EMPLOYMENT TRIBUNALS

Claimant: **L Mergell**

Respondent: **Vauxhall Surgery – Dr Shah**

Held at: **London South Employment Tribunal by video hearing**

On: **9 and 10 June 2021**

Before: **Employment Judge L Burge**

Representation
Claimant: Mr Brittenden, Counsel
Respondent: Mr Munro, Solicitor

JUDGMENT having been given orally to the parties on 10 June 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant was employed by the Respondent from 1 April 2010 until she was dismissed on 19 November 2018 for alleged misconduct.

The evidence

2. Pezhman Fard (GP and investigator), Kirit Shah (GP partner at the Respondent) and Beata Roso (Practice Manager) gave evidence on behalf of the Respondent. The Claimant, Linda Mergell gave evidence on her own behalf.

3. The Tribunal was referred during the hearing to documents in a hearing bundle of 233 pages. Further documents were provided to the Tribunal of 16 pages.

4. Both Mr Brittenden and Mr Munro provided the Tribunal with written and oral closing submissions.

Issues for the Tribunal to decide

5. At the beginning of the hearing the Tribunal agreed with the parties the issues to be decided. These were:

   a. Was the Claimant dismissed for a potentially fair reason in accordance with s.98(1) of the Employment Rights Act 1996 ("ERA")? The Respondent relies on conduct which is a potentially fair reason (s.98(2)(b) ERA). The Claimant does not dispute that the Respondent dismissed her for conduct.

   b. Did the Respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the Claimant? This is to be determined in accordance with equity and the merits of the case (s98(4) ERA).

   c. In accordance with the test in *British Home Stores v Burchell* [1980] ICR 303, has the Respondent shown that:
      i. it had a genuine belief that the Claimant was guilty of misconduct?;
      ii. it had in its mind reasonable grounds upon which to sustain that belief? (neutral burden); and
      iii. at the stage at which that belief was formed, it had carried out as much investigation into the matter as was reasonable in the circumstances (neutral burden)?

   d. Did the procedure followed and the decision to dismiss fall within the range of reasonable responses open to a reasonable employer in the same circumstances?

   e. If the Claimant's dismissal was unfair, is the Claimant entitled to a Basic Award and/or a Compensatory Award, and, if so, should there be any of the following adjustments:
      i. any uplift to the Compensatory Award as a consequence of a failure to follow procedures under the ACAS code?
      ii. any reduction or limit in the Compensatory Award to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors accordingly made no difference to the outcome in accordance with *Polkey*? and/or
      iii. any reduction in either award to reflect any contributory fault on the Claimant's behalf towards her own dismissal?

f. Notice pay - was there an actual repudiation of the contract by the employee so as to justify the Claimant being dismissed without notice pay?

Credibility

6. Throughout the documents, in the disciplinary appeal hearing and in the Tribunal the Claimant had a clear and consistent recollection of events. Throughout she maintained that she should have updated the patient notes better but that she would not and never did prescribe medication. Dr Shah

also came across as honest, accepting when he had not acted as optimally as he could have. But his recollection was not as clear as the Claimant's and that was evident in the documents as well as when he gave evidence to the Tribunal. For example, in the letter of dismissal Dr Shah was quoted as saying that he "had no recollection of any conversation in connection to this patient". The Tribunal finds as a fact that this was not correct, Dr Shah inputted numerous test results and subsequently spoke to Patient A on the telephone. When there was a dispute in recollection, the Tribunal therefore preferred the Claimant's version of events as she was more reliable.

Findings of Fact

7. The Respondent is a medical practice operating in Vauxhall and in 2018/early 2019 was solely owned by Dr Shah, GP. It employed 8 people, including Linda Mergell, the Claimant, who was employed from 1 April 2010 in the capacity of Practice Nurse. The Claimant's day to day activities included dealing with minor emergencies and injuries, general health advice, new patient checks, dressings, immunisations, diabetic care under a shared care scheme with local hospital and community clinics.

8. The Claimant gave evidence, that is accepted by the Tribunal, that she attended an Integrated Care Manager course in 2012. This gave her permission to review medication, but it did not give her permission to prescribe it. Dr Shah gave evidence, that is accepted by the Tribunal, that he always allowed his staff to have training for personal development and according to staff interest. The parties agree that the Claimant was not authorised to prescribe medication.

9. Dr Shah considered the Claimant to be a "good member of staff", he considered her to be reliable and dependable and confirmed that she had a clear disciplinary record. The Claimant gave evidence that she had been offered a pay rise in 2018 - she was offered a pay rise of 5% by Dr Shah and another 5% was to be paid at the end of the financial year if the practice targets were met. Dr Shah confirmed this in his evidence. Dr Fard gave evidence that Dr Shah felt bullied by the Claimant and that was why he had offered her the pay rise. The Tribunal rejects that evidence as it is inconsistent with the evidence given by both the Claimant and Dr Shah.

10. Dr Fard commenced work as a locum at the Respondent in May 2018. It was common for the Respondent to have locum GPs working there. Dr Fard and Dr Shah subsequently explored the possibility of Dr Fard becoming a partner in the surgery and he became involved in management and instigating new practices in the Respondent. Dr Fard had a digital approach to healthcare and instigated Whatsapp groups for communicating with staff. The Claimant gave evidence that she objected to being contacted in the evenings and at weekends. The Claimant also did not agree with other policies that Dr Fard tried to introduce at the surgery. Dr Shah gave evidence to the Tribunal, that is accepted, that he was not proficient with IT.

11. On 5 September 2018, the Claimant saw a new patient ("Patient A") for a new patient health check. The Claimant gave evidence, that is accepted by the Tribunal, that a patient health check involves carrying out weight, height,

blood pressure checks as well as discussing family history, past medical history, smoking and alcohol consumption status, how often the patient exercises, any medication being taken. It may involve taking blood tests and triaging the patient if there is a problem. During that check it became apparent that Patient A had high blood pressure. The Claimant gave evidence that while the patient was in her room she went to seek advice from Dr Shah who looked at the patient's notes and advised to re-start the hypertension medication which the patient had been previously given by his previous GP and that the prescription was signed by Dr Shah. The Claimant said that she was also advised by Dr Shah to refer the patient to the local hospital for an ECG and 24 hour Blood Pressure Monitoring. Dr Shah's evidence was that he did not authorise the prescription and that he would not prescribe such a miniscule dosage of Ramipril for a patient with such high blood pressure. Dr Shah said that he would have used different medication and called him in for a follow up appointment in two days' time to check his blood pressure again. The Tribunal prefers the Claimant's evidence, the Claimant's evidence was consistent throughout the disciplinary proceedings and to the Tribunal and the Tribunal believed her.

12. The Claimant was concerned that Patient A had developed type 2 diabetes and that as he was going on holiday at the end of that week, she took the opportunity to discuss his case in a diabetic virtual clinic. The Claimant gave evidence that this virtual clinic took place in Dr Shah's office and so he was present. It was also attended virtually by a diabetic consultant and a diabetic nurse specialist. According to the Claimant at the end of the clinic she raised Patient A's case and was informed by the diabetic consultant that he could be seen the next day if his blood test results showed him to be diabetic and requiring insulin. This was recorded on Patient A's notes which was part of the bundle before the Tribunal. Dr Shah has no recollection of attending the diabetic clinic. The Tribunal finds that the Claimant's version of events took place, although Dr Shah may not have engaged with the query relating to patient A and so has no recollection of it.

13. Over the next few weeks the Claimant telephoned the patient on more than one occasion to check his progress and to prompt him to go for the blood tests. When the blood test results came back on 10 September 2018, they showed him as diabetic which could be controlled by oral medication. Other blood tests also came back on 10 September 2018 and Dr Shah inputted them into the electronic notes.

14. On 18 September 2018 the Claimant saw Patient A again following his return from holiday. The Claimant discussed the blood test results with him and advised him that he had type 2 diabetes which required medication and that if he made lifestyle changes, he could avoid the initiation of insulin for some time. The Claimant found that Patient A's blood pressure was very high. She gave evidence that she left the room to look for a GP in the building but she could not find one so she advised Patient A to attend A & E in accordance with British Hypertension control guidelines and updated the notes to this effect.

15. The Claimant's evidence was that just before the patient was about to leave for A & E, there was a knock on the door and it was the locum GP Dr Grace

Okoli who told her she was now leaving for the day from her clinic. Dr Okoli worked as a locum GP one morning per week and had done so on and off for about 3 years. The Claimant's evidence was that she requested Dr Okoli to join her whereupon Dr Okoli checked Patient A's blood results and renal function which were on the Claimant's PC screen and that as Dr Okoli had turned her PC off, she asked the Claimant to initiate Titrating Ramipril. The Tribunal accepts Dr Fard's evidence that "titrating" means a staged increase of the medication. The Claimant's evidence was that Dr Okoli asked her to print the prescription from her computer so that she could sign it and hand it to Patient A and that is what occurred. The Claimant's evidence was that both the Claimant and Dr Okoli should have updated the records to reflect the turn of events and in particular Dr Okoli's intervention but neither did.

16. The Claimant saw Patient A again on 8 October 2018 at which time his blood pressure was stabilizing which indicated that with titration it would come within normal limits. The Claimant gave evidence, that is accepted by the Tribunal, that she advised that he would next need to be seen by a GP to have his medication reviewed and that he should do this within the next months. The Claimant entered a 10mg repeat prescription on the system and her evidence is that Dr Shah printed it. Dr Shah and Dr Fard gave evidence that as it was a repeat prescription it was not scrutinized, in accordance with usual practice. They also both gave evidence that this was inappropriate medication for a patient suffering from very high blood pressure but that, as the GP signing the prescription, they agreed it was Dr Shah's ultimate responsibility. Dr Fard's evidence to the Tribunal was that Dr Shah had been "blindsided" by the Claimant's input of the medication on repeat prescription. The Claimant's evidence is that Dr Shah and Dr Okoli had advised that course of treatment and that she would never have made that decision without direction from a doctor.

17. On 16 November 2018 Dr Fard saw Patient A. Dr Fard gave evidence that he was concerned for the patient's safety because there had been six attendances at the surgery but they had not been referred to a GP despite potentially catastrophic malignant hypertension. In Dr Fard's view the patient had not seen a GP while being at risk of death or permanent disability from a stroke. Dr Fard and Dr Shah gave evidence that they discussed that it appeared that the Claimant had been prescribing medication, which she did not have the authority to do. Dr Shah gave evidence that Dr Fard showed him entries from Patient A's records. It is accepted by all parties and the Tribunal finds as a fact that we now know that those records were incomplete and, crucially, did not include interventions by Dr Shah on 7 and 10 September 2018 where he entered numerous lab results into Patient A's records and telephoned him to discuss the results.

18. The Tribunal also finds as a fact, based upon the evidence of Dr Fard, that if Dr Fard had made the telephone call to Patient A he would have quickly reviewed Patient's A's electronic records prior to making the telephone call which would have alerted him to Patient A's high blood pressure. The Tribunal accepts Dr Shah's evidence that he did not do so because he was not as proficient with the IT and that had he done so he would have reacted to the high blood pressure reading and acted differently in relation to Patient

A's care.

19. The Respondent had a Disciplinary Procedure which contained the following process:

"Step 1

The employer will set down in writing the nature of the employee's conduct, capability or other circumstances that may result in dismissal or disciplinary action, and send a copy of this statement to the employee. The employer will inform the employee of the basis for their complaint.

Step 2

The employer will invite the employee to a hearing at a reasonable time and place where the issues can be discussed. The employee must take all reasonable steps to attend. After the meeting, the employer will inform the employee about any decision and offer the employee the right of appeal.

Step 3

If the employee wishes to appeal they must inform the employer. The employer will invite the employee to attend a further hearing to appeal against the employers' decision and the final decision will be communicated to the employee. Where possible, a more senior manager should attend the appeal hearing."

20. In cross examination Ms Rosso accepted that Dr Fard and Dr Shah made a deliberate decision not to comply with the disciplinary procedures at the point it dismissed the Claimant as it was gross misconduct and so instant dismissal. The Tribunal finds as a fact that the Respondent intentionally disregarded the disciplinary procedures.

21. The Tribunal finds as a fact that the Claimant was summarily dismissed at the end of her shift by letter dated 19 November 2018 and was not given an opportunity to respond to the allegations contained therein. The letter of dismissal set out the allegations and then provided a summary as follows:

"1. Your record keeping was misleading and inconsistent.
2. You are not a prescriber and had no right to issue medication which we know in retrospect was insufficient in dose to be effective and not endorsed by a GP. This is an act of gross misconduct.
3. You did not discuss any of the prescriptions with a GP.
4. You did not arrange for an urgent GP review on 3 occasions when you discovered the BP was dangerously high.
5. You have contravened the NMC code of practice by:
i. initiating medication
ii. managing the patient in place of a GP
iii. undertaking medication reviews.
6. Your actions deprived the patient of appropriate treatment.
7. You have behaved dishonestly and lost the confidence of the employer.
8. You have acted beyond your competence and remit as practice nurse."

22. The letter of dismissal was in the name of Ms Roso but in evidence to the Tribunal the Respondents' witnesses said that it was Dr Fard, or perhaps Dr Fard in conjunction with Dr Shah who made the decision to dismiss on 19 November 2018. In closing submissions Mr Munro submitted that it was

the Respondent's case, and the Tribunal finds as a fact, that Dr Fard was both investigator and decision maker. Dr Fard gave evidence that:

"*The reason why I felt I had no option but to terminate immediately was because such was the severity of the professional misconduct and the compelling nature of the evidence which we unearthed, that we felt dismissal was the inevitable outcome".*

23. In evidence to the Tribunal it was clear, and the Tribunal finds as a fact, it was Dr Fard's conclusion that the Claimant had prescribed medicine that led him to disregard the disciplinary procedures and to summarily dismiss her.

24. On 21 November 2018 the Claimant's Unison representative Debbie Jones wrote an email to Ms Rosso highlighting the deficiencies in the process both from a disciplinary and ACAS Code point of view. The response came from Ms Rosso but Mr Fard gave evidence that it was written by him. It said *"… we welcome a tribunal hearing as we feel this will help to expose Mrs Mergell's unforgivable actions"*, and criticised Unison for engaging in *"unprofessional and immoral"* behaviour in representing her. In evidence Dr Fard regretted the tone with which it was written but said that it was because of the shock of the Claimant's actions.

25. The Claimant appealed against her dismissal by letter dated 1 December 2018. The Tribunal finds as a fact that this was the first time the Claimant was able to give her version of events. This was a detailed account and is consistent with what she described orally in the subsequent Appeal Hearing on 31 January 2019 and before the Tribunal.

26. On 3 December 2018 the Claimant was informed that an appeal hearing would take place on 31 January 2019, that Dr Shah would be accompanied by various people and that evidence would be provided to her in advance of the hearing.

27. Ms Roso gave evidence that she telephoned Patient A several times to ask that he request a copy of the prescription. Although he was willing to help he did not in fact request the prescription as he promised to do. When asked why she did not ask Patient A whether a Dr had been involved in his care that day, Ms Rosso said that she did not know why he was not asked and that there was no reason to think that he would not have been forthcoming. The Respondent did not write to Patient A and did not provide him with a copy of the form that he would need to take to the pharmacy to obtain the prescription.

28. On 20 December 2018 the Claimant's Union representative requested documents from the Respondent and sent a chasing letter on 16 January 2019. On 24 January 2019, a week before the hearing, the Respondent wrote to the Claimant informing her that her appeal would be heard by an independent appeal officer. In addition to the original allegations a host of other allegations were included. The Claimant objected to the additional charges via her Union representative.

29. The appeal hearing took place on 31 January 2019 with Mr Hickman, appeal officer. Dr Shah, Dr Fard and Ms Rosso did not attend the appeal meeting nor had they been interviewed. The notes provided to Mr Hickman were the abbreviated notes which did not contain Dr Shah's interventions in Patient A's case. The Tribunal did not have the benefit of hearing from Mr Hickman. It does not appear that Mr Hickman tested the Claimant's version of events as the Respondent's witnesses confirmed, and the Tribunal finds as a fact, that Mr Hickman did not then interview Dr Shah, Dr Fard or Ms Roso. At the Appeal Hearing the transcript shows that Mr Hickman said that he would try to obtain a statement from Dr Okoli. After the appeal hearing a statement dated 31 January 2019 was obtained from Dr Okoli who said, in summary, that she could not recall whether she was asked to sign a repeat prescription on that day, that she did recall seeing the Claimant with Patient A but that she had not got involved in his management. The Claimant was not given an opportunity to comment on this report.

30. In summary Mr Hickman found in his report on 19 March 2019 that the Claimant was not afforded the opportunity to attend an investigatory meeting or a disciplinary hearing prior to her dismissal and was not told about it which meant she could not prepare or obtain representation:

    "*GHI finds for the reasons stated above that the Employer has not followed ACAS guidance in relation to the investigation and Disciplinary process and have also breached their own policies and procedures as outlined within LM's Statement of Main Terms and also those clearly set out within the Employee Handbook."*

31. Mr Hickman also recommended:

    "*GHI recommends that his findings represent actions that LM's actions have been contrary to the NMC Code of Conduct and evidence actions and omissions that would be considered to be gross misconduct as identified within her letter of dismissal dated November 19th 2018*."

32. The Tribunal finds that Dr Fard and Dr Shah accepted Mr Hickman's recommendations and the Claimant's dismissal stood, although it is unclear at what point this was communicated to the Claimant.

33. Dr Fard became a partner in the Respondent on 1 April 2019.

Legal principles relevant to the claims

Unfair dismissal

34. Section 94 of the Employment Rights Act 1996 ("ERA") confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that she was dismissed by the Respondent under section 95, but the Respondent must show the reason for dismissing the Claimant (within section 95(1)(a) ERA). S.98 ERA deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that

it had a potentially fair reason for the dismissal within s.98(2).

s.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,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

35. The second part of the test is that, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason:

s.98 *(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.

36. The employer bears the burden of proving the reason for dismissal whereas the burden of proving the fairness of the dismissal is neutral. The burden of proof on employers to prove the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. As Lord Justice Griffiths put it in *Gilham and ors v Kent County Council (No.2)* 1985 ICR 233:

"The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason,

and the inquiry moves on to [S.98(4)], and the question of reasonableness".

37. In the case of *British Home Stores v Burchell* [1978] IRLR 379 EAT, the court said that a dismissal for misconduct will only be fair if, at the time of dismissal:

    (1) the employer believed the employee to be guilty of misconduct;
    (2) the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
    (3) at the time it held that belief, it had carried out as much investigation as was reasonable.

38. In the case of *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 EAT, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair.

39. *Brito-Babapulle v Ealing Hospital NHS Trust* [2013] IRLR 854 per Langstaff (P) at [40]:

    "… It is the tribunal's task to assess whether the employer's behaviour is reasonable or unreasonable having regard to the reason for dismissal. It is the whole of the circumstances that it must consider with regard to equity and the substantial merits of the case. But this general assessment necessarily includes a consideration of those matters that might mitigate. For that reason, we think that there was here an error of direction to itself by the tribunal."

40. In the case of *Sainsburys Supermarket Ltd v Hitt* [2003] IRLR 23 CA, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal.

41. The Court of Appeal in London Ambulance *NHS Trust v Small* [2009] IRLR 563 warned that when determining the issue of liability, a Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct. In *Foley v Post Office; Midland Bank plc v Madden* [2000] IRLR 82 the court said it is irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "substitute its view" for that of the employer.

42. The Employment Appeal Tribunal in *Clark v. Civil Aviation Authority* [1991] IRLR 412 laid out some general guidelines as to what a fair procedure requires. But even if such procedures are not strictly complied with a dismissal may nevertheless be fair – where, for example, the procedural defect is not intrinsically unfair and the procedures overall are fair: *Fuller v. Lloyd's Bank plc* [1991] IRLR 336. An employment tribunal must take a broad view as to whether procedural failings have impacted upon the fairness of an investigation and process, rather than limiting its consideration to the impact of the failings on the particular allegation of

misconduct, see *Tykocki v. Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust* UKEAT/0081/16.

Compensation

43. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought compensation is awarded by means of a basic and compensatory award.

44. The compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer (*Polkey v A E Dayton Services Limited)* [1988] ICR 142.

45. S.124A ERA provides for adjustments to the compensatory award if a party has failed to comply with the ACAS Code of Practice on Discipline and Grievance Procedures (2015).

46. The basic award is a mathematical formula determined by s.119 ERA. Under section 122(2) it can be reduced because of the employee's conduct:

    "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".

47. A reduction to the compensatory award is primarily governed by section 123(6):

    "*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…"*

48. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in *Nelson v British Broadcasting Corporation (No. 2)* [1980] ICR 111. It said that the Tribunal must be satisfied that the relevant action by the Claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

Breach of contract

49. A court or tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct. This is a different standard from that required of employers resisting a claim of unfair dismissal, where reasonable belief may suffice.

Analysis, conclusions an associated findings of fact

50. Dr Fard dismissed the Claimant because he thought she had prescribed medicine, the Tribunal concludes that this was the reason for dismissal. This was dismissal for conduct, a potentially fair reason under s.98(2) ERA. The Claimant accepted that conduct was the reason given by the Respondent and it is a potentially fair reason.

51. Was the dismissal fair? In accordance with s.98(4)(a) ERA, the question is whether it was reasonable for the employer to treat the conduct in question, as sufficient to dismiss the claimant. S.98(4)(b) states that it must be determined in accordance with equity and the substantial merits of the case.

52. The Respondent is a small employer – it has 8 employees. The Respondent utilised an external provider for the appeal process. It did, however, have a comprehensive disciplinary policy that set out in steps the actions that it was required to take. At the dismissal stage the Respondent ignored the steps set out in the disciplinary procedures. Dr Fard formed his view and spoke to Dr Shah who "had no recollection" of dealing with Patient A but was only provided with incomplete notes that did not detail his interventions. Dr Okoli was not questioned at the time that Dr Fard was conducting his investigation. It is not clear when Dr Okoli was asked for her version of events of 18 September 2018. The Tribunal has not had the benefit of hearing from Dr Okoli. The only written evidence in the bundle is a statement from Dr Okoli dated 31 January 2019 (the same day as the Appeal Hearing) saying that she was not involved in the management of Patient A's case and that she does not recall signing a repeat prescription. In Dr Fard's witness statement he does not mention speaking to Dr Okoli near the time of the incident and says "Prior to the appeal hearing taking place, Dr Okoli had been asked to provide a statement following the Claimant's appeal letter in which she stated that it was Dr Okoli who had signed off Patient A's prescription on the 18th September 2018." As Dr Okoli's statement says that she is responding to a letter dated 28 January 2019 the Tribunal finds that Dr Okoli was not asked about the incident until late January 2019, some four months after the event.

53. It is highly unlikely that an investigation will be fair if the person against whom the allegations are made does not have a fair opportunity to respond to them. Not least when this was an employee who worked 50 hours a week, had been an employee for 8 years, had a clean disciplinary record and who was well regarded by Dr Shah who had had no reason to believe that she had prescribed previously. At no point did Dr Fard or Dr Shah take into account the Claimant's mitigating circumstances.

54. Dr Fard did not look for information to support the Claimant's case. When Ms Rosso spoke to Patient A a number of times to ask him to obtain a copy of the prescription she did not go one small step further and ask him if there had been a Dr involved when he attended on 18 September 2018, or to provide him with a copy of the form he needed to take to the pharmacy. The Tribunal agrees with the submission of Mr Brittenden, there can be no criticism of an employer GP practice who does not involve a patient in an internal disciplinary matter, but once they have involved him, and he seems willing to participate it is extraordinary that the simple question was not asked – did you see a Dr during your visit or was it only the Practice Nurse?

55. At appeal stage, Mr Hickman undertook a review of the documentation, gave the Claimant an opportunity to speak but crucially did not investigate properly her version of events by interviewing Dr Shah, Dr Fard and Dr Okoli to hear what they had to say about the Claimant's version of events. Dr Okoli's statement was provided after the appeal hearing, some four months after the event. The Claimant had no opportunity to respond to it.

56. The Respondent approached the matter with a pre-determined mindset. It was predisposed to finding that the Claimant was guilty of gross misconduct, and failed to pay any regard to any evidence supporting her case or any mitigating circumstances. When the Claimant's Union representative wrote an email setting out how unfair the process had been Dr Fard wrote a hostile reply welcoming a Tribunal hearing and even going so far as to criticise the Union representative for engaging in "unprofessional and immoral" behaviour in representing the Claimant. Dr Fard was the investigator, the decision maker and along with Dr Shah, also the decision maker on the Appeal. Not only is this contrary to the Respondent's disciplinary process it also demonstrates predetermination and does not accord with the principles of natural justice.

57. The Respondent may have had a genuine belief that the Claimant was guilty of misconduct, but it did not have in its mind reasonable grounds upon which to sustain that belief and at the stage at which that belief was formed, it had not carried out as much investigation into the matter as was reasonable in the circumstances.

58. The ACAS Code of Practice on Discipline and Grievance Procedures (2015) requires the Respondent to carry out disciplinary procedures fairly. This includes the investigation, disciplinary and appeal process. The investigation needs to, fairly, establish the facts of the case. The ACAS Guides go into more detail about how investigations should be carried out, including that "it is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against". That did not happen in this case.

59. The Tribunal must remind itself that it is not for the Tribunal to decide whether or not it would have dismissed the Claimant had it been in the employer's shoes. However for the above reasons setting out the deficiency and partiality of the investigation and decision making, the Tribunal cannot be satisfied that the conduct in question was sufficient to dismiss the Claimant in accordance with s.98(4). While Mr Hickman recognised the unfairness of the dismissal in not allowing the Claimant to answer the allegations, the appeal was also as unfair as the dismissal. Mr Hickman had been provided with incomplete records omitting Dr Shah's involvement and he also did not interview the others in order to test the Claimant's representations. The procedure followed and the decision to dismiss fell outside the range of reasonable responses open to a reasonable employer in the same circumstances. The procedural failings are truly indivisible from the question of the substantive fairness of the dismissal.

60. For all the above reasons, the Tribunal concludes that the Claimant has

been unfairly dismissed.

61. It is difficult for a Tribunal to enter into the realms of what might have happened had a fair disciplinary process been followed. Nevertheless it is necessary in order to decide on whether a *Polkey* deduction is warranted. Had the investigation been fair where the Claimant was allowed to answer the allegations rather than being summarily dismissed, what would have been the outcome? It is likely that it would have been Dr Okoli's word against the Claimant's. Would that have resulted in a balance of probabilities test based on the Claimant's and Dr Oloki's work history at the Respondent? What would that investigation find? Or perhaps there would have been a half-way house where Dr Okoli took more responsibility than she said in her statement but said that she did not sign the prescription? Would Patient A then have been asked? Would the prescription have been obtained? Would the investigation have found that there was a collective failure in relation to this patient? Would the Claimant's mitigating circumstances have been taken into account so that any disciplinary sanction was reduced? There are too many hypotheticals to be able to reach a conclusion and there is no certainty that the Claimant would have been dismissed at the end of any of these avenues. No *Polkey* deduction is therefore appropriate.

62. Given the failures to follow the principles contained in the ACAS Code of practice described above, the Claimant should be awarded a significant uplift for non-compliance with the ACAS Code. However, an appeal did take place. It is just and equitable that the Claimant be awarded a 20% uplift in the compensatory award for breach of the ACAS Code.

63. In relation to contributory conduct, the Tribunal concludes that the Claimant did contribute to her dismissal – had she updated the notes properly, as she accepts she should have done, an investigation may not have been necessary. Was this action culpable or blameworthy and did it cause or contribute to the dismissal, so that it would be just and equitable to reduce the award? The Tribunal finds that it was to a small degree and so it is just and equitable to reduce the Claimant's basic award and compensatory award by 10%.

64. The Claimant was dismissed without notice. She brings a breach of contract claim in respect of her entitlement to notice.

65. The Respondent says that it was entitled to dismiss her without notice for her gross misconduct. The Tribunal must decide if the Claimant committed an act of gross misconduct entitling it to dismiss without notice. In distinction to the Claimant's claim of unfair dismissal, where the focus was on the reasonableness of management's decisions, and it is immaterial what decision the Tribunal would have made about the Claimant's conduct, the Tribunal must decide for itself whether the Claimant was guilty of conduct serious enough to entitle the Respondent to terminate the employment without notice. The Tribunal concludes that she was not. The Tribunal found the Claimant to be a compelling witness, she was consistent throughout the internal procedures and to the Tribunal. Conversely, Dr Okoli's statement was not persuasive, it was made four months after the event, she appeared

not to have a clear recollection and no further investigation was made of it. While the Claimant did not keep the notes properly up to date this does not constitute conduct so serious as to fundamentally repudiate the contract of employment and therefore the Claimant is entitled to be paid her notice pay.

Employment Judge **L Burge**

Date 11 June 2021

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