant alleged in cross-examination that she had raised at the appeal that things were missing in the disciplinary notes and that what she had said at the disciplinary hearing was that this invoice had received a 'no windscreen' cover letter and a bill. This is referred to in her disciplinary appeal meeting notes (p.117). Her evidence is that she had the information at the hearing to answer to this and had done so, and explained that this had received the appropriate number of letters. Her evidence was that two letters had been sent, normally only one letter would be sent for this type of invoice, but an overdue reminder had gone out, so perhaps the operator had requested one. A copy of the invoice itself was within the bundle which confirms that the claimant had sent a no windscreen cover letter on 2 March 2018 and an overdue reminder on 1 June 2018 (p.216). The Tribunal find that the claimant had the information to respond, it was a simple explanation and find therefore on a balance of probabilities that she provided this response at the hearing and the notes had failed to record it.

94. The claimant's case is that for payments relating to no windscreen cover, they would only send out a bill. It was put to the claimant under cross examination, that a third letter could have been sent. The claimant did not dispute this but referred to the letters which were normally sent out and she had sent out the normal amount.

95. With respect to invoice 577419; during the disciplinary hearing the notes record that Mrs Overton put it to the claimant in the hearing that the customer should have had a bad debt letter and the claimant agreed but she had been focusing on the post November 2017 invoices. Under cross-examination the claimant's evidence was that although she conceded that it could have had a bad debt letter, bad debt is not a letter used for windscreen cover and she could not recall why she would therefore have said what is recorded in the notes at the hearing however she did deny having given this response and the Tribunal find on a balance of probabilities that she therefore had. The claimant was asked by Mrs Overton in the hearing, whether she had telephoned to chase this debt. The claimant stated that telephone was not part of the process.

96. With respect to 568323; the claimant conceded in cross-examination that she had possibly given the response recorded in the notes, namely that query letters for this repair were on the old system and therefore not available and when asked by Mrs Overton if there was no information why she had not chased, the claimant's recorded response was that the communications were disjointed, missing details letter had been sent on 19 January and the repair was over a year old. The claimant in cross-examination went on to say that this would have been one of the pre-November 2017 invoices which Mr Overton was looking at but accepted that nothing further had been done to chase for payment before it was 'written off'..

97. With respect to invoice; 579005; the claimant did not deny that in the meeting she was asked about this invoice which had been written off the day after a letter had been sent out. Her response to Mr Overton at the time was that it had not been written off, just hidden from operator

98. In respect of invoice KM67B; in relation to this invoice this was an invoice where three letters would normally be sent. The claimant did not deny that in the disciplinary hearing she had said that she had not sent another chasing letter,

accepted she could have sent but did not do so because three letters had already been sent out.

99. Mrs Overton mentions briefly in this hearing that 5 letters should be sent and not 3, and later asserts in the meeting that all overdue Accounts should get an overdue reminder i.e. a fourth letter. The Tribunal find Mrs Overton's evidence before this Tribunal on exactly what letters should be sent out was unclear, there is no written policy and her evidence of what letters should be sent does not accord with the evidence Mrs Smith gave nor with what is set out in the operator's manual. Nowhere within her witness statement does she clarify her evidence on this point. The claimant states in this disciplinary meeting that if there is a process for 5 letters to be sent everybody needs to be told and as already, set out, the Tribunal find on a balance of probabilities, that the claimant was not aware of any policy of sending out 4 or 5 letters as standard and Mrs Overton does not in the disciplinary hearing proceedings address the claimant's point that she had not been told about a change in policy. Mrs Overton in her evidence before this Tribunal did not clarify what she is alleging the correct process is for each type of payment method, what letters should be sent out, when this was communicated and how/by whom.

100. There is in the disciplinary hearing, a discussion about 12 or so specific example invoices, in respect of a significant number of them the claimant either accepted that further chasing letters could have been set, excesses had been overlooked, the debt was over a year old and the customer she indicated would therefore be unlikely to respond to another chasing letter, or letters were on the old system and not available. In summary; more could have been done to chase payment. The claimant does not contend that the invoices were ones which should have been written off. The claimant did not allege within this hearing that she was right to write off the invoices, that she had made any sort of decision that it was correct to do, her evidence is that she was only hiding the invoices from the operator and that is the instruction she thought she had been given. It was not in dispute during the disciplinary proceedings and is not in dispute in these proceedings, that the invoices were written off and the claimant did not and still does not dispute being the one who did that.

<u>Reconcile function</u>

101. The respondent's notes of the disciplinary make brief reference to the claimant's companion, Mr Slater (himself an operator/franchisee) asking whether the claimant had any formal training, asking if there was a written down procedure and that he thought the 'hidden from operator' function was misleading. The claimant complains that the notes failed to record in full the questions and answers provided. The Tribunal find that the notes are deficient in this regard.

102. The claimant produced for the appeal, a copy of the notes her companion had produced (p. 46). The notes record the claimant confirming that in respect of training it had just been a "*show and tell*" and Mrs Overton confirming that there was no written down process. In terms of the '*hidden from operator'* function, Mr Slater's notes record Mr Buckley explaining the Reconcile function as; "*writing off debt, whether it is absorbed by the Company or charged to operator*". The notes also record Mrs Overton and Mr Buckley not responding when asked whether the claimant was aware of the Reconcile function.

103. The Tribunal find that the notes of Mr Slater are on a balance of probabilities, a more reliable account of the questions Mr Slater asked and the answers given. The respondent's make reference to those questions but it is apparent that they have failed to capture the full extent of what was said.

104. The Tribunal find, that the Reconcile function was to write off an invoice and/or remove it from an operator's statement but this is not how Mr Buckley explained it at the hearing. Mr Overton's when asked about this explanation from Mr Buckley during the Tribunal hearing, gave evidence that what Mr Buckley;

"*…should have said rather than saying that the function was to write off, was that it was to move it to debt collection"* and that the**; "*options are; hide, remove, write-off."*** and that ***"if it is on an operator's statement, we can write it off from his statement and we take responsibility to pay it off - you could say it's a bit confusing".***

105. If it is confusing to Mr Overton and to Mr Buckley who developed the software, this would we find, on a balance of probabilities have probably been confusing to the claimant.

106. Mrs Overton's undisputed evidence is that prior to her involvement in this disciplinary process, she had not been involved in managing this part of the business and therefore had no knowledge of whether or not the claimant had under the old system, written off invoices. However, she proceeded to then say that she understood that the claimant *"certainly*" would not have written off or had the authority to write off invoices, that she was not sure who did although she believed it may have been Mr Overton. Further, her evidence was that the writing off of invoices should only be done with the agreement of the operator because it is their income; "*the claimant never had the authority to write off, it was to transfer to OK Debt not to write off, only if everything exhausted the operator agreed that an invoice can be written off, we would not expect her to do it.*"

107. Mrs Overton was asked by the Tribunal to clarify whether from January 2018, when the new system was launched to all operators, whether the claimant then had the ability to write off an invoice, she stated "*no because, I do not believe so, I do not think there was any facility for the claimant to go into it. My role was a very part-time role, my role was more with operators than the invoice system, my role came about since the disciplinary and up to that point I was not involved*."

108. Mrs Overton also confirmed that she did not know how under the old system debt could be written off. It is surprising that Mrs Overton did not seek to establish for herself; how the claimant had used the previous system, what functions she had been familiar with using, whether she had been given the authority previously to write off invoices and/or whether she was familiar therefore with what should and should not be done before writing off. None of those questions were asked by her of Mr Overton or Mrs Smith, according to the notes of the interviews with them.

109. The TJS Report, shows that an invoice was written off on 3 November 2017 and one on 31 January 2018 (prior to the invoices which were the subject of the disciplinary hearing in August 2018). The Tribunal asked Mrs Overton about those two earlier written off invoices which appeared on the spreadsheet but her evidence was that she did not know. When asked whether she had considered as part of the disciplinary process whether the claimant had written off those two previous, Mrs Overton's evidence was; "*no, I don't believe* so" and she went on to say that she was not sure if they had a discussion about them or not and that she did not know the "*ins or outs"* but as this is a cloud-based system thing can be carried out remotely. The claimant's undisputed evidence

was that she did not carry out those two writes off and that she had never written off an invoice and this was not disputed by the respondent.

Further Investigation

110. Mrs Overton interviewed Mr Overton and Ms Smith on the 26 September 2018 and notes of that interviewed were prepared.

Mr Overton

111. In his interview Mr Overton confirmed that he had spoken with the claimant in May or early June 2018 about chasing debt, his account of that conversation was that he had asked the claimant to go through the individual operator's statements, look at everything from October 2017 and chase outstanding debt which involves; "*talking to the operator, communicating with the customer and contacting the insurance company. The lines of communication are by phone and email. Lyn said if I've sent 3 letters what else can I do? I said don't send them another letter, pick up the phone to them…"*

112. When Mrs Overton was asked whether she had asked Mr Overton about the claimant's recollection of the instruction he had given to her on 8 August, her evidence was; "*no, I didn't put it to him - not with that statement*" but she went on to assert that they had spoken about it, however if she did, she did not detail in her evidence before this Tribunal what was discussed. Further, such a discussion with Mr Overton was not recorded and if she relied on anything said during any informal discussion with Mr Overton, that was not communicated to the claimant. The claimant was only supplied with the notes of the formal interviews with Mr Overton and Ms Smith as the evidence relied upon when making the decision to dismiss.

113. Nowhere within that interview notes does it record Mr Overton being asked about the instruction that he had given to the claimant to; "*uncheck the box on the left".*

114. Mr Overton refers in his interview, to the conversation he had with the claimant on the 8 August 2018 however his evidence to Mrs Overton is that he told the claimant that the operators statements need to be "*cleared up*". He referred to showing the claimant the new feature on the programme which can hide, remove, duplicate and transfer or write off an outstanding debt and he alleges that; "***clear instructions were given for each facility and I demonstrated each on her machine*.**" Mr Overton alleged that he had explained that; *" …**when every type of contact has been exhausted and the operator has been involved, if there is nothing more than can be done e.g. it is very old, the customer has moved house, or the phone number is incorrect then the debt can be written off. I explained that the operator needs to be involved as they have done the repair…"***

115. Mr Overton was not asked to describe the training in any detail, how long the training had lasted, or how he had checked the claimant's understanding of each facility she had allegedly been shown or indeed why she had been shown how to write off, when in the previous 13 years she had not written off invoices. The evidence of Mr Overton does not appear to support Mrs Overton belief, as expressed to this Tribunal, that the claimant had no authority to write off debt because his evidence in his statement is; ***"…if there is nothing more that can be done…then the debt can be written off…"***

116. There was also no discussion about whether the claimant was doing anything differently in terms of how she was processing invoices than how she had over the past 13 years in terms of the type of and amount of letters sent and whether any issue had ever been raised with her about her practice/performance.

Mrs Smith

117. The notes of the interview with Mrs Smith refer to a conversation at the end of May 2018 when Mr Overton asked the claimant to 'clear up' each of the operator's statements and go through each one individually, from the October 2017 ones onwards and that she was to chase by telephone, send another letter if necessary and send a note to the operator about what had been done if she could not chase it anymore.

118. Mrs Smith also recalled a conversation on the 8 August 2018 when Mr Overton showed Mrs Smith how to transfer an invoice to '*OK Debt'*, and if nothing further could be done to obtain payment and if the operators agrees, then to write it off and hide it from the operator. Mrs Smith in her statement stated that the claimant was not at work when Mr Overton had explained the new function to her, however she was in the following day and Mrs Smith stated that he explained the process "*exactly the same*" to the claimant.

119. Mrs Smith was not asked to explain in detail what she had been shown, to explain which boxes she was told to uncheck or whether she had heard Mr Overton tell the claimant to uncheck the "box on the left". She was not asked how long the training lasted, whether she felt there was room for misunderstanding in the absence of anything written down. Mrs Smith was also not asked about how many letters she understood should be carried out on which type of invoices, whether she understood there should be more than 3 letters sent out on Account work or generally 5 letters sent out as standard under the new system. Mrs Smith's evidence before this Tribunal, was supportive of the claimant's account of the normal amount of letters which were sent out.

120. In cross-examination the claimant denied that she had been told in the conversation with Mr Overton at the beginning of June or August to chase insurance companies or customers by *telephone,* she also denies being told anything other than to hide from operator and told how to do that by unchecking the "*box on the left*".

121. Mrs Overton did not arrange a further hearing or provide the claimant with copies of the witness statements and allow her an opportunity to comment on them, particularly their account of what she had been shown and what had been explained to her, before she arrived at her decision. The claimant did not therefore have the chance to dispute that she had been shown all the functions under the Reconcile tab and in particular shown how to write off invoices.

Evidence before the tribunal – training

122. Mr Overton's evidence before this Tribunal is that he was responsible for training on the new system and that there was no manual in place for the new system for the operators to follow and that he had given the claimant; "*two minutes of training*" on 8 August. Mr Overton in his evidence, stated that when he gave this 2 minutes of training to the claimant, he did not mention how to write off an invoice because it was not what he wanted her to do. When asked whether Mr Overton felt it would have been safer to explain to the claimant how invoices are written off on the new system i.e. the consequences of unticking the checkbox for

'transfer to debt collection', his evidence was; "***she fully understood what needed to be done****"* and he referred to the claimant being able to come and see him if she was concerned that that she had not raised any concerns. This is not consistent with what was said in his statement during the disciplinary hearing or what Mrs Smith had said.

123. Mrs Smith's evidence to the Tribunal was that she could not recollect what Mr Overton had said to the claimant when he had trained her. However, her evidence was that the claimant was more experienced in computers than she was, it was a simple operation and she does not believe that the claimant made a mistake. Ms Smith evidence was the claimant did not mention to her a further alleged conversation with Mr Overton on 10 August.

124. The claimant's evidence before this tribunal was that Mr Overton stood at her desk for a few minutes on 8 August, and his instructions were to; "*click on reconcile tab, choose bad debt (or training), select tab for 'no charge to operator and* ***uncheck that box (untick it),*** *check that box and submit"*..

125. Mrs Smith's evidence, was that she understood that the invoice could not be hidden from an operator without moving it to OK Debt or removing it completely.

126. Under cross examination Mrs Overton's accepted that when transactions are carried out on the claimant's computer, each action is time stamped and comes up on the report under the event date. She did not dispute that the report did not show a time stamp for transactions on 8 August. Her evidence was that a time stamp would only be created when the 'Submit' tab is pressed therefore Mr Overton must have shown the tabs and process to the claimant without pressing 'Submit (because there is no date stamp to show any transactions when he had given the training). She accepted therefore that the claimant would not during the training, have seen the text boxes with the messages which appear when the Submit function is pressed, however her evidence was the claimant would have seen them herself when carrying out the functions later.

127. Mrs Overton's evidence was that the new system was so simple no further training was required and that the report shows that the claimant had in fact carried out a transfer to OK Debt collection, 44 times before starting to write off the invoices (p.39). Despite asserting it was simple, the Tribunal note that Mrs Overton deferred to Mr Buckley to explain the Reconcile function at the disciplinary hearing and Mr Buckley, according to Mr Overton, had not given a full or accurate description of its functions..

Outcome

128. Mrs Overton wrote to the claimant on the 26 September 2018. The claimant was informed that her explanation that she did not know she was writing off invoices was not satisfactory in that Mrs Overton had interviewed Mr Overton and Ms Smith and that Mr Overton had;

i. ***Confirmed that he had showed the new facility to her and how to; hide, duplicate or write off invoices with a demonstration of each.***

ii. ***That he had stated that the debt must not be written off until every type of contact had been exhausted and the operator involved.***

129. The claimant was informed that Ms Smith had recollected witnessing both of these conversations.

130. Mrs Overton's evidence is that she formed the belief that the claimant had been asked to chase all the outstanding invoices until ***all avenues had been exhausted*** and that she ***chose*** instead to write off invoices and that this could have caused financial loss to the operators and the company.

131. That the claimant carried out those transaction is not in dispute, her case is she was not aware she was writing off, she felt she was doing what she had been told; to hide them from the operator. She does not contend that she had exhausted all avenues to recover the debt and that they should in any event, have been written off.

Dismissal

132. The letter the claimant received from the respondent (p.457/8) is dated (p.54) 26th of September 2018 and refers to;

"***The excessive number of invoices that have been written off, without following the correct procedure to chase outstanding invoices, resulting in unnecessary financial loss to our company and our franchisees"***

133. It is evident from the outcome letter that the belief Mrs Overton had formed that the claimant's explanation was unsatisfactory had been materially influenced by the evidence of Mr Overton and Ms Smith, which the claimant had not had a chance to respond to. It appears from Mrs Overton's evidence to have also been influenced by informal discussions with Mr Overton which were not recorded or communicated to the claimant.

134. The claimant referred to a document in the bundle, which was not raised in the disciplinary or appeal, which had not been provided to her until after the appeal, during disclosure for these proceedings. This document (p.262) shows an invoice (559479) which appears on the list of invoices written off (p.408). The transaction is recorded as 15 August 2018 at (p.262). The claimant contends that it had been written off by someone else on 15 August. The history to the invoice shows that it had only 1 letter before either written off or transferred to OK Debt (the history shows "Hidden from Operator"). The claimant had requested copies of all invoices on the report – these had not been supplied as requested for the grievance but had been disclosed for this hearing. The claimant therefore alleges that whoever carried out this action, had only sent one letter before writing off, something she had been criticised for during this disciplinary process for (p.215). Mrs Overton's evidence under cross examination was that this invoice had been transferred to OK Debt (as the history shows payment from Optic-Kleer to Optic- Kleer) and that it could still be chased when in OK Debt, whereas the claimant had transferred and then written off the invoice. Further, the claim was resubmitted, so 2 letters had in fact been sent out.

135. The claimant also identified from the information provided for this hearing, that another invoice 554679 (p.252) had been processed as "payment from optic-Kleer, to Optic- Kleer: Bad debt" and under cross examination Mrs Overton accepted that it had been moved to bad debt without 3 letters having been sent out and this cannot she conceded have been sent to OK Debt and continued to be chased, because OK Debt was not a function available in March 2018. Mrs Overton could not explain why this was showing as processed to bad debt in March 2018 and appeared also on the list of the actions on the claimant's computer and written off on 21 August 2018 (p. 408) however, the key issue was

that it had been moved to bad debt without 3 letters being sent. The claimant denied that she had carried out this process because it did not show on her report for March 2018 and her evidence was; "I did not use the reconciliation function before that so was not me".

136. The claimant also put it to Mrs Overton in cross examination that another invoice (569197) showed a transfer to OK Debt on 9 August 2018 (p.287), which she could not have carried out on 9 August because she was not in work on that day. Mrs Overton a conceded that this was another example of where 3 letters had not been sent according to the history before it was transferred to Ok Debt. Mrs Overton's evidence under cross examination was that there could have been a conversation with the employee at the time who carried out that transaction about how many letters had been sent (although no further evidence was provided about any such conversation) and that in any event, on the 9 August it was transferred to OK Debt so would still have been chased.

137. While those invoices were not discussed during the disciplinary or appeal process and Mrs Overton appeared unaware of them, Mrs Overton appears prepared to excuse it appears, a transfer with less what she contends is an adequate number of letters, on the basis that they are transferred to OK Debt and can still be chased.

138. Mr Overton's evidence during the disciplinary proceedings, is not that the claimant would have been failing to comply with his instructions, in transferring the invoices to OK Debt –and indeed Mrs Smith's evidence was;

"***The invoice could be put to OK debt collector so we can carry on chasing it."***

139. Although therefore Mrs Overton's evidence was that she believed the claimant had failed to follow the correct procedure, regardless of whether she had meant only to transfer to OK Debt, the Tribunal find that this cannot have been a reasonable belief to have held on the evidence that she had, particularly the evidence of Mrs Smith or consistent with her response to examples shown where someone other than the claimant appears to have transferred to OK Debt, in circumstances where she appears to be alleging it was premature to do so.

140. The claimant put it to Mrs Smith in cross examination, that in the bundle there are eight examples of transfers to OK Debt carried out on 9 August. Mrs Smith evidence was that she had possibly been chasing those invoices on 9 August. Mrs Smith was taken to one invoice (554700) (p.252) on 9 August, and Mrs Smith accepted that this invoice had not received the full quota of letters but that it was probably transferred to OK Debt to chase and the operator wanted it removing off his statement, however there was no note in the system that the operator had requested this. Mrs Smith's response was that the operator could have emailed but accepted that normally a note would be on the history of the invoice and it was not. The claimant identified another invoice (p.258) (557633) on 9 August, where less than three letters of been sent out and Mrs Smith again thought it may have been because it was a really old one and it was put into OK Debt to chase.

141. There is a draft of the disciplinary letter within the bundle (p.457) which was included in error by the respondent's solicitors. This draft is also dated 26 September. The draft letter includes the following additional wording which was left out of the final letter;

"***In writing off invoices, it is denying the operators and our company any monies due. Regardless of whether you chose to write off invoices intentionally or to hide them from operators and transfer the invoices to OK debt, your choice not carry on chasing invoices is direct failure to follow company process, which you are aware of and followed previously, causing serious impact to our company".***

142. In terms of the wording in the draft letter, the claimant's case was that she did not consider this relevant to the fairness of the dismissal but it went to credibility. The claimant did not put any questions to Mrs Overton about the significance of the additional wording in the draft letter. The Tribunal do not find that it would be appropriate to draw any inference in respect generally of the respondent's credibility because of the wording of this draft letter. Mrs Overton did not attempt to deny in her evidence, that she would have considered it still very serious for the claimant to have transferred the invoices to OK Debt without completing what she believed to be the correct procedure however, this was not the reason relied on by the respondent for dismissal. The claimant's case is that the real reason was because her role was no longer required, her case is not that the real reason was because she had transferred invoices to Ok Debt or had hidden them from operator, or because that is what her stated intention had been. The issue is therefore whether the belief that was formed i.e. that the claimant knew that she was *writing off* invoices and did it deliberately, was a reasonable one.

143. The claimant complains that there was never any real attempt to understand whether the problem was a training issue, what had taken place on 8 August in terms of training she had been given and whether she had actually understood what she was doing.

Appeal Hearing.

144. The claimant appealed the decision to dismiss by letter of the 1 October 2018.It is not in dispute that the points of appeal were;

- *Some of the responses were missing from the notes of the disciplinary hearing on 25th of September,*
- *She had only been supplied 12 examples of the invoices out of 59; and*
- *The notes of 14 September meeting were not enclosed with the evidence sent to the claimant before the disciplinary hearing and she had not received copies before the decision to dismiss of the witness statements of Mr Overton and Ms Smith.*

145. The claimant confirmed that she had made no mention at the appeal that the real reason for dismissal was that her role was made redundant and this did not form a ground of appeal.

146. The respondent instructed Mr Silvey, an HR Consultant from Peninsula to hear the appeal. The claimant was informed by letter of the 9 October 2018 of the hearing on the 12 October 2018. The claimant was informed that this was a review of the original decision and Mr Silvey would be making a recommendation. The respondent is a very small employer and it is not part of the claimant's case that the appeal should have been conducted by someone else or that Mr and Mrs Overton, the only two directors at the time, should not have made the decision about whether to implement the recommendations.

147. Mrs Overton included within the letter inviting the claimant to the appeal; the notes from the 14 September meeting and the statements from Mr Overton and Ms Smith's interview taken on 26 August 2018.

148. The claimant attended the appeal hearing without a companion, her evidence before the Tribunal was that she had only been given two days' notice of the hearing and had not been able to arrange for someone to attend with her however, she conceded that she had not raised this as an issue at the time and nor does she allege that she had not been able to put her case.

149. The claimant prepared a document which Mrs Overton confirmed in evidence she had seen because the claimant came with it to the appeal (p.119). Within this statement the claimant disputed the evidence of Mrs Smith and Mr Overton. The claimant denied that during the June 2018 conversation she had made a comment that if she had sent 3 letters what else could she do and denied that she had been told to clear up statements and send notes to the operators. The claimant's evidence was that the discussion at that time was that chasing had got a little behind and that;

"…***I was to go through all the statements and indeed by communication with customers and insurance companies by email and telephone, chase outstanding invoices. This I did and in doing so many problems were solved*…"**

150. The claimant denied despite the above, that she had been instructed to chase payment by telephone, her evidence is that she had done this but she had not been instructed to do so. However, the Tribunal find on a balance of probabilities, taking into account the evidence of Mrs Smith and Mr Overton and content of her own statement for the appeal, that she had been instructed to chase by telephone.

151. The claimant at the appeal complained about the training she had been given and denied being told to 'clear up' the statements, but told to tidy them up, that there was no mention of writing off debt or contacting operators. The claimant alleges that *contacting operators* was not asked of her until 12 September, during a different, later conversation and she questions whether there has been some confusion by Mrs Smith and Mr Overton about what she had been told when. This 12 September conversation was not raised during the disciplinary hearing by the claimant. The claimant stated under cross examination that she was not alleging that Ms Smith and Mr Overton had given false evidence but that she believed that their recollections were not accurate.

152. The claimant also raised that with respect to the Amended Report she had been given, the dates in that Report did not match; the far-left hand column showing the dates the invoice was written off were not the same as the actual date the invoice was hidden from operator. When Mrs Overton contacted Mr Buckley by email on 30 October, she refers by way of an example of the way the Amended Report had been 'mis-sorted', to invoice 577427 and the system showing it hidden on 22 August but the report shows it written off on 15 August (p.125).

1. Inaccuracies with notes of the hearing

153. The notes of the disciplinary hearing record the claimant not providing a response to questions about invoice HG08KUF; the claimant gave evidence at the appeal that this invoice had a 'no windscreen' letter/bill and an overdue letter which would have been more letters than would have been sent out under the old system and that she had this information with her at the disciplinary hearing her answer was not been recorded in the notes.

154. The claimant also raised that the disciplinary notes did not include the questions and answers from her companion and Mr Buckley's explanation of the reconcile function, and that the only function she was aware of was removing the invoice from the operator's statement.

155. With regards to the inaccuracies in the notes of the 14 September, the claimant explained this related to the response to the comment by Mrs Overton about the time taken between invoices being written off and that the claimant could not have possibly checked and read the notes on the invoices. The claimant asserts that she had replied; "why *wouldn't I? They are there. I don't just choose an invoice"* and that what she had not said, was that; *"it's about choosing".*

156. The claimant also alleged that the reference to having sent 3 letters out so what else "*can we do*?", was a reference to recent communications and was not raised by her with reference to the older invoices which is how it appears in the notes.

157. The claimant also asserted that where she is referred to as having stated in the disciplinary hearing on 25 August, that some of the letters on the system were "*too harsh*", that this was a reference to situations where the first letter had not been received by the customer and the second letter would therefore be 'too harsh' in those circumstances and was thus taken out of its proper context

158. The claimant also raised an absence of guidelines about when to send the letters and that at no point had it been made clear that more letters should be sent or that the responsibility for debt collection had changed.

159. The claimant accepted under cross examination that she could "*probably accept*" that the notes had *not* been deliberately drafted to disadvantage her.

2. Only 12 examples given

160. The claimant accepted in cross-examination that her challenge was that;

"..the 12 examples could be accounted for by the letters she had sent out and therefore her belief that they could still have been dealt with. The inference from her ground of appeal is the potentially more of the instances could have been explained this way" (p.142)

161. It was put to the claimant in cross-examination that the 12 example invoices established to the respondent that more could have been done to chase the unpaid invoices. In response to that the claimant repeated that there was no set amount of letters, no clear processing policy, that Mrs Smith had agreed on the amount of letters that are normally sent out for different scenarios and that she sent the letters required out. However, the notes of the appeal record the claimant stating in respect of some of those 12;

"*Again are ones that David was going through and …yeah…last three…two had incorrect details, one letter, and I've put stars on the three that …have just had the one letter which okay normally would have two, but David was concentrating on them*…" (p.141)

162. The claimant was still conceding therefore that at least some invoices had been written off (unintentionally) without, even on her own case, the required number of letters being sent first. It is in any event, not the claimant's case that the invoices should have been written off and that she was instructed to do so.

3.Evidence not supplied before the hearing

163. In terms of the statement of Mr Overton and Mrs Smith which had not been supplied prior to the disciplinary hearing, the claimant confirmed under cross-examination that she had agreed during the appeal that it was not a matter of dishonesty but that she believed they had recollected incorrectly, she referred to them as;" *Misremembering."*

164. Although not a stated ground of appeal, the claimant raised during the appeal hearing (p.86/87) that she was not shown by Mr Overton the facilities under the new system;

"…there was no, you know, " Do this " um, the .. facility to hide, write off.."

And;

"There wasn't even a demonstration".

And;

"It was "Go in to reconcile, no charge to operator, check the button, hidden from operator…"

Interview Ms Smith – Appeal

165. An interview was conducted by Mr Silvey with Ms Smith on 12 October 2018 (p.120).

166. The Tribunal consider that the questions put to Mrs Smith are superficial and the majority of them are leading. The interview establishes very little and fails to raise with Mrs Smith what the claimant alleges she was told in June and on 8 August. Mr Silvey makes no reasonable attempt to establish what functions the claimant was shown, the words used, how thorough the training was or whether write off was mentioned to the claimant during the training. For example;

SS: So we looked, we looked on the system.

And then ..he said… 'if you do this, this will happen. If you do that, that will happen'

MS: Right. Okay.

SS : But we didn't actually do one.
….
MS; And when you said that David explained the process exactly the same to Lynn ..did it include that?

SS: Yes.

167. Mr Silvey failed to explore with Mrs Smith in any meaningful way the extent of the training and how clear the process was. The investigation into the training on the 8 August, to the extent it can be called an investigation, is inadequate.

168. Mr Silvey then repeats back Mrs Smith's evidence about what was said on 8 August and asks her whether there was another conversation on 12 September. He again does not put to her what the claimant alleges was said on the 8 August. In terms of a conversation on the 12 September 2018, Mrs Smith evidence is that there was another conversation but she cannot recall if she was present but that Mr Overton had told her that he had asked the claimant to chase again and contact the operators. Mrs Smith is not asked whether she may have confused the dates when the claimant was told to chase the operators.

169. Mr Silvey did not conduct an interview with Mr Overton who was the one who had the conversations with the claimant and carried out the training.

Appeal report – 6 November 2018

170. Mr Silvey's report was provided to the respondent on 6 November 2018. In summary the essences of the findings were as follows;

1. Accuracy of the notes; While there were elements of the notes which had elements of the claimant's accounts missing, the claimant was not able to clearly explain how these points would have affected the outcome and they were within the scope of acceptability in terms of accuracy.

2. Only 12 invoices provided; The responsibility is to conduct a reasonable investigation and the claimant appeared to accept she was aware of the requirement to write to customers and Mrs Smith had corroborated the account of the training received.

3. Statements of Mrs Smith and Mr Overton not disclosed before decision to dismiss; The evidence of Mrs Smith and Mr Overton are broadly consistent, the claimant made no suggestion they were dishonest and she had now had the opportunity to raise any concerns about them. The use of the Amended Report was reasonable in the circumstances, the Excel spreadsheet has been mis-sorted and Mr Buckley had provided an explanation why the dates did not match – Mrs Overton had tried to put them into invoice date order.

171. The recommendation was that the respondent had conducted a reasonable investigation and formed an honest belief in the claimant's culpability.

172. The claimant referred to the recommendations of the appeal which state that to dismiss is likely to be within a band of reasonable responses and that the original sanction of dismissal with notice paid in lieu should be upheld (p.147) but that she had in fact been summarily dismissed. Hence the claimant would later raise as part of a grievance, a claim for notice pay.

173. There is within the bundle (p.165) a signed statement from Mr Silvey stating that his report contained an error and that his recommendation was to uphold the original decision, the reference to notice pay was an error, caused by using a template paragraph and that he had understood at the time the decision was summary dismissal. The claimant's confirmed that her position on this was that; *"I can only accept it was a genuine mistake".*

174. Further, the claimant complains that the appeal relied on assertions from Mrs Overton that it had never been the operator's responsibility to get the correct information from the customer and that this is contrary to the operators' manual and may have influenced what Mr Silvey thought. The claimant conceded in cross-examination that she had already given her evidence at the disciplinary hearing that she felt it was the operator's responsibility to help collect debt and that the notes of the disciplinary hearing (p.49) confirm that Mrs Overton reminded the claimant that it was the respondent's responsibility to chase

outstanding debt. The claimant conceded that Mrs Overton had expressed this view about the operator's responsibilities prior to the appeal and that she had therefore had the chance to deal with this view of Mrs Overton's at the disciplinary stage.

175. The claimant was informed by letter of the 7 November 2018 of the decision to uphold the decision to dismiss and their report was attached. The original JSF report was not provided to the claimant at this stage or during the appeal hearing.

176. The evidence of Mrs Overton is the she and Mr Overton talked about the appeal and discussed between them what to do. Mr Overton's evidence was that he had considered whether the claimant had made a mistake but felt it was deliberate because of "*how quickly it had been done"* and because she had done it correctly and transferred 44 invoices first to OK Debt.

Allegation 10 August conversation

177. The evidence of the claimant is that it was only after the appeal and after making a request for during the later grievance process, that she received the **TJS Report.** By letter of the 14 November 2018 the claimant was sent a copy of the original Excel spreadsheet showing the written off invoices in date order (i.e. the spreadsheet before Mrs Overton had attempted to sort it and in doing so misaligned the dates). She was also sent screenshots of the Reconcile messages.

178. The claimant wrote requesting copies of all the written off invoices during the grievance however the respondent refused to provide them on the basis that the claimant had gone through the appeal process and could have requested them during that process.

179. The claimant's evidence before this Tribunal was that on receipt of the TJS Report she then remembered (because this was in date order of actions performed) that she had been searching the invoices by insurer and this prompted her to recall that she had seen duplicate invoices on 10 August (invoice (570821) which had been copied from the same invoice number (387/39). The invoice was distinctive to her and she had not understood at the time why it said it had been copied from the same invoice number when she had already hidden it from the operator. This in turn prompted her to recall that she had in fact had another conversation with Mr Overton on 10 August 2018 about this invoice. During this conversation she alleges she asked him why there were copy invoices showing and he told her again to untick the box on the left. She then did so, hence why after transferring 44 invoices to OK Debt, she then started writing them off from 10 August (although she had not realised she was doing this). She had not been sent any of the copy invoices during the disciplinary or appeal process and hence had not recalled this conversation.

180. However, under cross examination the claimant conceded that there had been reference to duplicate invoices and double entries in connection with the invoices transferred to OK Debt, during the appeal, by Mrs Overton. The claimant, alleges however that this did not prompt her recollection at that point, it was only when she saw realised from the TJS Report that she has been searching by insurer that she recalled the specific invoice. (p.107).

181. The claimant complains that had she had the original TJS report or copy/duplicate invoices, this would have prompted her to recall this conversation during the disciplinary or appeal.

182. Mrs Overton under cross examination, did not dispute that the claimant had not been shown the screen shots of the history of the invoices after transfer to OK Debt collection but the claimant had accepted at the disciplinary hearing that she had transferred the invoices and therefore Mrs Overton concentrated on was what the claimant had or had not done to chase the payments.

183. Mr Overton denied in his evidence before this tribunal, that there was a further conversation on the 10 August 2018.

184. The respondent also asserts that the claimant's account of the circumstances surrounding this conversation, are not credible in that she alleges that within a 3-minute window from transferring the last invoice to OK Debt and when the first invoice was written off, she spoke to Mr Overton. It is asserted by the respondent the claimant would not have had time to speak with him, return to her desk and carry out that next operation. However, it is a small office, it is not alleged she had to restart her computer and the Tribunal find that 3 minutes is on a balance of probabilities, a sufficient amount of time potentially to have what she alleges was a very quick discussion and return to perform a pretty quick function on her computer.

Grievance

185. The claimant then wrote on 2 November 2018 setting out a complaint and grievances. The claimant complained that the whole process had been 'orchestrated' to avoid paying the claimant a redundancy payment.

186. The claimant also complained that she believed that concerns she had raised in the past had not been received favourably such as excesses not refunded to policy holders when no excess applies. She also raised that she had asked for a letter to be created to send to customers where there is an excess due. None of these issues were however raised during the appeal, and the claimant does not in the issues in relation to this unfair dismissal claim, repeat the allegations about the issues she had raised about refunds to customers as a reason for her dismissal. In her claim form, she refers to the real reason being because her role is no longer required. Mrs Overton dealt with the grievance and following a hearing on 23 November, it was dismissed by letter of the 7 December 2018.

187. The claimant appealed the grievance on 10 December 2018 in relation to the recommendation by Mr Silvey that payment in lieu of notice is paid and in respect of outstanding holiday pay. The grievance was dismissed on 9 January 2019.

188. The claimant had produced a second witness statement for the purposes of these tribunal proceedings, in which she alleges the respondent tampered and changed letters that appear in the bundle and which do not match the originals. She referred to the dismissal letter dated 26 September 2018, which is addressed above. Reference is also made to the respondent's letter regarding the outcome of the grievance in that the date on the original letter was 6 December and not 7 December and a few further changes. The claimant also referred to the letter inviting to the grievance appeal hearing and an amendment which referred to the holiday pay issue. The respondent had prepared a draft letter dated 17 December 2018 which did not address the outstanding holiday pay but the one she had received is dated 18 December 2018 and confirms holiday is payable. The claimant had submitted a tribunal claim on 18 December 2018 and questions whether this had prompted the change in the letter. The claimant did not however allege that she had sent a copy of the tribunal claim direct to the respondent and it would have taken a few days at least for that to be processed by the Tribunal and sent out. The Tribunal do not consider that there

are grounds to draw adverse inferences from those draft documents and other than the reference to holiday pay, the amendments are not significant.

189. The claimant did not raise as an issue how her grievance was dealt with. The grievance was dealt with after the appeal against dismissal. The claimant did not put any questions to the witnesses about the grievance process.

Claimant's evidence at the tribunal

190. The claimant was asked under cross-examination, that if Mr Overton had told her to untick the box on the left i.e. the transfer to debt collection (OK Debt), how had she managed to carry out the process correctly and transfer the first 44 invoices to OK Debt rather than having written off those first invoices. The evidence of the claimant was that she had tabbed across the screen, rather than clicking with the mouse, that she had tabbed past the first box so she had not unticked it and then physically clicked the '*remove from operators list*' with the mouse - that she said, was the only explanation. However, it was put to the claimant that she must have seen the '*transfer to debt collection'* checkbox was ticked (when she carried out the first 44 invoices) to which she stated;

"I just clicked remove from operator's statement – I clicked – I assumed – as tabbed on it, it would have removed it, I don't know"

191. It was put to the claimant under cross examination that her explanation made no sense, to which she replied;

"no, it doesn't make any sense"

192. The Tribunal was then physically shown on screen what the claimant accepted she would have seen when carrying out this process and it was apparent to the Tribunal, that when looking at the screen, the user would clearly see whether or not both check boxes had been ticked. The claimant agreed.

193. It was put to the claimant under cross examination that the real explanation was that she had followed Mr Overton's instructions correctly the first 44 times (and left the '*transfer to debt collection'* box ticked by default), however she denied this and said that what she had done, by leaving the box ticked was "*incorrect"*.

194. In summary therefore the claimant's evidence before the Tribunal, is that Mr Overton had told her to untick the '*transfer to debt collection'* on 8 August - but that she had not done that for the first 44 invoices, which she believed was an error. Her evidence is not therefore that she had carried out the first 44 invoices correctly, and when she spoke to Mr Overton on the 10 August he told her that she had to 'untick the box on the left' and that is when she then wrote off the invoices (unintentionally)- thinking that all she was doing was hiding them from the operators and tiding up their statements.

195. It is difficult, from looking at the computer screen to understand how she could not have seen that the '*transfer to OK Debt'* box had **not** been unticked during the first 44 times. Even if she had tabbed across the screen, there are only a few boxes and it is obvious whether the box is ticked or not, which she accepted.

196. In terms of the pop-up boxes that appear once Submit is pressed, during cross examination her evidence was that she saw the boxes but would not recognise what they said, that she was looking for a box that said; '*is now hidden from operator'*. However, it was pointed out to her that during the appeal hearing

(p115) she had stated she did not recollect the messages. Her evidence about the pop up boxes was inconsistent however, the Tribunal find that the boxes do not say 'written off', they say repair closed.

Real reason for dismissal

197. The evidence of the claimant was that during the time that she was tasked with chasing invoices from June to July 2018, Mrs Smith was managing the invoices that have been received and the operators' statements without any assistance from the claimant. The claimant therefore argues that her role was made redundant in that once she had completed the task of chasing invoices, her role was no longer required.

198. The evidence of Mrs Overton under cross examination was to refute that suggestion. She asserted that the role of inputting invoices and seeing that through to payment to the operator remained and was very much required. That simplifying the system created more work because rather than chasing invoices on an ad hoc basis, outstanding payments were moved to 'Ok Debt' collection making it easier for them to be able to concentrate on those invoices that need chasing. Mrs Overton evidence was that after the claimant left the respondent's employment the respondent had advertised her role for quite a while. Mrs Smith had been chasing invoices herself and Mrs Overton has also been assisting. Mrs Overton gave undisputed evidence that her daughter had gone into hospital for treatment for a period and Mrs Overton had been more available to assist but that her daughter is now back home. Her evidence was that she had been doing the claimant's role for three or four months since the claimant had left. No one had been recruited to cover her role yet, they had not advertised but Mrs Overton she referred to it being a ''tough period' for the operators because of the Covid pandemic.

199. The claimant accepted in cross examination that on her own case, had she not been dismissed for gross conduct, she would have been made redundant around the same time as the dismissal.

Remedy

200. The claimant gave evidence that she had a letter from the NHS and had a 10-year service history with them and could therefore get a reference but her husband had a heart operation on 1 April 2019 and she could not take on a full-time job. She was only able to get 'bank' work which she alleges is only available part time for existing employees. Her husband's heart condition means that she has been trying to find work around him and manage their business, which has been difficult. The claimant confirmed that she had not provided any evidence with regards to mitigation and did not give oral evidence about any jobs she had applied for.

201. Within her schedule of loss the claimant referred to the restrictions around looking after husband, the fact that she been dismissed for gross misconduct after 14 years of employment without a reference and that it would take a longer to find work.

202. The respondent submits that the claimant had failed to take reasonable steps to mitigate her losses.

Claimant's submissions

203. The claimant submits that the respondent failed to comply with the Acas code in that it failed to carry out a reasonable or adequate investigation. It failed to factor in that the issue could have been due to a training issue. It was unfair to

take the witness statements from Mrs Smith and Mr Overton after the claimant gave her evidence at the disciplinary hearing.

204. She complains that the disciplinary hearing focused on not sending out enough letters to customers but there was no written procedure and that there had been no company procedure identified which the claimant had failed to follow. The examples given in the bundle show that some action had been taken by the claimant and that another employee had transferred debt without sending out all the normal letters but there was no evidence they had received any disciplinary action.

205. At the disciplinary appeals was the first time duplicate/copy invoices were raised, she had not been sent copies of any duplicate invoices before the appeal or the disciplinary so she could compare how different they were to the ones that she had been sent before the disciplinary hearing. The ones she had been sent before the disciplinary hearing all said, '*hidden from operator'*, which is what she thought she was doing and that she was not able then to give an accurate account of the process.

206. The claimant alleges the second paragraph of the draft dismissal letter was removed because it makes reference to her failure to follow company procedure but the claimant questions what procedure she failed to follow and that she had worked in the same way for 14 years (as at dismissal). She was unaware of the ability to write off an invoice on the new system. She argues that the ability to write off should be limited and not available to everyone because it is so serious and at no time was this function explained to her.

207. The claimant argued that the disciplinary outcome was a foregone conclusion with no consideration of retraining or whether to treat as a performance issue.

Respondent

208. The respondent submits that the misconduct amounted to a fundamental breach of trust and confidence. It is submitted that the respondent has shown the reason for dismissal under section 98 of ERA.

209. In terms of reasonableness under section 98 (4) the Tribunal is invited to consider the size and administrative resources of the respondent.

210. In terms of fairness in summary; the respondent submits that it has followed the recommendations of Acas; there was an investigation meeting on 14 October, the claimant was shown a report showing the writing off of circa 300 invoices and she did not deny it. She asked whether those invoices could still be seen on the system, she had informed the Tribunal she did not know she was writing off but if that was the case why would she ask if they could still be seen on the system because her case will be that they could, it is submitted this is a 'guilt response.'

211. The rate at which she had written off the invoices meant she could not have checked them.

212. The claimant was invited to a disciplinary hearing. She was warned that a possible outcome was summary dismissal she was sent sample of the invoices and the report and this was the evidence that the respondent relied upon to make its decision.

213. The claimant confirms she had sufficient time to respond and prepare for the hearing and was accompanied by Mr Slater.

214. She did not dispute writing off more than 300 invoices therefore it was simply whether she knew the correct procedure. She was taken to a number of invoices where she accepted she could have sent more letters or chased payment by telephone calls.

215. The claimant was notified of the decision on 26 September and given a right of appeal which she exercised. The respondent took the step of appointing an external HR expert who carried out a thorough appeal and the claimant had the chance to put forward evidence. The claimant had been given a copy of Mr Overton and Mrs Smith's witness statements and had a chance now to comment on them. The claimant accepted that they were both truthful but believed their memories were distorted over time.

216. Reference was made to the Burchell test and that the respondent genuinely believed the claimant to be guilty of misconduct.

217. The claimant accepted she had written of the invoices and accepted during the disciplinary hearing that she had done so prematurely, therefore by her own admission she was guilty of not following the correct procedure.

218. The claimant could not during the disciplinary or appeal recollect the conversation she now alleges she had with Mr Overton on 10 August and it submitted it is convenient for her to do so the purposes of these Tribunal proceedings and that although she could not recall a conversation at the disciplinary or appeal was able to recall the earlier conversation on 8 August

219. Further she alleges the conversation on 10 August took place between 12:03 and 12:06 a matter of only three minutes.

220. The claimant alleges she was told to undertake the OK Debt box. Mr Overton's evidence is that he was heavily involved, he knew the importance of keeping that box ticked and he would never have said that. The claimant had to consciously click to '*remove from operators list'* so she must have seen the '*transfer to debt collection' box.*

221. Mrs Overton obtained statements from Mr Overton and Mrs Smith regarding the instruction to the claimant and they gave collaborating statement. Those statements were provided to the claimant for the purpose of the appeal and she did not accuse Mr Overton or Mrs Smith of being untruthful.

222. The claimant's case is that there they conspired to avoid redundancy makes no sense.

223. At the time that the respondent formed the belief, it had carried out as much investigation as was reasonable and dismissal fell within the range of reasonable responses to dismiss.

224. In terms of remedy; the claimant has not provided any evidence of attempts to secure new employment. Under cross examination she sought to introduce new evidence about her husband's health condition but this complicates things in her case as it implies she would not have been able to carry out work for the respondent. This however is not in her witness statement and there is no evidence to support in the bundle.

225. The Tribunal is invited to find even if there is unfairness in the process, even if a fair procedure been followed the outcome would have been the same and to make a 100% Polkey deduction.

226. A deduction it is argued should be made to the basic award as the claimant accepted in cross examination conduct in writing off directly attributable to dismissal and 100%reduction should be made and in respect of the compensatory award.

227. The respondent also referred to the admissions the claimant made about her role being made redundant at around the time of the dismissal, if her case is accepted that there was a genuine redundancy situation

Claimant's comments

228. The claimant was given an opportunity to comment the submissions of the respondent and asserted that she did not believe she was writing invoices off prematurely. The first report she received was mis-sorted, the event date order came first - she did not see two copies of the invoice because it was by insurer and denies contributing to her dismissal.

229. The claimant complains that had she received the copy invoices, the correct report and a witness statements she would have known what had happened and that she was transferring to 'OK Debt' - nowhere within the invoices does it say where the invoices were being transferred to it, it only states 'hidden from operator'. With the invoices and witness statements she would have been able to show it was a training issue.

230. The claimant also referred to the schedule of loss within the bundle that makes reference to her husband's heart surgery

The Legal Principles

231. Before the Tribunal reaches its conclusions in relation to the issues before it, is has had regard to the law which it is required to apply when considering the matters for consideration;

The Reason for Dismissal – section 98 (1) and (2) ERA

232. It is up to the employer to show the reason for dismissal and that it was a potentially fair one namely, that it falls within the scope of section 98 (1) and (2) of the Employment Rights Act 1996 (ERA) and was capable of justifying the dismissal of the employee. A 'reason for dismissal' has been described as: 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: **Abernethy v Mott, Hay and Anderson 1974 ICR 323 CA**

233. At the stage of establishing the reason, the burden of proof is on the employer and what is not required at this stage, is for the employer to prove that the reason justified the dismissal. Whether the reason justified the dismissal or not is a matter for the Tribunal to assess when considering the question of reasonableness. It is however sufficient that the employer genuinely believed the reason given and did so on reasonable grounds.

Reasonableness - section 98 (4) ERA

234. Once an employer has shown a potentially fair reason for dismissal within the meaning of section 98 (1) ERA, the Tribunal must go on to decide whether the dismissal for that reason was fair or unfair which involves deciding whether the employer acted reasonably or unreasonably dismissing for the reason given in accordance with section 98 (4) ERA;

Section 98 (1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason falls within this subsection if it—

(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b)relates to the conduct of the employee,

…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

235. What a tribunal must decide is not what it would have done but whether the employer acted reasonably.

236. Mr Justice Browne- Wilkinson in his judgement in **Iceland Frozen Foods Ltd V Jones ICR 17 EAT** set out the law in terms of the approach a tribunal must adopt as follows;

a. *The starting out should always be the words of section 98 (4) themselves*

b. *In applying the section, a Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the member of the Tribunal) consider the dismissal to be fair*

c. *In judging the reasonableness of the employers conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of three employers*

d. *In many (though not all) cases there is a band of reasonable responses to the employees conduct which in which the employer acting reasonably may take one view, another quite reasonably take another.*

e. *The function of the Tribunal, as an industrial jury, is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the*

band of reasonable responses which the reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, it is falls outside the band it is unfair

237. In terms of procedural fairness, the House of Lords in **Polkey v AE Dayton Services Ltd 188 ICR 142 HL** firmly established that procedural fairness is highly relevant to the reasonableness test under section 98 (4). If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced.

Conduct

238. Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal. According to the EAT in **British Home Stores v Burchell 1980 ICR 303** the employer must show;

i. *It believed the employee guilty of misconduct*
ii. *It had in mind reasonable grounds upon which to sustain that belief*
iii. *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*

Redundancy Definition

239. Redundancy is defined in section 139(1) ERA; it includes were under (b) the requirements of a business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

Acas Code – liability

240. The respondent's does not have a separate disciplinary policy but applies that which is set out in the Acas code.

241. The Acas Code provides at paragraph 9 as follows;

"*It is decided that there is a disciplinary case to answer, the employee should be notified of this in writing, The notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."*

Acas Code – Remedy

242. Section 207A (2) Trade Union and Labour Relations (Consolidation) Act 1999 TULR(C)A provides that

207A Effect of failure to comply with Code: adjustment of award
(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies
(b) the employer has failed to comply with that Code in relation to that matter, an
(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that
(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies
(b) the employee has failed to comply with that Code in relation to that matter, an
(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

Contributory Fault

243. Section 122 (2) ERA gives tribunals a wide discretion whether or not to reduce the basic award on the ground of *any* kind of conduct on the employee's part that occurred prior to the dismissal. To justify a reduction to the compensatory award the conduct must be shown to have caused or contributed to the employee's dismissal.

"*where the tribunal considers that **any conduct** of the complainant before the dismissal (or, where the* dismissal *was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*"

244. The equivalent provision in respect of the compensatory award is section 123 (6) ERA;

"*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."*

245. In **Nelson v BBC (No.2) 1980 ICR CA 110 CA**, 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*
- *it must be just and equitable to reduce the award by the proportion specified*.

Polkey

246. The question of whether procedural irregularities rendering a dismissal unfair, really made any difference to the outcome is to be taken into account when assessing compensation: **In Polkey v Dayton Services Ltd 1988 ICR 142 HL**.

247. In any case where the employer has dismissed for a substantively fair reason but has failed to follow a fair procedure, the compensatory award (but not the basic award) may be reduced.

248. A 100 per cent reduction is appropriate where any procedural failure made absolutely no difference and the outcome would have been exactly the same even if a fair procedure had been adopted.

249. ***Williams v Amey Services Ltd EAT 0287/14*** the EAT summarised the various methods by which it is open to a tribunal to make a Polkey reduction. Her Honour Judge Eady observed that: '*In making such an assessment the [employment tribunal] is plainly given a very broad discretion. In some cases it might be just and equitable to restrict compensatory loss to a period of time, which the [tribunal] concludes would have been the period a fair process would have taken. In other cases, the [tribunal] might consider it appropriate to reduce compensation on a percentage basis, to reflect the chance that the outcome would have been the same had a fair process been followed. In yet other cases, the [tribunal] might consider it just and equitable to apply both approaches, finding that an award should be made for at least a particular period during which the fair process would have been followed and thereafter allowing for a percentage change that the outcome would have been the same. There is no one correct method of carrying out the task; it will always be case-and-fact-specific. Equally, however, it is not a "range of reasonable responses of the reasonable employer" test that is to be applied: the assessment is specific to the particular employer and the particular facts.'*

250. In ***Hamer v Kaltz Ltd EAT 0502/13*** **t**he EAT; the assessment of what would have occurred but for the dismissal as not an 'all or nothing' one but one where the tribunal was required to take into account chances or prospects.

251. **In *Hope v Jordan Engineering Ltd EAT 0545/07*** the question arose whether the Polkey reduction applied to all heads of loss comprising the compensatory award, including, for example, compensation for loss of statutory rights or long notice. The EAT ruled that this reduction covered all heads of the compensatory award.

Polkey and Contributory Fault

252. In ***Rao v Civil Aviation Authority 1994 ICR 495, CA*****,** The Court held that the proper approach is first to assess the loss sustained by the employee in accordance with section 123 (1) ERA which will include the percentage deduction to reflect the chance that he or she would have been dismissed in any event, and then to make the deduction for contributory fault. However, in deciding the extent of the employee's contributory conduct and the amount by which it would be just and equitable to reduce the award for that reason under section 123 (6).

253. EAT in ***Granchester Construction (Eastern) Ltd v Attrill EAT 0327/12*****.** Mr Justice Langstaff (then President of the EAT) referred to the Court of Appeal's decision in *Rao* before noting that it may be 'appropriate to moderate what would otherwise be the degree of contributory fault that would reduce an award because there have been matters of conduct taken into account in assessing the chances of a fair dismissal'. Were this not so, he continued, 'it might be in effect double-counting to impose upon the claimant a further reduction by way of contributory conduct'. It was therefore not wrong, as a matter of principle, for the tribunal, having already applied a 50 per cent Polkey reduction to the compensatory award to reflect the chance of a fair dismissal, to set a further reduction for contributory conduct at 10 per cent only in order to 'avoid the injustice of an excessive and disproportionate reduction'.

Mitigation

254. It is for the employer to show that the claimant has failed to mitigate his or her loss. In ***Ministry of Defence v Hunt and ors 1996 ICR 554, EAT*****,** the EAT stressed that the employer must adduce evidence in relation to mitigation and that a vague assertion of failure to mitigate unsupported by any evidence is unlikely to succeed.

255. In the first instance, compensation will be assessed on the basis that the claimant took all reasonable steps to reduce her loss. Whether a claimant has mitigated is a question of fact, and tribunals will judge the matter on the particular circumstances of the case.

256. ***Ministry of Defence v Cannock and ors 1994 ICR 918, EAT***: The fact that a decision not to pursue a career was reasonable did not mean that she had taken all reasonable steps to mitigate her loss.

Conclusions

257. The Tribunal has applied its findings of fact and the applicable law to determine the issues in the following way;

Reason for dismissal

258. The respondent's case is that it dismissed the claimant for conduct. That is a fair reason in law. The reason advanced by the respondent was as set out in the dismissal letter namely; the excessive number of invoices that have been written off, without following the correct procedure to chase outstanding invoices, resulting in unnecessary financial loss to our company and our franchisees.

259. The claimant's case is that although she accepts that she wrote off invoices it was not deliberate, she alleges that this incident was used as an excuse to terminate her employment and avoid a redundancy situation in circumstances where her role was no longer required.

260. At this stage the burden is on the employer to show the reason for dismissal and that it was a potentially fair one.

261. An employee who casts doubt on an employer's potentially fair reason for dismissal must adduce evidence in this regard and although there is a low evidential burden of proof, some evidence is required. The only evidence submitted by the claimant in this case was her belief that because she got up to date with chasing invoices and because the new computer system included pre-populated letters, it was a more efficient system and she believed there was less work to do. She produced no evidence in support of that belief.

262. The Tribunal has found that the respondent still required the claimant's role to be performed, and that the requirements for employees to carry out work of a particular kind had not ceased or diminished or were expected to cease or diminish, as at the date the claimant was dismissed.

263. The hurdle the employer has to jump at this stage of the inquiry to establish the fair reason, is not a high one. It is whether on the face of it the reason could justify the dismissal and is a substantial reason. The inquiry then moves onto a consideration of reasonableness. It is not contended by the claimant that the reason given, namely the writing off of circa 300 invoices was a

trivial or unworthy reason, her evidence is that she did not know that she was doing it.

264. The Tribunal find that the respondent has established that it dismissed for one of the fair reasons set out in section 98 (2) ERA, namely the alleged conduct.

Reasonableness

265. The Tribunal must then consider the test under section 98 (4) ERA and in **British home Stores v Burchell.** There is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the Tribunal to decide.

266. The Tribunal reminds itself that the test of whether or not the employer to acted reasonably is to be judged by the way in which a reasonable employer in those circumstances and in that line of business, would have behaved, taking into account the honest beliefs of the employer at the time of dismissal. It is not for the Tribunal to substitute its view.

267. The need to apply the objective standard of the reasonable employer applies as much to the question of whether the investigation into the suspected misconduct was reasonable in all the circumstances, as it does to the reasonableness of the decision to dismiss for the conduct reason.

268. The claimant at the initial investigation meeting had not disputed that she had written off invoices although she takes issue with the accuracy of some parts of the notes. The claimant then however denied having been aware that she had 'written off' anything at the disciplinary hearing.

269. During the disciplinary hearing the claimant maintained a position that she believed she was only hiding invoices from the operators and blamed a lack of understanding of the new system. There was also some discussion between the claimant and Mrs Overton about what the proper procedure would be to chase invoices. The Tribunal find that invoices had been transferred to OK Debt where there were other steps that could have been taken to chase the payments and that the claimant had not exhausted 'all avenues' at that stage to collect the payments. Mrs Smith specifically states that she understood from the instructions from Mr Overton in August 2018, that the invoices could be transferred to OK Debt so they can carry on chasing. Mr Overton and Mrs Smith statements are consistent in stating that if nothing further could be done and the operator agrees to it, the statements could be written off, however neither of them give evidence that the claimant was instructed not to transfer the invoices to OK Debt until she had exhausted all avenues. The Tribunal find that it would not have been reasonable to form a belief on the evidence during the disciplinary process, that the claimant had been instructed to 'exhaust all avenues' before transferring to OK Debt, only before writing off the invoices, this however was not the reason why she was dismissed – she was dismissed for writing them off.

270. Mrs Overton then conducted interviews with Mr Overton and Mrs Smith but failed to share their evidence with the claimant prior to dismissing her. This was a serious flaw in the investigation process. As came out during Mrs Overton's evidence, there also appears to have been some discussion with Mr Overton, which was not shared with the claimant.

271. Given Mrs Overton's unfamiliarity with this part of the business and how the administrative staff worked, she failed to ask Mr Overton or Mrs Smith what the normal procedure is in terms of chasing debt. Although Mrs Overton is aware of the introduction of the new 23 pre-populated letters, she does not seek to establish during the investigation with Mrs Smith as office manager, how the use

of those letters had been implemented and what had been communicated to the claimant about any change in policy in terms of the process for chasing payment, it is unclear to what extent this view that the claimant had not sent out enough of the new letters, influenced her view that the claimant's motive in writing off invoices was to reduce her workload..

272. Indeed, the evidence of Mrs Overton when presented with examples where another employee had apparently transferred an invoice to OK Debt before for example 3 letters had been sent, herself explained this away on the basis that the invoices could still be chased. Mrs Smith herself accepts that she had done the same. It is therefore not clear what policy Mrs Overton was alleging the claimant had failed to follow when transferring the invoices, if she had done so believing she was sending them to OK Debt.

273. The claimant had transferred the invoices very quickly and it was reasonable for the respondent to conclude that she failed to check the history to the invoices before doing that however, although the Tribunal find that Mrs Overton held a genuine belief that the claimant should not have transferred the invoices to OK Debt before carrying out further steps, the Tribunal do not find on the evidence that this was a breach of any company policy or a breach of the instructions from Mr Overton and that on the evidence it was not reasonable to hold such a belief. However, the reason for dismissal relies on a belief that the claimant had written off invoices deliberately, not that she understood that she was sending them to OK Debt (or hiding from operator).

274. The Tribunal find that the respondent held a belief on reasonable grounds, that the claimant had not followed the correct procedure before the invoices were **written off.** By the claimant's own admission, there were a significant number of the invoices where further action could have been taken and the claimant does not allege that the invoices should have been written off.

275. The Tribunal also find that the respondent held a belief that the claimant had written off the invoices deliberately however, the Tribunal find that at the stage at which that belief was formed although there were reasonable grounds for that belief, the respondent had not carried out as much investigation into the matter as was reasonable in all the circumstances. There were serious procedural failings in terms of the investigation, the most serious of which was the failure to provide the claimant with the notes of the interviews with Mr Overton and Mrs Smith which Mrs Overton had clearly considered important to her findings, and to carry out a reasonable investigation into the training which had been provided. The Tribunal find that the investigation fell short of a reasonable investigation.

276. The Tribunal has taken into account the employer's size and administrative resources when assessing what kind of investigation would have been reasonable in all the circumstances. However, the respondent failed to put forward any reason why it could not have provided the claimant with the notes of the interviews with Mr Overton and Mrs Smith. It has also failed to put forward any reason why there was no further investigation into the training which had been given.

277. The Tribunal also find that the respondent which adopted the Acas code of practice as its disciplinary process, was in breach specifically of paragraph 9 in that it failed to provide copies of all the written evidence prior to the disciplinary hearing and there was no good reason for its failure to do so.

278. The Tribunal find that the respondent took a very superficial approach in terms of investigating the training that the claimant had received. The claimant had carried out this role for 14 years at dismissal, with no disciplinary warnings for conduct of performance. She had never in all those years had responsibility for writing off an invoice and there was no evidence she had ever attempted to do so.

279. The Tribunal find that the respondent failed to reasonably apply its mind to the issue of training and whether what she had done was a result of misunderstanding of the new system, when carrying out its investigation. It illustrates how cursory the discussion during the interviews with Mr Overton and Mrs Smith was, that at the appeal Mrs Smith volunteered that there had been no demonstration of the functions (despite what appears to have been said the contrary by Mr Overton in his statement for the disciplinary) and that nowhere within those statements is it recorded that the training lasted about 2 minutes.

280. Had the claimant been provided with the statements of Mr Overton and Mrs Smith she could have challenged at that stage the assertion that she had been shown how to write-off debt and that each facility had been demonstrated to her.

281. The Tribunal then considered whether the appeal corrected the flaws in the disciplinary investigation and the Tribunal finds that it did not.

282. The claimant was presented with the witness statements of Mr Overton and Mrs Smith and she is given the opportunity to comment on them. However, the claimant mentions during this appeal that she did not understand that she was writing off debt and she specifically refers to there having been no mention of writing off when Mr Overton had given her training on the new system (p.86). She also refers to there having been no demonstration (p.87). She also refers to the explanation Mr Buckley had given at the disciplinary hearing which had not been her understanding of the Reconcile function (p.87).

283. Mr Silvey interviewed Mrs Smith, however for the reasons set out in the Tribunal's findings, that further investigation did not correct the flaws in the disciplinary investigation process. The investigation was cursory, most of the questions were leading, there was no reasonable attempt to understand what training had been given to the claimant. Indeed, although Mr Overton had said for the purposes of the disciplinary hearing in his witness statement that he had demonstrated each of the facilities on the system, Mrs Smith in her statement informs Mr Silvey there had been no demonstration. There was we find no reasonable inquiry into the training issue and the matters raised by the claimant about the training she received, at the appeal – it is given scant attention. Mrs Smith is not asked whether she heard the words which the claimant alleges were used by Mr Overton when giving the 'training'. Mrs Smith's evidence was she heard the training the claimant received, she does not allege of course that she was being given the training at the same time and was seeing what the claimant was being shown.

284. Mr Silvey did not interview Mr Overton who had actually given the training, to discuss the claimant's evidence about the extent of the training and the inconsistency in the evidence over whether a demonstration had been given or not, whether the claimant was aware of how to write-off debt and, whether there was scope for misunderstanding. He did not put to Mr Overton what the claimant alleged he had told her to do. It was not put to him that he may have been confusing the instruction he gave to her on 8 August to chase operators

with a subsequent discussion in September. The challenge by the claimant to his account of events in his interview, is not put to him.

285. Given that that the main plank of the claimant's defence is not that she did not carry out the transactions but that she did not understand the new system and specifically did not appreciate that she was writing off debt, there was an inadequate investigation into the training issue and whether there was scope for misunderstanding. This was not remedied by what was a superficial and cursory discussion with Mrs Smith during the appeal. The Tribunal find the respondent did not either during the disciplinary or appeal stage, reasonably apply its mind to the quality of the training that had been provided, it failed to carry out as much investigation as was reasonable in all the circumstances. The circumstances and context are important; this was a longstanding employee with a clean disciplinary record who Mrs Overton understood had never written off an invoice in the past but a couple of days after being shown a new computer system, wrote off circa 300 invoices in circumstances where she alleges she did not mean to and does not allege it was appropriate to do so and where what she had been instructed to do had only been given orally and where there was no written manual or policy given to her on how to use the system.

286. Mr Silvey also fails to ask Mrs Smith about the claimant's contention that she may have confused her recollection of the instruction given to the claimant on 8 August with a subsequent conversation in September, in terms of the requirement to chase the operators. He also fails to check with Mrs Smith as Office Manager, what her understanding was in terms of the letters which should be sent out on each type of invoice

287. The claimant was not provided with a copy the original TJS report until after the appeal. The mis-sorting was not the Tribunal find, deliberate however it did cause further confusion and the Tribunal find that it did make it more difficult for the claimant to present her case fully.

288. The issues that the claimant raised at the appeal, in terms of the accuracy of the notes was addressed at the appeal and although some of the corrections were accepted, the Tribunal find that those points in the notes did not fundamentally alter the evidence which had been given during the disciplinary process.

289. The respondent had the resources to instruct an external HR consultant to assist the appeal process, it had the resources therefore to seek some basic advice on how to follow a fair process Given that it does not have a separate disciplinary policy and relies on the Acas code, the respondent should have familiarised itself with the code and in particular, the very fundamental requirement to disclose sufficient information including witness statements, to enable the employee to have a fair hearing. The failure to do so was a serious procedural flaw.

290. The Tribunal find that at the time the respondent formed the belief that the claimant had committed the conduct, it had not carried out as much investigation into the matter as was reasonable and that the decision to dismiss was therefore unfair.

291. The Tribunal has considered its powers under section 123 (1) ERA and whether the claimant would have been dismissed if the respondent had followed a fair procedure.

292. The Tribunal takes into account that the claimant had on the first 44 occasions successfully transferred the invoices to OK Debt however, this could still have been explained by her confusion or lack of understanding of the system.

293. Although not information available to Mrs Overton at the time she made the decision to dismiss, Mr Overton before this tribunal accepted quite readily that he had not explained to the claimant how invoices were written off under the new system because he did not consider that that was a task that she would be required to perform. There was no manual or even short guide explaining the different functions of the system and Mr Overton in his evidence before this tribunal (regarding the various facilities under the Reconcile function), described it as 'confusing'. Mr Overton accepted that Mr Buckley who had designed the system, had given an explanation of it during the disciplinary hearing, which was not wholly accurate in that it only referred to one facility of the Reconcile function.

294. The Tribunal find that it a further investigation had established that the claimant had not specifically been shown how to write-off debt, and that the training did not consist of any demonstration, that the Submit function was not pressed during the training and the text therefore did not appear on the screen and was not explained to her, that it may have reached the decision that the write offs were or may have been, an error. The respondent would still be faced with the situation where the claimant had carried out the correct procedure 44 times before unticking the 'transfer to debt' box and writing off the invoices. The claimant's explanation she admitted, in terms of not noticing during those 44 invoices that she had not unticked the transfer to debt box, by her own admission *'made no sense'.* The fact she transfers so many so quickly, is not evidence however that she was writing off invoices, if anything it perhaps indicates that she did not realise she was carrying out such an important and final act.

295. Even had she raised the explanation that there had been a conversation on 10 August, that conversation is denied by Mr Overton. Even if it had been established that she had not been told about the write-off function and this had not been demonstrated to her, although the words 'write-off' do not appear on the screen, it may be reasonable to believe that the words 'repair closed' indicate something more than simply hiding from operator. However, the respondent put it to her she may have been blasé in not paying sufficient attention to the message, that is not the same as understanding and ignoring it.

296. Taking all those factors into consideration, had there been any further or corrective investigation into the training, if addressed properly by the respondent and with an open mind, the Tribunal consider it may have resulted in a fair dismissal, principally because of the claimant's failure to give a clear explanation for why she had carried out the transfers correctly initially.

297. The Tribunal find that it would be just and equitable to take that prospect into account and to reduce the compensatory award to be reduced to the extent that a 40% reduction is appropriate.

298. The Tribunal considered whether there is conduct of the claimant which to an extent caused or contributed to the dismissal or otherwise any conduct of the claimant before the dismissal where it will be just and equitable to reduce the amount of the basic award. If the claimant's actions were due to a lack of training and understanding which we find is a likely explanation, there is no culpability on the part of the claimant. The Tribunal do not find as a fact, that there was a failure by the claimant to comply with the correct procedure had she understood that she was 'hiding from operator' or even transferring to OK Debt.

299. The Tribunal do not find therefore that it has been established that the claimant's conduct was culpable or blameworthy. In any event taking into account the reduction in the compensatory award under section 123 (1), the Tribunal do not consider that it would be just and equitable to reduce the basic or compensatory award any further.

300. There has been a breach of the Acas, however the claimant raised this in the context the fairness of the dismissal, she did not argue for an uplift in the compensation, she did not raise it as an issue and she did not include an uplift within her schedule of loss.

301. The claimant has not provided any evidence that she has sought to mitigate her losses. Whilst her husband's ill-health may provide reasonable grounds for a period of not actively looking for work, the claimant did not explain what the restrictions were and over what period of time. The claimant gave no evidence about any efforts she had made to seek alternative employment. The claimant did not give evidence that she had applied for any jobs. The Tribunal find that the claimant has not taken reasonable steps to mitigate her losses and did not put forward evidence about how long she considered it would take her to find work. After 14 years of employment and without a reference however, the Tribunal consider that it will take the claimant some time to find alternative work however given the absence of any evidence about any efforts that she has made so far to find other work, her future losses are limited to a period of 4 weeks.

Remedy

302. The respondent is to pay to the claimant the following award;

A. Basic Award: £3,159
B. Loss of statutory rights: £450 x 60% = £270
C. 4 weeks loss of earnings: £697 (net) plus £4.76 (pension) x 60% =£421 (net)

Total: £3,850 (net)

Employment Judge Rachel Broughton

Date: 5 February 2021

JUDGMENT SENT TO THE PARTIES ON

.....

AND ENTERED IN THE REGISTER ON

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.