EMPLOYMENT TRIBUNALS

Claimant: Mrs C Leader

Respondent: Ashton Pioneer Homes Limited

HELD AT: Manchester (by CVP) **ON:** 23 - 24 February 2021

BEFORE: Employment Judge B Hodgson (sitting alone)

REPRESENTATION

Claimant: Ms R Lewis, Lay representative

Respondent: Ms M Peckham, Solicitor

RESERVED JUDGMENT ON LIABILITY

The Judgment of the Tribunal is that the claim of unfair dismissal is not well-founded and is dismissed

REASONS

Background

1. This is a claim of unfair dismissal which is denied

2. The hearing of the claim was conducted, with the agreement of the parties, by remote video platform (CVP) as noted by the reference in the heading of the action to Code V

3. For the avoidance of doubt, it was agreed between the parties at the outset of the hearing that the correct title of the respondent is as set in the heading of the action above

4. Preparation for the hearing had been completed between the parties. They had agreed a joint bundle of documents which comprised a total of 491 in terms of numbered pages but this incorporated a number of supplementary pages which required extended numbering. The respondent also produced a separate supplementary bundle but this comprised, said to be for the sake of completeness, the documentation put before the appeal panel, all of which was incorporated in the main bundle and therefore did not need to be considered by the Tribunal. The parties had exchanged witness statements

5. Given the timescale allocated to the hearing and the extent of the evidence to be heard and considered, it was agreed that the Tribunal would initially limit itself to hearing evidence, and reaching a finding, on liability only and then move to a remedy hearing if that proved necessary

Issues

6. The issues as to liability raised for the Tribunal to determine, in summary, were agreed at the outset of the hearing as follows:

   6.1. Was there a potentially fair reason for the claimant's dismissal? The respondent relies upon conduct under section 98(2)(b) of the Employment Rights Act 1996 ("ERA").

   6.2. Was the decision to dismiss the claimant fair and reasonable in all the circumstances (taking into account the size and administrative resources of the respondent) under the provisions of section 98(4) of the ERA, and, in particular:

      6.2.1. did the respondent have a genuine belief that the claimant was guilty of misconduct?

      6.2.2. did the respondent carry out as much investigation as was reasonable in the circumstances?

6.2.3. from that investigation, were there reasonable grounds for the respondent to conclude that the claimant had committed misconduct?

6.3. Was summary dismissal within the range of reasonable responses available to a reasonable employer?

6.4. In the event of a finding of unfair dismissal, should any adjustment be made to any compensatory award arising from a failure to follow the ACAS code and/or under ***Polkey*** and/or by way of contributory fault?

Facts

7. As indicated, the parties had prepared an agreed bundle of documents and references in this judgment to numbered pages are to pages as numbered in such bundle

8. The claimant gave evidence on her own behalf and also called as a witness her mother, Mrs Julia Mee. The respondent called to give evidence: Mr Peter Marland, Director of Housing; Ms Sara Sharrock, former Director of Resources; and Ms Jane Atherton, former Chair of the Board of Trustees

9. The Tribunal came to its conclusions on the following facts – limited to matters relevant or material to the issues - on the balance of probabilities, having considered all of the evidence before it, both oral and documentary, and the submissions of the parties

10. The respondent is a Community Benefit Society (a not-for-profit organisation), based in Ashton under Lane, Greater Manchester, offering housing to people in deprived areas. It manages some 1000 units and has a staff of approximately 47 employees. A Staffing Structure chart as at December 2019 is at page 410

11. The claimant commenced employment with the respondent on 24 July 2002 as a Housing Services Officer (her original contract of employment being at pages 30 – 33) and was promoted to the position of Customer Services Manager on 10 July 2006 (her contract for this post being at pages 34 – 41), a position she held until her summary dismissal, effective on 27 September 2019. In this role, which is classed as an office-based role, the claimant managed between 3 and 8 staff

12. Two copies of the Job Description for the claimant's role were produced to the Tribunal, one at pages 42 – 46 and one at pages 47 – 50

13. It is common ground between the parties that, prior to her dismissal, the claimant had an unblemished disciplinary record. The respondent's Disciplinary Rules and Procedures document is at pages 51 - 62

14. The respondent operates a flexi-time policy for its staff (the Policy document being at pages 66 – 69), allowing for the prospect of time being accrued and then taken as flexi leave

15. The issues arising in this matter concern the respondent's time-recording system, known as Proteus. This system, which has been in use by the respondent since approximately 2006, records times of arrival and departure of staff to and from the office by means of a personalised electronic fob

16. On 15 May 2019, the Proteus system had gone down. In order to avoid the necessity for subsequent manual adjustment, the respondent's Finance Officer, Ms Michelle Barnes, took a note of the staff readings

17. It was noted by Ms Barnes from these readings that the claimant had clocked in for work at 10.10 on that day. She had clocked out for lunch at 13.07 and then clocked back in at 14.31. In the course of that afternoon, she adjusted her arrival time to 09.30. She later clocked out at 16.58. The following day, the claimant adjusted her clocking times for the previous day. She again adjusted her arrival time from 09.30 to 09.15. She also adjusted her departure time initially from 16.58 to 17.00 and then again from 17.00 to 17.15

18. This was regarded as suspicious activity and, accordingly, the entries made on the Proteus system by all staff were monitored over the following four weeks. The claimant was absent on holiday in the latter part of May, returning on 4 June

19. Further adjustments to her Proteus system entries were made by the claimant on 4 June, and also on 6 and 12 June, which were noted and her Manager, Mr Peter Marland was notified

20. Mr Marland obtained a historic breakdown of the claimant's clocking records and, on analysis, this showed (see pages 210 -206):

    20.1. during 2017, the claimant had deleted 64 lunch time entries, usually in the course of the same afternoon

    20.2. during 2018, the claimant had deleted 47 lunch time entries, again usually on the same afternoon

    20.3. during 2019, the claimant had deleted 26 lunch time entries, again usually on the same afternoon

    20.4. there had additionally been a number of other changes to arrival and departure times and also only single lunchtime entries

    This amounted to a total of 226 adjustments/deletions over the period

21. Having considered this information, Mr Marland called the claimant to a meeting on 14 June - at which the respondent's Chief Executive Officer was also present (as required by the respondent's Disciplinary Policy in the event of a possible suspension) – and outlined to her the allegation that she had fraudulently adjusted her hours on her Proteus clocking in and out which had potentially enabled her to have leave which she would not otherwise have been entitled

to. The claimant declined to comment and Mr Marland advised her that she was being suspended pending an investigation (see notes at pages 73 – 74). Mr Marland confirmed the positon to the claimant by letter also dated 14 June (pages 75 – 76) and then proceeded himself with the investigation

22. The allegations – "of potential gross misconduct" - set out in the confirmatory letter were:

- Alleged fraudulent adjustments to the Proteus Flexi time Clocking in/out system over a prolonged period of time

- Alleged taking of flexi-time leave that you were not entitled to take

23. Mr Marland then wrote to the claimant by letter dated 28 June inviting her to an investigation meeting and enclosing copies of the time recording breakdowns (pages 77 – 83)

24. The letter confirmed the right of the claimant to be accompanied and, having repeated the general allegations, goes on to state:

"Specifically, it is alleged that you have maintained the outward appearance of clocking in/out at lunchtime and then fraudulently, using the Proteus Managers Access, have proceeded to delete your lunchtime clockings, usually on the same afternoon. This activity results in the Proteus system using the default setting to only deduct 30 minutes for your lunch break when it is alleged you have taken a longer lunch break. The details of which can be found in Appendix 1 and Appendix 2 attached to this letter

The company considers the above allegation to be of potential gross misconduct"

25. Appendix 1 comprises a comprehensive list of all deletions to lunch time clockings and other adjustments made by the claimant from January 2017 through to June 2019 and Appendix 2 a summary of the flexi leave taken during that period

26. The reference to "the Proteus Managers Access" is to the fact that the claimant, holding the position of Manager, had the ability to access the system to make adjustments to the clocking in/out records, both to her own entries and to those of the staff she managed, without further authorisation (staff managed by her would need to seek her authority to make any such adjustments). If there is no lunch break entry, or only one of either clocking in or out, the record automatically defaults to a 30 minute lunch break. In doing so, unlike other adjustments, the fact that this has occurred is not identified on the Proteus report which is produced monthly

27. The investigatory meeting went ahead on 5 July, the claimant being accompanied by her colleague, Ms Nicola Willis. The content of the meeting is set out in the notes at pages 85 – 92

28. In the course of the meeting, the claimant denied any wrong doing and gave examples of off-site activities but requested that she be given copies of her Outlook calendar entries and work notebooks to enable her to check her movements against the entries. She also suggested that, on 15 May, she may have been checking for illegal car parking out of the office as part of her duties and that this would be able to be seen on CCTV. Following a break in the meeting, however, the claimant withdrew consent for the CCTV footage to be inspected, saying "actually I'm not happy about you viewing the CCTV on that date". Later in the meeting Mr Marland referred again to the CCTV footage, advising that the purpose of viewing it would be to rebut the allegations but the claimant did not consent. The claimant contended that the Proteus system was not fit for purpose and subject to abuse and that she often had to work during her lunch break leading to her adjusting her clocking times

29. Mr Marland then carried out a series of investigatory meetings with other members of staff. On the same day, 5 July, he met with Ms Barnes (notes at pages 206AF – 206AG), with Ms Natalie Nixon (notes at pages 206AH – 206AI) and with Ms Nicola Woods (notes at pages 206AK – 206AL)

30. Ms Barnes provided details of the claimant's actions on 15 and 16 May and gave her view that the Proteus system worked fine and was fit for purpose. Ms Nixon, as the Senior Customer Services Officer, worked closely with the claimant. She could only recall being out on the site with the claimant 2 or 3 times in the past year and offered the information that the claimant went to her mother's house at lunch time each Wednesday and Thursday. Ms Woods indicated that the claimant rarely visited off site and only for short periods of time

31. On 15 July, Mr Marland wrote to the claimant pages (93 – 94) with a record of the earlier meeting for her approval together with copies of her Outlook calendar from 2017 to 2019 (pages 95 – 170), as had been requested by the claimant. He called her to a further meeting prior to which she would be given access to her work note books as also requested by her

32. On 22 July, Mr Marland met again with the claimant who again was accompanied by Ms Willis (see notes at pages 171 – 179). As had been indicated, prior to the meeting, the claimant was given supervised access to her work note books. The claimant stated that she had arrived at work at 10.00 on 15 May after collecting refreshments for a meeting and checking bins for contamination. She had spoken to Bill Wainwright about that evening's meeting after clocking out. In the course of the meeting, the claimant read out from a detailed pre-prepared statement explaining why she denied any wrongdoing with regard to timekeeping. She also raised allegations of bullying (see page 178)

33. On that same day, Mr Marland held follow up meetings with Ms Nixon (notes at pages 206AI – 206AJ) and with Ms Woods (notes at pages 206AL – 206AM). Both Ms Nixon and Ms Woods advised that they were not aware of the claimant

having performed any duties over her lunch break or visiting off site other than on one occasion

34. On 24 July, Mr Marland held meetings with Ms Cath Hollinrake (notes at pages 206AN – 206AO), with Mr Bill Wainwright (notes at pages 206AP – 206AQ) and with Ms Amanda Reynolds (notes at pages 206AR – 206AS). Mr Marland sought the views of Ms Hollinrake as to the claimant's allegations that the Proteus system was "not fit for purpose" and was abused by other members of staff. She denied this was the case and confirmed, having checked the records, that no such issue had previously been raised by the claimant according to the notes of past management meetings. Mr Wainwright had a similar view as to the Proteus system. He also confirmed that he had spoken with the claimant for perhaps no longer than 2 or 3 minutes on 15 May. Ms Reynolds had checked the respondent's systems and could confirm that the claimant had not sent any e-mails out of hours (after 6pm) in the past twelve months. She also confirmed that the claimant had not previously raised any issue of the Proteus system being not fit for purpose

35. By letter dated 25 July (page 180), Ms Hollinrake wrote to the claimant, referring to the allegations of bullying she had made at the reconvened investigation meeting, and inviting the claimant to give details of such allegations in writing if she wished them to be investigated. Ms Hollinrake advised that, dependent upon the detail of the allegations, the disciplinary process may be suspended pending their investigation

36. On 31 July, the claimant emailed Ms Hollinrake setting out details of her bullying allegations (pages 181 – 182). These did not indicate any relation to the allegations of misconduct she was facing. She was subsequently invited to attend a grievance meeting on 8 August (pages 183 – 184)

37. The grievance meeting went ahead as scheduled on 8 August (see notes at pages 186 – 192)

38. By letter dated 3 September (pages 193 – 198), Ms Hollinrake went through the specifics of the claimant's grievance, setting out her findings and, in conclusion, confirmed that the claimant's "grievance is not upheld and that no further action is necessary." The claimant was notified of her right to appeal which she did not exercise

39. Mr Marland completed his "Disciplinary Investigation Report" with a date of issue of 6 September (pages 201 – 206). The Report set out in detail the evidence produced by Mr Marland's investigation dealing with all matters raised and put forward by the claimant. Specifically, Mr Marland had cross-referenced the claimant's clocking deletions and adjustments against her Outlook calendar and notebook entries and could find no evidence to support her explanations. There were seven appendices to the Report comprising the relevant supporting documentation (pages 206A – 206AS)

40. The Report concluded with a Recommendation (paragraph 7 – page 206) that "the evidence should be presented to a Formal Disciplinary Hearing" and, after a summary of his findings, that "the evidence would suggest that there is a reasonable belief that Gross Misconduct has taken place in that:

    - [The claimant] has fraudulently adjusted the Proteus Clocking system which has resulted in fraudulent time keeping resulting in gaining at least 12 additional days paid leave
    - There is a serious breach of Confidence regarding the integrity, accountability and honesty with regard to [the claimant] in her role as a Customer Services Manager at [the respondent]
    - [The claimant] has failed to meet the high standards of personal conduct and service required from [the respondent's] employees in the Staff Code of Conduct"

41. By letter dated 6 September from Ms Sara Sharrock, the then Director of Resources (pages 199 - 200), the claimant was called to attend a disciplinary hearing on 23 September. The allegations to be addressed, described as constituting potential gross misconduct, were set out as follows

    - That you have fraudulently adjusted your time on the Proteus flexi clock system over a prolonged period of time as detailed in the attached Disciplinary Investigation Report and accompanying appendices
    - Specifically, it is alleged that you have maintained the outward appearance of clocking in/out at lunch time and then fraudulently, using the Proteus Managers Access, have proceeded to delete your lunch time clockings. This activity results in the Proteus system using the default setting to only deduct 30 minutes for your lunch break when it is alleged you have taken a longer lunch break. This has enabled you to fraudulently accrue time and paid leave

    Mr Marland's Report was enclosed together with the appendices

42. By email dated 19 September (see pages 210 – 211), the claimant requested copies of the Disciplinary Policy, Flexi Policy and Information Security Policy together with minutes of Management meetings which Ms Sharrock forwarded to her (pages 213 – 291)

43. The disciplinary hearing proceeded on 23 September and was chaired by Ms Sara Sharrock. Mr Bill Wainwright, Maintenance Manager, was the other panel member in accordance with the respondent's Policy. By agreement, the claimant was accompanied by her colleague, Ms Willis. The notes of the meeting are at pages 292 – 308

44. Mr Marland, as Presenting Officer, gave a powerpoint presentation of the Management case (pages 317 – 327). The claimant maintained a denial of any

fraudulent actions whilst accepting that she could not point to any documentation that might support her contentions

45. By letter dated 27 September (pages 309 – 316), Ms Sharrock wrote to the claimant with the Panel's decision. This letter sets out a point by point response to the various matters put forward by the claimant in her defence and concludes that "the Panel consider your actions to be gross misconduct and a gross breach of trust, resulting in the company losing faith in your integrity in your role as Customer Services Manager. As a consequence the Panel have decided you have been summarily dismissed i.e. without notice or notice pay, from today's date"

46. The letter notified the claimant of her right to appeal which she exercised by preliminary email dated 13 October (page 328), followed up by an email dated 4 November (page 413). The email of 4 November sets out "the further information" the claimant intended to discuss at the Appeal Hearing as follows:

    46.1. In relation to the alleged fraudulent use of Proteus, calculations indicate that an average of 9 minutes per day were the amount of adjustments made over a two and a half year period. These calculations take into account only the specific days I worked during this period. There were activities that took me over my contracted hours and the only way I knew how to make adjustments to better reflect the hours that I actually worked, was to retrospectively modify Proteus using my managerial permission. The actual adjustments were only a portion of the additional hours that I had worked. I will provide further details of tasks undertaken at the Appeal Hearing

    46.2. I had spoken to my manager, Peter Marland, about the way I was using Proteus system after it was introduced and on several other occasions over the years. Furthermore, as the records show [sic] had used this approach for a long period of time and was unaware it was inappropriate, especially as I was fully aware of its transparency

    46.3. [The respondent] failed to provide me with a copy of the Disciplinary Policy throughout the investigation/disciplinary process in a timely way, and then only after I requested it. Consequently, I would like to have some of the witness statement providers NATALIE NIXON and NICOLA WOODS, as well as PETER MARLAND, available separately, at the Appeal, as I believe that this is material to the Appeal Hearing" [claimant's capitals]

47. With regard to the question of the attendance of Ms Nixon and Ms Woods, the respondent requested that they attend to which they each replied, declining on medical grounds (see pages 346 and 347). The respondent accepted this position and notified the claimant accordingly, attaching a copy of the replies when it sent the claimant a copy of the Agenda for the appeal hearing, confirming that Mr Marland would be in attendance (pages 342 – 345)

48. The claimant attended the appeal hearing on 2 December (see notes at pages 356 – 365)

49. The Appeal Panel was chaired by Ms Jane Atherton, the then Chair of the Board of Trustees and the other members of the Panel were Mr John Arden, a Board Member, and Mr Tony Berry, the respondent's Chief Executive Officer

50. Ms Sharrock acted as Presenting Officer. The claimant was in attendance and was again accompanied by Ms Willis

51. The claimant had prepared and submitted detailed "Appeal Notes" to the Panel (see pages 348 – 355). She maintained her denial of any fraudulent actions and argued that, in any event, given the level of time involved over an extended period of time, dismissal was too harsh a sanction

52. It was confirmed to the claimant that Mr Marland was available for her to question but she declined the opportunity and accordingly he was not called to give evidence. The claimant was questioned by both the Panel and Ms Sharrock. Ms Sharrock presented the Management case and was questioned by both the Panel and the claimant

53. The Panel asked the claimant to explain in what way she considered the evidence of the witnesses she had asked to attend to be untrue. Her reply is recorded as

    "NN [Ms Nixon] stated that I go to my Mum's every Wednesday and Thursday, how did she record that? Also asked about complaints – spreadsheets not up to date. NN confirmed Notice on cars. Have gone to the stores and film crews

    Collaborate attendance at the Base. Confirm with NW that I attended the Tenants meetings and bought stuff for events. Lie about not attending for sandwiches"

54. The claimant was also asked again if she wanted the CCTV footage of 15 May to be viewed and confirmed that she did not

55. The hearing was adjourned to allow the Panel to deliberate. By letters dated 6 December (page 366) and 16 December (page 367), Ms Atherton advised the claimant of delay in the outcome pending further investigation and deliberation

56. The Panel summarised for its own use the outstanding points it considered had arisen from the Appeal hearing and which required further investigation (page 403)

57. The Panel considered the contention that the claimant's dismissal was in reality a cost cutting exercise by taking the response to this from Mr Berry (pages 408 - 409). He explained why in his view this contention had no merit, particularly given that the claimant's post remained part of the respondent's staffing structure

58. The other matters raised were put to Mr Marland and Ms Sharrock and their detailed responses were set out in writing (pages 404 – 407)

59. Ms Hollinrake was asked to scrutinise the Neighbourhood Services Log Books from January 2017 – June 2019 to check what contact with the claimant had been recorded. After extensive scrutiny, the records (summarised at pages 368 – 371, the records themselves at pages 372 - 384) showed a total of 12 calls made by the claimant, all during normal office hours, during that period, together with one email sent to the claimant on a Saturday (in April 2017) with no response from her being logged

60. Ms Barnes was asked to provide an overview of the Proteus clocking software and how adjustments were recorded. She responded with detailed illustrations of how, generally, adjustments were highlighted in bold but that this did not apply to lunch time deletions which did not appear on the monthly reports (see pages 385 – 387 with the supporting documentation at pages 389 - 401)

61. The Appeal Panel then reached its conclusions which Ms Atherton set out in writing to the claimant by letter dated 20 December (pages 461 – 463). The letter sets out the claimant's three grounds of appeal, and the Panel's findings in regard to each, which it rejected. It further goes on to give the Panel's findings on the additional contentions raised by the claimant at the hearing, namely: the alleged lack of training in the Proteus system, the contention that the decision to dismiss was in fact part of a cost-cutting exercise and that dismissal in all the circumstances was too severe a sanction. These contentions were also rejected

62. The appeal was accordingly denied

<u>Law</u>

63. Section 98(1) of the Employment Rights Act 1996 states:

    In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:

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

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

64. Relating to the "conduct of the employee" is one of the reasons set out in subsection (2)

65. Section 98(4) of the Employment Rights Act 1996 states:

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.

66. It is for the employer to prove the reason for dismissal. The application of section 98(4) has a neutral burden of proof.

67. There is well-established case law setting out the guiding principles for determining an unfair dismissal claim based upon a dismissal by reason of conduct, as alleged in this case

68. The case of ***British Home Stores Limited v Burchell (1980) ICR 303*** proposes a three-fold test. The Tribunal must decide whether:

68.1. the employer had a genuine belief that the employee was guilty of the misconduct alleged;

68.2. it had in mind reasonable grounds upon which to sustain that belief; and

68.3. 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 (which include the gravity of the charges and the potential impact upon the employee – ***A v B 2003 IRLR 405***).

69. The Tribunal must then consider whether the sanction of summary dismissal was reasonable in all the circumstances

70. The Tribunal must not substitute its own view for that of the employer unless the latter falls outside the band of reasonable responses (***Iceland Frozen Foods v Jones 1983 ICR 17****)*. This applies to procedural as well as substantive matters (***Sainsburys v Hitt 2003 ICR 111***).

Submissions

71. By agreement, the Tribunal heard first the submissions on behalf of the respondent. The respondent's representative had prepared written submissions, essentially setting out the legal framework including references to case law, and which she supplemented orally, summarised as follows

72. There is no dispute as to the actions of the claimant which resulted in her obtaining a not insignificant financial benefit. Nothing was produced to support the amended entries

73. The procedure followed was a fair one and this is not a case where the employer is actively looking for evidence of guilt but rather encouraging the claimant to explain her actions and giving her the opportunity to do so at the hearings

74. The claimant made no meaningful response when the allegations were first put to her when she would have been expected to have defended herself. There is no reasonable explanation for the amendments made on 15 May and there was a repeated pattern generally of deletions and amendments made without explanation

75. The evidence before the respondent was that the claimant did not work regularly over lunchtimes and her role was predominantly office based. Evidence produced supporting the allegations came from colleagues with no axe to grind and no reason to mislead. Only for the first time in cross-examination was it raised by the claimant that other colleagues may have been usefully questioned as part of the investigation

76. The respondent had a genuine belief in the claimant's guilt which was supported by the evidence and reasonably held. All matters raised by the claimant were fully investigated. There was nothing to support the allegation that the decision had been taken in order to save money

77. It is not accepted that there was a reasonable need to reconvene the appeal hearing following the panel's further investigations but, if so found, the only consequence of that would have been to delay the outcome by up to two weeks rather than affect the decision itself. The further enquiries were made for the sake of completeness only

78. It was reasonable to conclude that the conscious actions of the claimant amounted to gross misconduct and a serious breach of trust and confidence

79. There is no legal obligation to produce witnesses for cross-examination as part of the internal process nor was there any contractual right to have them produced, and the respondent's decision in this regard cannot be said to unreasonable

80. The claimant's representative made oral submissions, summarised as follows

81. In terms of facts, the claimant was authorised to make appropriate amendments to her clocking entries but was not shown how to do this. The manner in which she made amendments was the practice she had always followed and she was unaware she was doing anything wrong. She never denied making the alterations and was not trying to hide anything, believing that all alterations were

visible to her managers. The claimant checked the time entries of her staff and assumed her managers were doing likewise with her entries

82. The claimant had explained the amendments by reference to working over lunchtime and out of office activities. There were no written operating instructions for the Proteus system

83. Mr Marland accepted in his own evidence that he had agreed that, were the claimant to work late, she should "just record the time" and the entries were legitimate even if they did not comply with what was now being said to be the correct protocol

84. The claimant's Job Description shows the claimant's responsibilities involved out of office activities. Her assessment of that amounting to 15% of her working time would necessitate a number of amendments to the clocking system. Mr Marland cannot be correct in assessing these activities at 1% of the claimant's working time as this would mean no more than 21 minutes per working week out of the office

85. Throughout the internal process, the claimant had given concrete examples of her out of office activities. She tried to reduce travelling because she was a designated office worker with no travel allowance and did not submit travel expenses and, as a result, these activities often impacted on arrival/departure and lunchtimes

86. The respondent was wrong to reject the evidence of the Job Description and the examples given by the claimant and find that the only acceptable evidence would have been notes added to the Proteus system or confirmation within the claimant's Outlook calendar. It is inconceivable the claimant's manager was unaware of her activities. It was wrong that her inability to produce diarised evidence of her movements could be interpreted as proof of her lying

87. The claimant's practice was to check out at lunchtimes but the office remained busy at this time, particularly on a Wednesday, when there was an early close. There was often pressure due to staff shortages. When it turned out that she had been unable to take her lunch break, she deleted the entries to default to a 30 minute lunchbreak even if she may not even have taken a break of that length of time

88. The claimant contends that there were procedural failings. The disciplinary policy was not provided in a timely fashion so she did not believe she would have been able to call witnesses. She was not given the opportunity to question the witnesses at the appeal. The evidence that she had visited her mother every Wednesday and Thursday was fundamentally incorrect and this evidence was never able to be challenged. It is very unlikely given how busy the office is on Wednesdays

89. Even recollecting precisely what the claimant had been doing on 15 May was difficult when she was asked some six weeks later and the allegations spanned

in total a period of over two years. The claimant had not kept her handwritten records

90. The claimant had not gained any personal benefit from the Proteus entries that she had not earned and she was unaware of any requirement to act differently with regard to the entries she had made and adjusted. The suggestion by Mr Marland that notes were widely used in the Proteus system was not borne out by the evidence of the Maintenance Manager or the comments of the Dismissing Officer

91. The calculation of the 'stolen time' showed a figure of 9 minutes per working day and, in all the circumstances, summary dismissal was not appropriate. One possible way of dealing with the matter would have been to deduct the time and re-educate the claimant

92. The flawed process rendered the decision unfair and, as a result of her dismissal, the claimant has been unable to find alternative comparable employment. Her pension arrangements have been adversely affected and the fact that she voluntarily contributed to the pension scheme just prior to being suspended showed that she was intending to continue working in a job she enjoyed

<u>Conclusions</u>

93. There was no dispute between the parties that, as a matter of fact, the claimant did make deletions and adjustments to the Proteus timekeeping system over a period of time. The issue between the parties was whether or not such deletions and adjustments were "fraudulent"

Reason

94. It is for the respondent to prove the reason for dismissal. The reason relied upon by the respondent is conduct, alleged to be (in summary) fraudulent use of the Proteus clocking system

95. The claimant contended that the true reason for the decision was in fact in order to save costs

96. It was accepted by the respondent in evidence that there had been a recent drive to reduce costs but this had been completed. Following completion of that exercise, the claimant's position remained as part of the respondent's staffing structure. There was no evidence put forward to indicate that either the Disciplinary Panel or the Appeal Panel had this aspect in mind in any way when they reached their conclusions. The suggestion was explored by the Appeal Panel but rejected

97. The Tribunal is satisfied that there was no evidence before it that the dismissal of the claimant was a sham exercise designed to achieve a cost saving and concludes accordingly that the sole reason for dismissal, as contended for by

the respondent, was the conduct of the claimant. If a cost saving were an indirect result of the decision, that does not negate conduct as the principal reason

98. The Tribunal then looked at the provisions of section 98(4) through the prism of the ***Burchell*** guidelines

Genuine belief

99. On the evidence, the Tribunal was satisfied that the respondent held a genuine belief that the claimant was guilty of the conduct alleged. There was no challenge to the contrary put forward by the claimant other than the contention that the dismissal was a sham exercise to save money and the Tribunal has set out above its findings in this regard

Was there a proper and reasonable investigation?

100. Clearly a significant investigation was carried out. Following the claimant's suspension, the investigating officer held a number of meetings, two with claimant and also with other witnesses, and considered an extensive amount of documentation. All of these investigative steps were incorporated within Mr Marland's Report which was given to the claimant

101. There then followed a disciplinary hearing and the claimant subsequently exercised her right of appeal

102. The claimant raised a number of procedural criticisms. These do not include any contention that the respondent breached the terms of its Disciplinary Policy. Such issues must be viewed from the perspective of the reasonable employer and applying the band of reasonable responses test

103. The claimant alleges that she was inhibited from defending herself fully at the disciplinary hearing as a result of late receipt of the Disciplinary Policy. She referred to the Policy requiring that "lists of all witnesses to be called will be submitted … no later than 10 working days before the date arranged for the hearing" (see page 60) which resulted in her believing that it was too late to raise the prospect of witnesses being asked to attend. The Tribunal did not accept this contention as reasonable. The claimant, as a Manager, was or should have been aware of the content of the Policy at least in principle if not in detail. She had received the Policy some four days prior to the hearing. There was nothing to prevent her asking for the attendance of the witnesses she wanted and, if necessary as a consequence, having the hearing date deferred. She did not raise the issue at all with the respondent at that stage

104. The presence of the witnesses was requested by the claimant at the appeal stage and their presence was in turn requested by the respondent but they declined. There is no legal or contractual right to have the witnesses attend. The main purpose in seeking their attendance was to question Ms Nixon on her assertion that the claimant was in the habit of visiting her mother each

Wednesday and Thursday. The claimant called her mother to give evidence to the Tribunal to rebut this. Her evidence, accepted by the Tribunal, was that the claimant visited her perhaps twice a week, but not necessarily on Wednesdays and Thursdays, and did not stay very long but this was not evidence that was before the respondent during the internal process. The evidence of both the dismissing officer and appeal officer was that the purpose of any time taken by the claimant out of the office was not material – it was the fact of the time taken and the subsequent deletions and adjustments that carried significance. It is right to say that, on the evidence, of the days of the week, Wednesdays and Thursdays were indicated as the days upon which the claimant made the majority of her deletions of the lunch break clockings. Ms Nixon however may well have accepted or been shown to have been mistaken as to the activity of the claimant on these days, whether by way of assumption or reliance upon what she had been told or otherwise, but this would not have made a material difference to the outcome and accordingly did not prejudice the claimant

105. In cross-examination, the claimant suggested the respondent should have extended its investigation to speak to other colleagues with whom she worked for evidence of her movements. This possibility was not raised at all by the claimant in the course of the internal process and she did not seek to call them. The Investigating Officer did interview the member of staff (Ms Nixon) whose work station, it was agreed, was adjacent to that of the claimant. She was also described, accepted by the claimant, as a friend of the claimant with no axe to grind or reason to lie. The Tribunal considers that the respondent was entitled to draw a line as to the number of witnesses interviewed and the line they had drawn was a reasonable one which the claimant did not question at the time

106. There was no further meeting with the claimant after the further investigations of the Appeal Panel. The claimant had raised a number of matters that the Appeal Panel felt it necessary to investigate further. Having done so, they did not put the responses back to the claimant for further comment. Again, the Tribunal's view is that the process has to be drawn to a close and it was not unreasonable of the Appeal Panel to conclude that the claimant had been given the opportunity to make her representations and decide not to revert to her for further comment prior to finalising their decision

107. Each explanation or reason for the deletions and adjustments that was put forward by the claimant at the various stages of the investigation and disciplinary process that could be checked was scrutinised by the respondent

108. Having considered the full extent of the respondent's investigation, the reaction to each of the matters raised by the claimant which were able to be subject to further investigation and consideration – including potentially exculpatory evidence – and also the claimant's arguments as to procedural defects, the Tribunal is entirely satisfied that at the time of forming its belief, the respondent

had carried out as much investigation into the matter as was reasonable in all the circumstances

Did the respondent have reasonable grounds upon which to support that belief?

109. Following investigation, including the meetings and hearings with the claimant, the respondent was left with the following position

110. The claimant accepted that she had made the adjustments and deletions but argued that they were justified by reference to her carrying out her work duties. The respondent's investigations and enquiries produced the following findings:

- The claimant had used the Proteus system for many years and had explained the usage of the system to the staff she managed. Although she claimed that she needed training in its use, she had at no time raised this as a request, whether in respect of herself or in instructing her team. In her prepared statement read out at the investigation meeting on 22 July, she stated that "All members of management team had training on how to access and amend their own and team clockings. In and out changes are highlighted in bold that have been amended unless it's over the lunch period when you remove clocking because it deducts the standard 30 minutes" (see page 173)

- The claimant contended that she had been transparent with the adjustments she had made but the above statement showed that she was aware the lunchtime deductions would not be highlighted

- The claimant had at no time used the 'notes' facility in Proteus to record the reason for any adjustments she had made

- The claimant said that she had raised at Management meetings concerns that the Proteus system was not fit for purpose. Examination of the records of the meetings showed no such concern being raised by her and the common view of the witnesses, including those with a role similar to that of the claimant, was that the system was in their experience fit for purpose

- In the investigatory meeting of 22 July (see page 175), the claimant stated that she often visited the Tenant Base at lunchtime. This was denied by one of the witnesses and, when challenged at the disciplinary hearing, the claimant sought to rein back on her assertion, alleging that she had been misquoted in the minutes (see page 297)

- In the investigatory meeting of 22 July (see page176), the claimant asserted that she had attended "all but one" of the tenants' bi-monthly evening meetings. The records showed that not to be the case

- Examination, by both the respondent and the claimant, of her Outlook and work notebooks produced nothing to support any out of office activity justifying the adjustments. In the investigation process, the claimant

asserted that she noted absences out of the office on the "whiteboard", which notes, by their nature, would not be retained. When challenged on this by witness evidence, she asserted at the disciplinary hearing that she had done this "sometimes" (see page 301). Not to record activity out of the office is a breach of the respondent's lone working policy

- The claimant asserted that she often dealt with communications outside of office hours. Examination of records showed that: she had not sent any e-mails after 6pm in the past 12 months; she had replied to three out-of-hours Facebook messages within the past two years; and that she had not had out of hours communication with tenants

- The claimant's initial response to the adjustments made in respect of 15 May was to suggest that she had been inspecting bins prior to arriving at work. If so, that would have been caught on CCTV. Having initially agreed to the offer to have the footage looked at, the claimant changed her mind and declined. The offer was further made at both the disciplinary hearing and the appeal hearing but each time it was declined

- The claimant ultimately could not give a proper explanation, or any explanation at all, for the adjustments she had made to her working time on 15 May. She categorised these as "an error", without explaining in what way her expressly going into the system to change the clocking times to her benefit could amount to an error

111. There was a significant number of adjustments that had been made to the clocking records of the claimant by her, of which there was a particularly high number of deletions of lunch time clockings resulting in the system defaulting to 30 minutes. Such deletions did not appear on the monthly clocking records passed on to managers for approval and therefore there was no transparency at all in respect of them

112. All specific explanations put forward that could be examined were examined and proved to be, at best, unsupported, arguably misleading, and certainly inaccurate. All that the respondent had, by way of justification for the significant number of adjustments and deletions, were general observations by the claimant on what the respondent assessed as infrequent and sporadic out of office activities, with nothing to support them whether by way of recorded entries, either in Outlook or the claimant's work notebooks, or witness evidence

113. It is not for the Tribunal to substitute its own view but rather to assess whether the respondent's decision was a decision reasonably available to an employer to take acting reasonably. The Tribunal concludes on the evidence and facts found that this was such a decision. Each of the claimant's explanations was examined and found not to be supported by any evidence and this was measured against the claimant's open admission of having effected the adjustments and her general explanations given to justify them

Was the sanction of summary dismissal a reasonable sanction?

114. Given the respondent's finding of fraudulent use of the clocking system by the claimant, resulting in either additional pay or equivalent by way of time off, it cannot, in the Tribunal's view, properly be said that summary dismissal is outside the band of reasonableness when it comes to sanction. "Fraudulent timekeeping" is given as an example of gross misconduct in the respondent's Disciplinary Policy (see page 58). The claimant's length of good service was taken into account by the respondent in reaching this conclusion

115. The finding of the Tribunal in all the circumstances is that the claim of unfair dismissal is not well-founded

116. The Tribunal would wish to stress that this decision is based on the legal principles outlined above and does not constitute a finding by the Tribunal that the claimant was in fact guilty of the conduct alleged. The Tribunal did not need to go on to assess to what extent, if at all, the claimant had in fact contributed to her dismissal. The Tribunal's decision is a finding that, on the evidence before the respondent, following a reasonable investigation, it cannot properly be said that the respondent was not reasonably entitled to come to the conclusion, and apply the sanction it did.

Employment Judge B Hodgson

Date 26 March 2021

REASONS SENT TO THE PARTIES ON

1 April 2021

FOR THE TRIBUNAL OFFICE

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